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A TREATISE

ON THE LAW OF

CORPORATIONS

HAVING A

CAPITAL STOCK

BY

WILLIAM W. COOK, LL. D.
OF THE NEW YORK BAR

SIXTH EDITION

VOL. I

CHICAGO
CALLAGHAN AND COMPANY
1908

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PREFACE TO SIXTH EDITION.

A GOVERNMENTAL RAILROAD HOLDING COMPANY.

In the various editions of this work during the past twenty years, the author has presented from time to time his ideas of the contemporaneous development of corporation law. The following preface was written with that purpose for this edition, but at the request of many friends, it was published in the North American Review for June, 1908. It is now republished, in a revised form, in the place for which it was originally written. It has been characterized by lay critics as "daring." The radical propositions of both political parties, however, during the past four years, indicate deep dissatisfaction with present management of corporations, and when the wave of socialism rolls high, as it certainly will sooner or later, conservative thought may have to turn to some such plan as is outlined herein to avoid the perils of governmental ownership of quasi-public properties. In the meantime it is submitted to the discriminating judgment of the most influential and intellectual constituency in the world—the American Bar.

The most striking feature of corporation law, during the past five years, has been the evidence of determination on the part of the American people to correct corporate abuses and to control wealth accumulated through corporations. This determination, which has long been apparent to all trained observers, became unmistakable during the insurance investigation and scandals, and has reached the point of heavy fines and the conviction of corporate officials for criminal offences involving secret rebates to favored shippers. It is significant that nothing but the fear of imprisonment finally stopped these iniquitous violations of corporation law. It was corporation law applied with terrifying force to the illegal, disgraceful and criminal practices of great corporations.

All this has led not only to resentment against the offenders but also to a popular fear that the growing wealth and power of corporations may jeopardize our republican form of government and the rights and liberties of the people. Thus far the crusade has accomplished some beneficent results. The "Railroad Rate Bill" of 1906, enacted by Congress, while drastic in its restrictions, has proved beneficial to the railroads, as well as to the public, and has not unduly increased the power of the national Government over the corporations; the prosecution of railroads and of individuals for giving and receiving secret and illegal rebates has effectually stopped that prolific source

of unfair competition; the campaign against the so-called "Trusts" has resulted in a number of convictions which has discouraged illegal combination, restriction of output, increase of selling price, and persecution of competitors; the Supreme Court of the United States has decided that a corporation cannot refuse to submit its books and papers for examination at the suit of the State, even though they furnish proof of criminality on the part of the corporation, inasmuch as a corporation is a creature of the state, and the legislature has an absolute right to investigate its contracts and learn whether it has exceeded its powers.* This goes far toward realizing that absolute control over corporations, upon which the American people are insisting. Such are some of the instances where the upheaval of public opinion against corporations has produced beneficial results.

There are three great forces in the United States which make up the industrial, political and social life of the nation. These are capital, labor and agriculture—a mixture of the first two. Labor is thoroughly organized in the cities, on the railroads, in factories and mines. The agricultural classes, highly intelligent, unorganized, widely scattered, are suspicious of both the corporations and the labor organizations. They and their close allies, the inhabitants of the small cities and towns, control the moral, intellectual, material and political life of the nation. It is a constituency still true to the New England ideal of preserving this country as the land of opportunity, of self-made men, of freedom from class distinctions and the power of wealth—the land where men of ability and honesty rise, irrespective of birth, wealth or family influence. Capital—in other words, the corporations (for they have virtually absorbed the capital of the country)—will, for their own protection, have to unite with the agriculturists and give the latter the telephone, the trolley, good roads, rural delivery, the reclamation of waste land, the revision of the tariff, and educational opportunities, literary, technical and professional, even though all these involve great monetary sacrifices. Corporations will have to make farm life attractive and comfortable, if they desire conservative government to protect their property. England to-day is threatened with socialism because the agricultural classes do not control, being less than ten per cent. as against over thirty-five per cent. in the United States, so distributed that they do control. Farmers are not socialists.

At present the corporations and the agricultural classes in America are far apart. In the year 1907 the whole country seemed to have joined in a hue and cry against corporations. Railroads rates were reduced, although all other prices had advanced. Taxes were

* 201 U. S., 43.

loaded upon corporations, although the general public had prospered until it had become wasteful and reckless. Commissions began to harry corporations, although extravagance, luxury and improvidence were rampant in every grade of society. New and strange theories floated out. The separate states were to be dismantled as to their most important powers, and the national government was to dominate corporations. The government was to acquire all the railroads of the country. Upon the death of a person all his wealth, in excess of a specified arbitrary amount, was to go to the state.

But not yet. The American people are not prepared to abandon their ancient moorings and embark on an unknown sea, without chart, compass, landmark or pilot. The fundamental principle of Anglo-Saxon life, that whatever a man honestly acquires is his own, is not to be swept aside to make way for the communistic idea that the state should seize all surplus wealth. What would the state do with it, and who would control the state? What a source of temptation, corruption, riot and revolution the prize of the control of such a state would be! The Roman Republic was practically a single city, small in wealth and population as compared with the modern world, and yet the turbulence of its last days has echoed down the centuries for well-nigh two thousand years. If history were to repeat itself in the American Republic with its coming two hundred millions of people, two hundred billions of wealth, a thousand cities, and a continent for its workings, the result would be chaos. There would then arise colossal demagogues like Cæsar and Napoleon, who established monarchies—for themselves—"to save society."

The historic mistake of the American people in giving to the ignorant a voting power over public *property* and public *expenditures*, especially in the South, cannot be repeated with safety in dealing with railroads. But the clash which has been going on for over fifty years between the railroads and the legislative and executive departments of the government cannot continue indefinitely. Some solution is necessary.

During the past five years the national government has travelled rapidly and far in the direction of control of railroads. On the plea that the states are derelict, it calls for federal supervision, and would have every corporation engaged in interstate commerce obtain a license from a United States Commission, which should also pass upon all issues of stocks, bonds and notes. This is the sequel to an investigation of a great railroad company which disclosed the fact that a group of prominent officials had caused it to issue for their benefit a large amount of stock and bonds at low figures. At the same time the policy of another railroad system, in making enormous purchases of

the stock of other railroads, brought clearly before the public the fact that a great railroad investment and speculative trust had come into existence and might destroy the existing competition between wide-spread railroad systems. All this added force to the argument that the authority of the Interstate Commerce Commission should include supervision of new issues of stock and bonds by interstate railroad companies, somewhat as provided for by the existing Massachusetts law on that subject. Here is a wide departure from old ideas of state rights and limitation of federal power. However, the claim is that it has been demonstrated, both as a matter of fact and as a question of law, that single states cannot regulate, control or successfully grapple with interstate railroads, and that, therefore, the national government must assert its authority even if this leads in the end to government ownership. But the safety of the public lies in separating the legislative and executive departments of the government from the corporations, and not in merging them. Our forefathers learned this lesson. Nearly a hundred years ago they experienced the evil results of corporations being thrown in contact with the legislature. Franchises were granted or blackmailed. Corporations bought and protected franchises until the situation grew so intolerable that the powers of the legislature were restricted, first, by constitutional prohibitions against legislatures granting special charters or franchises; and, second, by delegating to commissions the regulation of corporations. A great source of political corruption was removed by the enactment of those reforms, and we ought not to take any backward steps. It cannot be denied, however, that the present policy of government regulation and supervision of railroads is tending toward governmental control and ownership. This prospect, of course, delights the socialists—those naïve optimists who disregard the lesson of Europe's governmental railroads—but it is less attractive to conservative men. Such, however, is the existing situation.

The next move will certainly involve a grave responsibility and possibly commit us to a policy involving the future of the Republic, for it is to be borne in mind that a republican form of government is not imperishable. Sir Henry Maine, a powerful and profound thinker and writer, in his work on "Popular Government,"* has well said, "It is characterized by great fragility" and "of all the forms of government, Democracy is by far the most difficult"; and that the democratic form of popular government "will tax to the utmost all the political sagacity and statesmanship of the world to keep it from misfortune." The question, "Shall the nation own the railroads or the railroads own the country?" is already being asked by serious-

* Pp. 20, 87, and Preface, p. x.

minded men, and the issue is likely to be fought out on some such line in default of a sane practical solution of the difficulty.

Even now the railroads are being drawn into politics; political parties are vying with each other in attacks on railroads; conditions are unsettled and menacing, and it is high time that some rational plan be devised to meet the popular demand without destroying values or subjecting our democratic government to a greater strain than it could, perhaps, withstand.

A radical solution of the whole problem would be a holding company, organized gradually to acquire the stock of all the railroads in the country. Such a holding company, chartered by Congress (a District of Columbia corporation), could be moulded to solve many of the political and economic problems involved. The stock could be issued gradually in exchange for or purchase of railroad stocks, at valuations to be approved by the Interstate Commerce Commission in each instance and from time to time, just as is now done in Massachusetts by a Corporation Commission.* The board of directors could include the Interstate Commerce Commission, and the remainder, constituting a majority, having been carefully selected in the beginning, would thereafter become practically self-perpetuating by the board recommending to the stockholders for election new men to fill vacancies in the board. The charter could likewise give the Interstate Commerce Commission the right to vote the railroad stocks purchased by the holding company.

Now, let us see how this would work in practice. The statistician of the Interstate Commerce Commission estimates that the railroad stocks in the hands of the public amount to about $4,800,000,000.† If a holding company owned all of this stock, it would have a capitalization of about four billion, eight hundred millions of dollars, which would mean forty-eight million shares of the par value of one hundred dollars each. If these were owned by one million American people, owning forty-eight shares each, the railroads would practically be owned not by the government, but by a power higher than the government, namely, the American people.

An illustration will show the workings of such a governmental holding company. Suppose 1,353,000 shares are sold to the public

* The Philadelphia Public Ledger doubts whether the railroad stockholders would exchange their stocks for the holding company stock. The above plan is not restricted to railroad stockholders turning in their stock, but it also contemplates selling the holding company's stock to the public for cash and buying railroad stocks in the open market with the proceeds. The latter would be the chief means of bringing about the desired result.

† Intercorporate Relationships of Railways in the United States as of June 30th, 1906, page 9.

for cash at par. That would produce $135,300,000—not an extravagant sum in comparison with the sums raised by single railroad systems. With that amount could be purchased:

100,000	shares	Penn. R. R. (full shares).....	costing	$12,500,000
100,000	"	N. Y., N. H. & H. R. R.....	"	14,200,000
100,000	"	New York Central R. R.....	"	10,600,000
100,000	"	Illinois Central R. R.....	"	13,900,000
100,000	"	C. & N. W. R. R.....	"	16,200,000
100,000	"	C., M. & St. Paul R. R.....	"	14,400,000
100,000	"	Great Northern R. R.....	"	13,800,000
100,000	"	Northern Pacific R. R.....	"	14,400,000
100,000	"	Union Pacific R. R.....	"	16,300,000
100,000	"	Atchison, T. & S. Fé R. R....	"	9,000,000
				$135,300,000

The income from these stocks, at the present dividend rates, would be $6,900,000 per annum. The expenses of the holding company, judging from the expenses of The Mackay Companies, a similar holding company for telegraph and cable stocks, should not exceed $25,000 per annum, being the expense of transfer offices, registrars and the engraving of the certificates of stock. That would leave about five per cent. on the holding companies' stock—an attractive rate in view of the safeguards thrown around the management and investments.

The Interstate Commerce Commission would vote the railroad stocks. They would have a large vote in each company. They would also have the right to receive and vote proxies for other stockholders. When it is remembered that nearly every great railroad system in the country is controlled, not by a few men, but by a multitudinous body of small stockholders,* it is apparent that it might be easy for the Interstate Commerce Commission to control any railroad by means of proxies. If that commission had had the vote of a large block of stock in the Illinois Central Railroad Company last year, and had been willing to receive proxies from other stockholders, who would be in control of that railroad system to-day? Even though great financial interests should obtain control of the holding company, no harm could come, because they could not vote or sell or encumber the railroad stocks, the charter having provided against that.

Surely it were better that a million intelligent and conservative American investors should own and control all the railroads, through such a holding company, than that the government with its vacillating and at times incompetent and dishonest administration should

* One of the leading American railroad systems has now 78,000 stockholders, and it is estimated that there are between three hundred thousand and a half million stockholders in the American railroads.

own and mismanage this vital element of national prosperity.* When one considers the waste of the present system and realizes that all saving from consolidations would mean lower rates and better service, under the rigorous, drastic and relentless regulation by Railroad Commissions—and no one will deny that the present commissions are rigorous, drastic and relentless,—it would seem better that the stockholders in American railroads should have stock in one holding company controlling all the railroads, than that they should have stock in several hundred different companies as at present, with wasteful competition, duplication of trains, offices, agents, stations, staff and an army of competing employees. The investor would have a more stable investment; the railroads would be able to get money for necessary extensions and improvements and retain the services of the strong, experienced, competent officials who now operate them, instead of intrusting the practical management to politicians, as would be the case if the government assumed the business; the Interstate Commerce Commission would vote the railroad stocks; the ruinous competition of competing railroads would disappear; the clashing of

* The Railroad Gazette of June 26th, 1908, quotes the above statement and says: "The point is, however, that American investors would not control the railroads under this plan. It would be left to a commission having no real interest in the economical management of the railroads to control them."

The answer to this criticism is that such ownership and control by the American investors would be attained by giving the vote of the railroad stocks to an honest and disinterested commission, instead of a group of capitalists as at present, who, with a small minority of the stock, capture the control for their own selfish aggrandizement, with "economical management" to enlarge their gains. They continue their control by the proxies of the scattered multitudinous majority stockholders, until they are able to sell out at a large profit or bring about a consolidation and issue watered stocks and bonds, which they sell to the public. In England the boards of directors of the railroad companies are made up of men whose business ethics are the best. In America it is different, and the people will not forever tolerate a situation such as is described above. The vast individual fortunes in America were created chiefly by the railroads. They dominate the railroads, and the railroads are used by them in the struggle for financial supremacy. It is doubtful whether the law is powerful enough to control them. Certain it seems to be that the only way to wrest the control of the railroads from Wall Street is some such plan as is outlined above or else by government ownership. Meantime the drift towards plutocracy continues. The problem in America is how to allow the accumulation of wealth and at the same time prevent any pernicious use of its power. Unless controlled, plutocracy and the brutal use of wealth means a revolt of the masses and a dictator, just as happened in the time of Cæsar and Napoleon. The above plan would allow the accumulation of wealth, but would most decidedly limit its power.

private interests, together with the din of public clamor, would cease, and the American people could pass on to some other subject less dangerous to the public weal. That would be the effect of such a holding company as is mentioned above.

Later on, if the government should guarantee three-per-cent. dividends (any amounts so paid to be repaid to the government with interest out of subsequent surplus profits), leaving the company free to declare such higher dividends as it could earn, the value of the stock would rise, and the higher its value the greater quantity of railroad companies' stocks could be obtained in exchange or for cash realized from the issue of the holding company stock, thus reducing the cost of acquisition, just as New York City, by using its credit in the construction of the underground railways in that city, reduced by probably one-half the outstanding obligations to pay for construction. Such a guaranteed stock would be equal to English consols or French *rentes,* and might be owned by banks and trust companies, and used as a basis for the currency on a par with United States bonds, and would be a stable investment for the savings of the poor, the accumulations of the investor and the wealth of the rich. If the American people ever decided that the government should own the railroads, the government could acquire a majority of the stock, the same as the English government acquired the stock of the Suez Canal. In fact, the charter might reserve that right to the government, just as the Act of Congress of July 24th, 1866, reserves to the government the right to take over the telegraph lines at an appraisal.

The three objections to a railroad stock-holding company are eliminated by this plan, namely, the danger that the railroad stocks would be purchased by the holding company at unfair prices or for personal purposes; the danger that the railroad stocks so held would be voted for selfish ends; and the danger that competition between railroads would be destroyed, to the detriment of the public. This fetish of insisting upon competition between railroads is perhaps the most serious obstacle to a realization of the suggested plan. The American people are opposed to the consolidation of competing railroads. But if the government were to own all the railroads, competition necessarily would disappear. So also, if the government had the voting of the stocks of the competing railroads, there no longer would be occasion for competition. If the Interstate Commerce Commission had had the voting of the railroad stocks owned by the Northern Securities Company, there would have been no attack on that company, because the Interstate Commerce Commission would have voted those stocks in the public interest, the same as they would administer the railroads themselves, if the government owned the railroads.

State prohibitions against the consolidation of competing railroads would quickly disappear before such a dispensation.

There is also a still broader view of this question of future competition between railroads. In England, for more than thirty years, Parliament legislated against the consolidation of railroads. This legislation proved to be utterly futile, and in 1872 a Parliamentary Committee made an elaborate and exhaustive report on the subject, and said, among other things, that consolidation "had not brought with it the evils that were anticipated, but that, in any event, long and varied experience had fully demonstrated the fact that, while Parliament might hinder and thwart it, it could not prevent it." The committee showed that at that time the North Eastern Railway Company was a consolidation of thirty-seven independent companies, some of which had formerly competed, and that before the consolidation they had as a rule charged higher rates and paid smaller dividends, but that in 1872 it was the most complete monopoly in England, and while charging the lowest rates had paid the highest dividends of all the great English combinations. In December, 1907, the Great Northern Railway Company and the Great Central Railway Company, which for many years had been keen competitors for the railway traffic, in a large part of the north of England, entered into a combination by which competition was eliminated. Again, as recently as August, 1908, the two greatest English railway systems, the London & North-Western and the Midland, entered into a combination or working agreement for a long period, and it is expected that economies in operating, amounting to $2,000,000 a year, will be thereby effected.* Those combinations are to be ratified by the stockholders and approved by Parliament, and is a recognition of the fact that the public is better served and more cheaply served by a closely scrutinized combination than by ruinous competition.

Even now the opposition of the American people to the consolida-

*The Chairman of the London & North-Western Railway at a meeting held August 14th, 1908, said:

"The geographical positions of the two companies are such as to place them in competition for traffic between many important places.

"We have been able to make an agreement which will, we hope and believe, have very important results. Its principles are first the elimination of all inducements to excessive competition, which, while expensive, produce no additional traffic; and, second, co-operation in the working of all competitive traffic in the manner most convenient to the public and most economical to both companies."

"The Statist," in its issues of August 8th and August 15th, 1908, pointed out that the above arrangement "is not only for the good of the railways, but is also for the good of traders, the traveling public, and, therefore of the country."

tion of competing railroads is largely futile. We may delay it, but we cannot prevent it, and we will find that ultimately the laws of trade are stronger than the laws of men. We will find also that a vast consolidated railroad system is more easily controlled than a hundred small ones, and that with railroad power there will come railroad responsibility, responsive to the public will. The special report of the Interstate Commerce Commission of July, 1907,* demonstrates that such amalgamations are even now going on with great rapidity in the United States. Some seventy-five years ago George Stevenson, the originator of the railroad locomotive, truly said that "where combination is possible, competition is impossible."

Even though the Interstate Commerce Commission voted a majority of the stock of a railroad company and thereby elected its board of directors this would be vastly different from government ownership. The officers, general manager, superintendent and employees would be paid by the railroad company and not by the government. The power to employ and discharge would be in the railroad company and not in the government. The evils of bureaucracy would not be present. If the government owned the railroads, Congress and the Executive would be very active in the patronage and power of railroads, but under the above plan Congress and the Executive would have nothing whatsoever to do with it. The board of directors of the railroad company would be made up of men representative of the locality of the railroad itself, as well as of the financial and operating departments of the railroad. The only connection between the government and the railroads would be through that quasi-judicial body, the Interstate Commerce Commission, and even that connection would be indirect, remote and free from the objections incident to government ownership.

Railroad men estimate that one billion dollars should be expended by the railroads each year for the next five years to provide additional facilities necessitated by the growth of the country in population and production. The railroads have found it impossible to sell their securities to obtain such a vast amount of money. If, however, the control of the railroads were vested in the Interstate Commerce Commission, as outlined above, there should be no difficulty in the railroads obtaining from the sale of their securities all the money they need.

The practicability of a holding company to control all the railroads of the country is strikingly illustrated by the facts set forth in a very recent publication. In April, 1908, Henry C. Adams, statistician of the Interstate Commerce Commission, in a carefully pre-

* In the Matter of Consolidations and Combinations of Carriers, Relations between Such Carriers, and Community of Interests Therein, Their Rates, Facilities and Practices. XII Interstate Commerce Reports, 277.

pared report, explained railroad holding companies as they now exist. It is an extraordinary showing. The interweaving of railroad interests has led to a vast labyrinth of railroad holding companies, some of them being railroad corporations, and other holding corporations, pure and simple, the object always being the power of control. Mr. Adams in his report says:*

"These holdings are all minority holdings, and in a strict legal sense do not give control. Yet, because of the wide distribution of majority ownership, the stock being in many cases held for investment in small lots by individuals, and because the proxies of such holders are frequently signed as a matter of form and without any investigation, these minority holdings in concentrated form virtually dominate the situation and dictate the policy of the corporations whose securities are thus held."

If the railroads have found the holding company efficient and proper to use to control other railroads, why is not a holding company, equally efficient and proper for the people to use to control all the railroads? The corporation has been developed and utilized to own, control and operate all the railroads in the country. The time has come when it may be further utilized to nationalize the railroads, without destroying private ownership or the advantages of private ownership.

A holding company, such as is outlined above, could gradually acquire control of all the railroads in the country. States could not raid it, and courts could not destroy it, under anti-trust statutes. It would nationalize railroads without political agitation, without condemnation and without costing the national government a dollar. If such a nationalization of railroads should take place, state legislatures and state railroad commissions would lose a large part of their present occupation. It would be giving large power to the Interstate Commerce Commission, and might at times cause that commission to use that power for political or personal ends. But even so, the public would always be watchful on account of its daily contact with railroad service, and there would be fewer abuses than under the present system. Power, moreover, leads to responsibility, and responsibility leads to conservatism, and if the Interstate Commerce Commission had the power of voting railroad stocks throughout the United States, public sentiment would insist that the personnel of the commission should represent the finest judgment and honor of the country.†

*Intercorporate Relationships of Railways in the United States as of June 30th, 1906, page 37.

†The New York Commercial says in regard to the above: "There is instantly suggested in this connection, however, the enormous, the tremendous, the really appalling power that would be possessed by the Inter-

Probably every railroad man in the United States would be in favor of such a holding company as this, *provided the Interstate Commerce Commission were not given the power to vote the railroad stocks.*

Underlying the surface manifestations of legislative enactments, political platforms and newspaper clamor is a deep-seated distrust of the present control of the railroads. This distrust is working itself out in the following ways:

(1) The present system of Wall Street voting the proxies of multitudinous stockholders cannot and should not continue. As the stockholders increase in number and holdings they will seek a more disinterested leadership. Such leadership seems available only by turning to the Interstate Commerce Commission.

(2) The people demand still greater regulation of railroads. Regulation without control of the board of directors is necessarily feeble, and does not and cannot produce the results which the people demand. Regulation by control of the board of directors would be complete, and is the goal towards which events are rapidly tending.

(3) The rapid tendency is towards governmental control of quasi-public corporations. Shall it come by government ownership or by utilizing the corporate idea as outlined above?

A trial of this plan does not involve any risk, or irrevocable step, or large amount of money. Such a company, if found undesirable in any way, could be dissolved and the securities distributed without loss. A very similar plan, covering cable, telegraph and telephone stocks, has worked smoothly, economically and successfully, and there seems to be no reason why it should not work equally well with railroad stocks. This possible solution of the railroad problem would seem to justify the experiment on a small scale at least. If the

state Commerce Commission under such a system. And the question compellingly asks itself; Could politics be kept out of that body even if its character were to be changed from an appointive to a popularly-elected commission?" The Philadelphia Public Ledger expresses very much the same idea when it says: "But in what way the Interstate Commerce Commission itself would be protected from congressional control, and the power of voting the stock made the great aim of political ambition, Mr. Cook does not attempt to explain." These are very pertinent remarks, but this danger may easily be obviated. The charter could contain a provision that the railroad stocks should be voted only by commissioners nominated by the President and confirmed by the Senate, and that at times when such commissioners should not exist, the stock should be voted by the holding company itself. Such a restriction on the voting power would be protected by the Constitution of the United States (see ch. 28, *infra*). It is to be borne in mind, also, in answer to this criticism, that if the American people ever decided to control the voting of the railroad stocks, they would go further and have the government take over the railroads themselves.

American people would be content with the present private ownership of railroads, the same as in England, that would be the better way, but it is doubtful whether the English mode of dealing with railroads would suffice for the complicated problems connected with the American railroads. The English railroads in the aggregate are comparatively small in mileage, capitalization, traffic and growth. They are free from most of the American troubles over rates, service and statutory regulations. They are controlled by financiers who respond to the wishes of English investors. The railroads are not used as weapons of offense and defense. The scandals connected with the ownership and control of American railroads do not occur in connection with English railroads.

The above plan is not socialism; it is not governmental ownership; it is not even governmental control by the executive or legislative branches of the government. It is private ownership, regulated by the Interstate Commerce Commission, protected by the judiciary, and is absolutely practical.

William W. Cook.

44 Wall Street,
November 2, 1908.

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§ 1. *Definition of corporation.*—A corporation is an artificial person, like the state. It is a distinct existence—an existence separate from that of its stockholders and directors. Chief Justice Marshall, in the Dartmouth College Case in 1819, followed the language of Lord Coke in 1613, and defined a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law." [1]

1 Dartmouth College *v.* Woodward, 4 Wheat. 518, 636 (1819).

Lord Coke in the case of Suttons Hospital (10 Coke's Rep. 1, 32), decided in 1613, defined a corporation as follows and said: "A corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law. They can't commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney. A corporation aggregate of many can't do fealty, for an invisible body can neither be in person nor swear; it is not subject to imbecilities or death of the natural body and divers other cases."

William M. Evarts used the following language in regard to corporations: "Now, what is the absolutely indispensable element in the constitution of corporations? It is, in the first place, that they should be immortal, as it was expressed in the old formula—that is, that the death of no member affected them. The next, that the will of the majority was the will of the corporation; that it was so as by necessity and for utility. For, a combination that threw members of corporations together, without determining that there never could be but one will, did not make a corporation, in the sense of a personality. The other was that the individual members, in their estates and their property, no longer constituted any part of the corporation's liabilities, but that the corporate property was the whole fund of responsibility."

The supreme court of the United States has said that "an incorporated company is an association of individuals, acting as a single person and by their corporate name;" and again, "Private corporations are but associations of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without a dissolution of the association." U. S. *v.* Trinidad Coal Co., 137 U. S. 160 (1890).

In *Re* Gibbs' Estate, 157 Pa. St. 59 (1893), a corporation is defined as follows: "A corporation is an artificial person created by law as the representative of those persons, natural or artificial, who contribute to, or become holders of shares in, the property intrusted to it for a common purpose. As it is the creature of positive law, its rights, powers, and duties are prescribed by the law."

The following cases give definitions of a corporation: Ohio Ins. Co. *v.* Nunnemacher, 15 Ind. 295 (1860); Ohio, etc. R. R. Co. *v.* Wheeler, 1 Black, 286, 295 (1861), per Taney, C. J.; Tippecanoe County *v.* Lafayette, etc. R. R., 50 Ind. 85, 108 (1875); Railroad Com'rs *v.* Portland, etc. R. R., 63 Me. 269, 277 (1872); Thompson *v.* Waters, 25 Mich. 214, 223 (1872); Baltimore, etc. R. R. *v.* Fifth Baptist Church, 108 U. S. 317, 330 (1883); People *v.* Assessors of Watertown, 1 Hill, 616, 620 (1841); Thomas *v.* Dakin, 22 Wend. 9, 70, 104 (1839); Warner *v.* Beers, 23 Wend. 103, 123, 124 (1840); Head *v.* Providence Ins. Co., 2 Cranch, 127, 167 (1804); Bank of U. S. *v.* Deveaux, 5 Cranch, 61, 88 (1809), per Marshall, C. J.; Louis-

A corporation can be created by or under legislative enactment, and by that alone.[1] No particular form of words is requisite to create a corporation.[2]

The domicile, residence, and citizenship of a corporation are in the state where it is incorporated.[3]

ville, etc. R. R. *v.* Letson, 2 How. 497, 552 (1844); 2 Kent, Com. 268; State *v.* Milwaukee, etc. Ry., 45 Wis. 579, 592 (1878).

In Tipling *v.* Pexall, 2 Bulst. 233 (1613), "the opinion of Manwood, Chief Baron, was this, as touching corporations: that they are invisible, immortal, and that they have no soul. A corporation is a body aggregate; none can create souls but God; but the king creates them, and therefore they have no souls."

It is well to state here that a joint-stock corporation and a joint-stock association are essentially different. Both have a capital stock, and both are managed by boards of officers and meetings of the stockholders. But a joint-stock company is unincorporated, is not a distinct entity, and is but a partnership. See ch. XXIX, *infra*.

1 Quoted and approved in Feiner *v.* Reiss, 98 N. Y. App. Div. 40 (1904); Franklin Bridge Co. *v.* Wood, 14 Ga. 80 (1853); U. S. Trust Co. *v.* Brady, 20 Barb. 119 (1855); Pennsylvania R. R. *v.* Canal Com'rs, 21 Pa. St. 9 (1852); Stowe *v.* Flagg, 72 Ill. 397 (1874); Hoadley *v.* Essex County, 105 Mass. 519 (1870); State *v.* Bradford, 32 Vt. 50 (1859); McKim *v.* Odom, 3 Bland, Ch. (Md.) 407, 417 (1829).

In England certain colleges have power to create corporations. No such power exists in this country. Medical Inst. *v.* Patterson, 1 Denio, 61 (1845).

Congress has constitutional power to incorporate a bank. McCulloch *v.* Maryland, 4 Wheat. 316 (1819). Congress may incorporate interstate railroads. California *v.* Pacific R. R., 127 U. S. 1, 39 (1888).

2 Denton *v.* Jackson, 2 John. Ch. 320 (1817). Yet a statute which seems to create a corporation may be construed not to have that effect. See Walsh *v.* New York, etc. Bridge, 96 N. Y. 427 (1884), holding that the trustees of the Brooklyn bridge are not a corporation, but that the property belongs to the two cities of New York and Brooklyn. A charter is legal, even though no maximum capital stock is fixed. State *v.* Bank of Commerce, 95 Tenn. 221 (1895).

A board of levee inspectors created by act of the legislature may be a corporation, although not expressly declared so to be by the act itself. Board, etc. *v.* Crittenden, 94 Fed. Rep. 613 (1899).

A special statute incorporating a lumber association creates a corporation, even though some of the usual corporate powers are not conferred. Sibley *v.* Penobscot, etc. Assoc., 93 Me. 399 (1899).

"To create a corporation no precise words are necessary." People *v.* Barton, 63 N. Y. App. Div. 581 (1901).

A supposed corporation formed without statutory authority may be legalized by a subsequent statute, which assumes that it is a corporation, and no specific words in a statute are necessary to incorporate a company, it being sufficient if the intent is clear. Smith *v.* Havens, etc Soc., 44 N. Y. Misc. Rep. 595 (1904).

A special act incorporating an institution may create it *ipso facto*, and not merely authorize organization. McDonald *v.* Shaw, 98 S. W. Rep. 952 (Ark. 1906).

3 American, etc. Co. *v.* Johnson, 60 Fed. Rep. 503 (1893). The domicile of a corporation is entirely distinct from the personal domicile of its of-

The Romans seem to have originated the idea of a corporation. The genius of that people for conquest and government led naturally, as with the English-speaking races, to industrial organization and new modes of business on a large scale. The Roman corporation was much the same as the corporation of modern times.[1]

§ 2. *Definition of charters, general and special — Definition of franchises.* —A charter is the instrument which creates the corporation. It formerly was granted by the king. Later it was granted by an act of the legislature—a separate act being passed for each charter. At present the constitutions of many of the states require that in all possible cases the legislature shall pass general acts whereby, by the simple filing of a prescribed instrument, persons

ficers or stockholders. Perry *v.* Round Lake, etc. Assoc., 22 Hun, 293 (1880); Rossie Iron Works *v.* Westbrook, 59 Hun, 345 (1891). See also cases in ch. XLV, *infra*, where the jurisdiction of the federal courts was at issue.

If the chief office of the corporation is not otherwise fixed it will be held to be the place where the stockholders are requested to meet. Such office cannot be changed by the general officers without action on the part of the stockholders or directors. Frick Co. *v.* Norfolk, etc. R. R., 86 Fed. Rep. 725 (1898).

The principal place of business of a corporation within the meaning of the bankrupt act may be in a state other than the state in which it is incorporated. *In re* Marine, etc. Co., 91 Fed. Rep. 630 (1899); Dressel *v.* North State L. Co., 107 Fed. Rep. 255 (1901); *In re* Magid-Hope, etc. Co., 110 Fed. Rep. 352 (1901).

An Australian corporation which has offices in London and weekly directors' meetings and stockholders' meetings in London where its general accounts are kept, may be subject to the English income tax levied on persons residing therein. De Beers, etc. *v.* Howe [1905], 2 K. B. 612.

An irrigation company has two franchises; one the franchise to be a corporation and the other the franchise exercised in operating the plant. The latter franchise is located where the plant is located. San Joaquin, etc. Co. *v.* Merced County, 2 Cal. App. 593 (1906).

[1] Professor Rudolph Sohm, in his Institutes of Roman Law, says, pp. 104-106: "In Roman law, the property of a corporation is the sole property of the collective whole; and the debts of a corporation are the sole debts of the collective whole. . . . It represents a kind of ideal private person, an independent subject capable of holding property, totally distinct from all previously existing persons, including its own members. It possesses, as such, rights and liabilities of its own. It leads its own life, as it were, quite unaffected by any change of members. It stands apart as a separate subject or proprietary capacity, and, in contemplation of law, as a stranger to its own members. The collective whole, as such, can hold property; its property, therefore, is, as far as its members are concerned, another's property, its debts another's debts. . . . Roman law contrived to accomplish a veritable masterpiece of juristic ingenuity in discovering the notion of a collective person; in clearly grasping, and distinguishing from its members, the collective whole as the ideal unity of the members bound together by the corporate constitution; in raising this whole to the rank of a person (a juristic person, namely), and in se-

may form a corporation without applying to the legislature at all. These general acts specify the contents of the instrument to be filed, and specify also the powers of the corporation. A charter is special where a special act of the legislature creates the corporation. A charter is under the general act when it consists of a certificate of incorporation filed with the public authorities in accordance with a general act of the legislature allowing corporations to be formed in that manner. The charter of a company formed under the general law consists not only of its articles of association, but also of the general statutes of the state under which the organization takes place.[1] The general laws of the state apply to a corporation organized under a special act so far only as the former are consistent with the latter.[2] Thus where Congress granted to a Califor-

curing it a place in private law as an independent subject of proprietary capacity standing on the same footing as other private persons."

[1] People *v.* Chicago Gas T. Co., 130 Ill. 268 (1889).

"Corporations organized under the general law are vested with the powers conferred by the general act, and those contemplated by the certificate, and such incidental powers with respect to the general and special powers as are necessary, in the sense of convenient, reasonable, and proper." Ellerman *v.* Chicago Junction, etc. Co., 49 N. J. Eq. 217 (1891).

Under the general act the charter consists of a certificate of incorporation and the provisions of the general act. Bixler *v.* Summerfield, 195 Ill. 147 (1902). The charter of a company formed under a general statute consists of such statute and of the articles of incorporation. Bent *v.* Underdown, 156 Ind. 516 (1901). Where the statutes in existence at the time of incorporation provide for the extension of corporate charters, a stockholder cannot prevent the corporation from extending its existence in accordance with such statutes. Smith *v.* Eastwood, etc. Co., 58 N. J. Eq. 331 (1899). A corporation may enjoin the secretary of state from taking its certificate of incorporation out of the state, even though he proposes to prove perjury by the officers in swearing to the certificate. Delaware, etc. Co. *v.* Layton, 50 Atl. Rep. 378 (Del. 1901).

A statute relative to corporations which is amended "so as to read as follows" operates to repeal by implication provisions inconsistent with the new law or omitted therefrom. Davidson *v.* Witthaus, 106 N. Y. App. Div. 182 (1905).

[2] A provision of the general statutes imposing a personal liability upon directors of a corporation is not incorporated into a special charter by a clause declaring that that corporation shall possess all the general powers and privileges and be subject to all the liabilities conferred and imposed upon corporations organized under the general act. Park Bank *v.* Remsen, 158 U. S. 337 (1895). The provisions of the general statutes relative to corporations are not applicable to a special charter so far as the provisions of the special charter seem to be inconsistent with those of the general statutes. See People *v.* Bowen, 30 Barb. 24 (1859); aff'd on other points, 21 N. Y. 517 (1860); also Hollis *v.* Drew, etc. Seminary, 95 N. Y. 166, 173 (1884); Lefevre *v.* Lefevre, 59 N. Y. 434 (1875); Clarkson *v.* Hudson River R. R., 12 N. Y.

nia corporation certain moneys, and took corporation bonds therefor, it being the clear intent of Congress, as shown by the statutes, to treat such California corporation as a part of a general plan for the building of a railroad through many states, the statutory liability of all stockholders in California corporations does not apply to such debt.[1] A general statute reserving to the state the right to amend or repeal charters is a part of all special charters thereafter passed, even though not expressly made a part thereof.[2] Where a statute provides that any corporation accepting its benefits thereby waives its exemption from the power of the legislature to amend its charter, the acceptance of the benefits of such a statute thereby works that change without any formal action on the part of the board of directors or stockholders.[3] Although a

304 (1855); Johnson *v.* Hudson River R. R., 49 N. Y. 455 (1872); Burroughs *v.* Brinkerhoff, 68 N. Y. 259 (1877).

The duration of a corporation is twenty years, although its special charter provides for "perpetual succession," where a general act provides for twenty years' duration. State *v.* Payne, 129 Mo. 468 (1895).

In New York the legislature is to decide whether a special or general incorporation law shall be enacted. People *v.* Bowen, 21 N. Y. 517 (1860); *Re* Gilbert El. Ry., 70 N. Y. 361 (1877).

A charter cannot be sold, mortgaged, or assigned, although the property and power to operate the property may be. See § 790, *infra.*

In Citizens' Bank *v.* Parish of Orleans, 54 Fed. Rep. 73 (1893), the court held that the acceptance by the corporation of an act which compelled the corporation to accept the terms of a new constitution did not have that effect.

In Citizens' St. R. R. *v.* Memphis, 53 Fed. Rep. 715 (1893), the court held that a charter granted without the reserved right to amend or repeal did not become subject to the right to amend or repeal, although it had entered into a consolidation after a constitutional provision was passed reserving this right in all cases. The consolidation was held not to have dissolved the old corporation. *Cf.* § 897, *infra.*

1 United States *v.* Stanford, 161 U. S. 412 (1896).

A statute reducing tolls on turnpikes does not apply to a corporation having a special charter which was unrestricted as to tolls. Heath *v.* Manire, 114 Tenn. 105 (1905).

A statute creating a liability of stockholders in trust companies doing business in the state applies to a trust company incorporated under a special charter. Murphy *v.* Wheatley, 100 Md. 358 (1905).

2 Citizens' Sav. Bank, etc. *v.* Owensboro, 173 U. S. 636, 644 (1899). A general statute reserving the right to alter, amend or repeal charters applies to all subsequent special charters not expressly excepted from its effect. Watson Seminary *v.* Pike Co. Court, 149 Mo. 57 (1899).

A general statute reserving the power to amend or repeal charters is a part of all special charters passed subsequently. Griffin *v.* Kentucky Ins. Co., 3 Bush (Ky.), 592 (1868); approved in Louisville Water Co. *v.* Clark, 143 U. S. 1 (1892). See also § 640, notes, *infra.*

3 Louisville & N. R. R. *v.* State, 45 S. Rep. 296 (Ala. 1907).

special charter gives the right to a railroad corporation to consolidate with other roads, yet a subsequent general statute may take away this power except so far as the same has been already exercised.[1] A special charter existing at the time of a constitutional amendment prohibiting future special charters may nevertheless be amended thereafter.[2] Where a special charter is granted, and nothing is prescribed as to its duration, it is perpetual.[3]

1 Pearsall *v.* Great Northern Ry., 161 U. S. 646 (1896). Mr. Justice Brown's opinion in this case contains a clear exposition of the law on this subject and on the various and far-reaching applications and restrictions of the Dartmouth College case.

The general statutes are a part of the charter, and a subsequent repeal of a part of the general statutes does not affect the corporation unless the statute expressly so provides. Knights of Pythias *v.* Weller, 93 Va. 605 (1896).

2 Wallace *v.* Loomis, 97 U. S. 146 (1877). A constitutional provision against special grants does not prevent the amendment of the whole charter where such amendment merely regulates powers already possessed by the corporation, or merely gives power to consolidate with another corporation. Bohmer *v.* Hoffen, 161 N. Y. 390, 409, 411 (1900). As to a special renewal of a charter existing prior to a constitutional provision prohibiting special charters, see *In re* Application of Bank of Commerce, 153 Ind. 460 (1899). A constitutional provision requiring incorporation under general laws only does not prevent a grant of street rights to a previous existing corporation. Smith *v.* Indianapolis, etc. Ry., 158 Ind. 425 (1902).

A constitutional provision against special charters does not prevent the legislature curing defects in the organization of a corporation under a general act. State *v.* Webb, 110 Ala. 214 (1896).

Where by an amendment an insurance charter is changed into a banking charter, an exemption from taxation may be lost thereby by reason of a constitutional provision enacted after the original charter was granted, but before the amendment was granted. Memphis City Bank *v.* Tennessee, 161 U. S. 186 (1896).

Although a constitutional provision requires incorporations under general acts, if at all, yet an old charter existing prior to the constitutional provision may be amended by the legislature after such constitutional provision. Farnsworth *v.* Lime Rock R. R., 83 Me. 440 (1891).

An old special charter may be amended although a new constitution forbids the grant of special charters. St. Joseph, etc. R. R. *v.* Shambaugh, 106 Mo. 557 (1891). A constitutional provision against the legislature granting special charters does not render invalid a special charter granted prior to that time, even though the actual organization of the company was after that time. State *v.* Hancock, 2 Pennewill (Del.), 252 (1899). A corporation amending its charter in accordance with a new statute thereby subjects its stockholders to a statutory liability provided for in such new statute. Senn *v.* Levy, 111 Ky. 318 (1901).

An amendment authorizing a corporation to increase its capital stock is a fundamental, and hence is a special act in violation of a constitutional prohibition against special acts. Marion T. Co. *v.* Bennett, 82 N. E. Rep. 782 (Ind. 1907).

3 See § 628, *infra*. A corporation

The state creates the corporation upon the application of individuals, who are called incorporators. The incorporators then organize the corporation. The functions of the incorporators thereupon cease, and stockholders proceed to contribute the capital and elect directors. The directors then start and continue to keep in operation the powers of the corporation.

It is a general rule that "every public grant of property or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public," and especially so as regards corporations organized under general laws.[1] For this reason it is held that the words "franchises, rights, and privileges" do not necessarily include an exemption from taxation.[2] On the other hand, a corporation chartered to exist only a limited number of years may take the fee to real estate,[3] accept a street franchise for a longer period than its own charter exists,[4] and enter into a contract which cannot be fully performed during the corporate existence.[5] A corporation as well as an individual may waive the ob-

whose charter is not expressly limited as to duration is perpetual. Snell *v.* Chicago, 133 Ill. 413 (1890).

1 Water Company *v.* Knoxville, 200 U. S. 22 (1906); Cleveland, etc. Ry. *v.* Cleveland, 204 U. S. 116 (1907); Central Transp. Co. *v.* Pullman's Car Co., 139 U. S. 24, 49 (1891). "Any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given by the law." Perrine *v.* Chesapeake, etc. Co., 9 How. 172 (1850).

2 Phœnix, etc. Co. *v.* Tennessee, 161 U. S. 174 (1896). A charter exemption of a street railway company from assessment for paving does not pass to a purchaser of its property, even though the sale is made under authority of a statute authorizing the transfer of "the estate, property, rights, privileges and franchises." Moreover if the new company is incorporated under the general act which requires it to pave, it cannot receive such exemption by reason of any such purchase. Rochester Ry. *v.* Rochester, 205 U. S. 236 (1907); aff'g 182 N. Y. 116. In State *v.* Pittsburgh, etc. R. R., 50 Ohio St. 239 (1893), a franchise is said to be, "as defined by Kent, a particular privilege conferred by the grant of the government and vested in individuals, or, as defined by Blackstone, a branch of the king's prerogative subsisting in the hands of a subject. 3 Kent, Com. 458; 2 Bl. Com. 37."

A corporate franchise may mean either the power to act as a corporation or may mean the right which a corporation has to operate a franchise, such as a railroad's right of way. The former is not property. It is not an element of value in estimating the value of the majority of the stock. Johnson *v.* Kirby, 65 Cal. 482 (1884). It is not an asset. A bank franchise does not pass to its assignee for the benefit of creditors, and the court will deny his application to sell it. Fietsam *v.* Hay, 122 Ill. 293 (1887).

For various definitions of franchise, see Wait, Insolv. Corp., § 12.

3 See § 641, *infra*.

4 See § 641, *infra*.

5 See § 641, *infra*.

jection that a statute is unconstitutional.[1] The word "franchise" has been construed to mean the entire property, tangible and intangible, when so intended, in a taxation statute.[2]

§ 2a. *Acceptance of a charter by the corporation arises from merely acting under it, and a want of formal acceptance is no defense to actions on its contracts.*—It is an old principle of law that individuals cannot be compelled by the state to accept a charter to act as a private corporation. Accordingly an acceptance of the charter by them is necessary to the actual existence of the corporation. But there is no rigid rule of law requiring them to indicate such acceptance in a formal manner. Any acts which prove an intent on the part of the corporators to proceed under the charter is a sufficient acceptance of it. It has been frequently held that an acceptance may be shown by proof that corporate meetings and elections have been held and other corporate acts entered into. Mere user of the right to act as a corporation is sufficient.[3]

1 Mayor, etc. *v.* Manhattan Ry. Co., 143 N. Y. 1 (1894), a case where the title of the act did not meet the constitutional requirements.

2 Adams, etc. Co. *v.* Kentucky, 166 U. S. 171 (1897). In the case of State *v.* Portage City, etc. Co., 107 Wis. 441 (1900), the court stated that a contract between a city and a waterworks company, giving to the latter the right to use the streets for its water pipes, was a franchise, and that *quo warranto* would lie to forfeit such franchise for failure to supply water, in accordance with its terms.

3 Acceptance of a charter is sufficiently shown by user under it. Demarest *v.* Flack, 128 N. Y. 205 (1891); Ameriscoggin Bridge *v.* Bragg, 11 N. H. 102 (1840); Bank of Manchester *v.* Allen, 11 Vt. 302 (1839); Talladega Ins. Co. *v.* Landers, 43 Ala. 115, 136 (1869); Blandford School Dist. *v.* Gibbs, 56 Mass. 39 (1848); Gleaves *v.* Brick Church Turnp. Co., 1 Sneed (Tenn.), 491 (1853); Perkins *v.* Sanders, 56 Miss. 733 (1879); Mutual F. Ins. Co. *v.* Stokes, 9 Phila. 80 (1872); Penobscot Boom Corp. *v.* Lamson, 16 Me. 224 (1839); Sampson *v.* Bowdoinham, etc. Corp., 36 Me. 78 (1853); Lincoln, etc. Bank *v.* Richardson, 1 Me. 79 (1820); Bow *v.* Allenstown, 34 N. H. 351, 372 (1857); Jameson *v.* People, 16 Ill. 257 (1855); Covington *v.* Covington, etc. Co., 10 Bush (Ky.), 69 (1873); People *v.* Farnham, 35 Ill. 562 (1864); Middlesex Husbandmen, etc. *v.* Davis, 44 Mass. 133 (1841); Commonwealth *v.* Bakeman, 105 Mass. 53 (1870); Palfrey *v.* Paulding, 7 La. Ann. 363 (1852); Benbow *v.* Cook, 115 N. C. 324 (1894); Trot *v.* Warren, 11 Me. 227 (1834). As to the acceptance of a charter, see also the digest of cases in 12 Am. R. R. & Corp. Rep., pp. 460-466. Building a part of the road is an acceptance of a special charter. St. Joseph, etc. R. R. *v.* Shambaugh, 106 Mo. 557 (1891). Acceptance is sufficient where the grantees afterwards apply for an amendment to the charter. Farnsworth *v.* Lime Rock R. R., 83 Me. 440 (1891); and see cases in §§ 183-186, *infra*, holding that a subscriber cannot defeat an action to collect his subscription by alleging informalities in organization. Formerly it was customary at the first meeting of the corporation to pass a formal vote ac-

§ 3. *A private corporation may become accommodation indorser, distribute its assets, issue its notes, stock, or bonds below par or for no consideration whatsoever, give away its assets, or may mortgage its property for the personal benefit of a part or all of its stockhold-*

cepting the charter. This, however, is not necessary. The fact of holding the meeting is a sufficient acceptance. See same cases; also, Atlanta *v.* Gate City Gas Light Co., 71 Ga. 106 (1883), where a charter granted in 1868 was not acted on until 1877. It was held that the application for a charter constituted an acceptance in advance. McKay *v.* Beard, 20 S. C. 156 (1883), holding that an acceptance existed though no meeting at all for organization was held, but the corporation proceeded to business; Logan *v.* McAllister, 2 Del. Ch. 176 (1858), holding that irregularities in organization are immaterial; Russell *v.* McLellan, 31 Mass. 63 (1833), where no notice was given of the first meeting, and a stockholder sued for a dissolution of the company as a copartnership. The best evidence possible of the acceptance should be given. Hudson *v.* Carman, 41 Me. 84 (1856). Where subscription books are opened and then abandoned, and ten years later are secretly re-opened and subscriptions taken without giving the statutory notice to the public that they may subscribe, the charter is forfeitable. State *v.* Bull, 16 Conn. 179 (1844). So, also, where a new charter is granted to an existing corporation, and it continues to act, the jury are to say whether the corporation continued under the old charter or accepted the new one. Hammond *v.* Straus, 53 Md. 1 (1879). As regards the acceptance of a charter amendment by simply acting under it, see State *v.* Sibley, 25 Minn. 387 (1879); Sumrall *v.* Sun Mut. Ins. Co., 40 Mo. 27 (1867); Rex *v.* Hughes, 7 B. & C. 708 (1828), a municipal corporation case; Bangor, etc. R. R. *v.* Smith, 47 Me. 34 (1859); Lyons *v.* Orange, etc. R. R., 32 Md. 18 (1869); Wetumpka, etc. R. R. *v.* Bingham, 5 Ala. (N. S.) 657 (1843), and many cases in ch. XXVIII and § 503, *infra.* Failure to organize under a special charter until after a constitutional amendment prohibiting special charters is fatal to it. State *v.* Dawson, 16 Ind. 40 (1861). In Texas it is a sufficient acceptance of a special charter to organize under it, but if the organization does not take place until after the constitution is changed, the special charter is subject to the amended constitution. Quinlan *v.* Houston, etc. Ry., 89 Tex. 356 (1896). Acceptance must be *in toto* or not at all. Rex *v.* Westwood, 4 B. & C. 781 (1825). A corporation cannot accept part of a special charter and reject the rest. *Re* Metropolitan Transit Co., 111 N. Y. 588 (1889). A person cannot be compelled to act as a corporator in a private corporation. Ellis *v.* Marshall, 2 Mass. 269 (1807). Hence his acceptance must be proved by user at least. Coffin *v.* Collins, 17 Me. 440 (1840). Organizing out of the state may not be legal, yet it suffices for an acceptance of the charter. Heath *v.* Silverthorn, etc. Co., 39 Wis. 146 (1875). A special charter must be accepted before the corporation exists, and such acceptance cannot be at a meeting held out of the state. Hence a bill by a stockholder to set aside a forfeiture of his stock was dismissed by the court. Smith *v.* Silver Valley Min. Co., 64 Md. 85 (1885). Acceptance of a new charter is not necessarily an abandonment of the old one. Johnston *v.* Crawley, 25 Ga. 316 (1858); Woodfork *v.* Union Bank, 3 Coldw. (Tenn.) 488 (1866). Acceptance of the charter is not implied by accepting the benefits, but

ers or officers, provided always that all the stockholders assent, and provided that corporate creditors are not injured, and provided that no statute forbids such acts. The doctrine of ultra vires is no longer held to forbid such acts by a private corporation under such circumstances—Powers, express and implied.—The powers of the corporation are given by the charter, and these powers are express or implied.

The express powers are those which are expressly specified in the charter or the statutes under which the corporation was incorporated.

The implied powers of a corporation are those which naturally arise from the nature of the business. The implied powers are not limited to those which are indispensably necessary, but include those which are appropriate, convenient and suitable for carrying out the express powers.[1] Thus, a corporation has implied power to buy, hold, and sell necessary real estate and other property in its corporate name; to sue and be sued in that name; to do business in its corporate name without rendering its stockholders liable as partners for its debts; to govern its officers, agents, and business by by-laws; to issue transferable certificates of stock to its stockholders; to have its business managed by directors instead of by the stockholders as in a partnership; to continue business although its stockholders die or sell their stock; to borrow money and give bills, notes, and acceptances; to issue negotiable bonds; to assign for the benefit of creditors; and, except in quasi-public corporations, such as railroads, to give a mortgage.[2]

performing none of the burdens imposed, as where a toll road was established over a highway. Welsh *v.* Plumas County, 94 Cal. 368 (1892). Where a stock corporation has received no stock subscription and issued no stock, it cannot maintain a suit. Aspen, etc. Co. *v.* Aspen, 5 Colo. App. 12 (1894).

1 Flaherty *v.* Portland, etc. Society, 99 Me. 253 (1904).

2 The definition of a corporation throws some light upon its nature, but a still clearer idea is obtained by considering the inherent powers of corporations. 1 Blackstone's Com. 475, says that the inseparable incidents or powers of all corporations aggregate are: (1) To have perpetual succession; (2) to sue or be sued, and grant or receive by the corporate name; (3) to purchase and hold lands and chattels; (4) to have a common seal; (5) to make by-laws. Chancellor Kent, in 2 Com. 278, n., adds: (6) the power to expel members. 1 Kyd, Corp. 13, 69, 70, has a different summary of incidents. See also 2 Kent, Com. 277.

The greatest and most vital features of modern corporations, however,—features that have become prominent since those authors wrote, and the features that have rendered possible the universal use and great achievements of corporations,—are two in number: (1) The limited liability conferred, by implication, by the granting of a charter (see §§ 7 and 241, *infra*); (2) the right of the corporation to issue certificates of stock and the right of the members to transfer them. The for-

The theory of a corporation is that it has no powers except those expressly given or necessarily implied. But this theory is no longer strictly applied to private corporations. A private corporation may exercise many extraordinary powers, provided all of its stockholders assent and none of its creditors are injured. There is no one to complain except the state, and, the business being entirely private, the state does not interfere. Thus, fifty years ago the courts would summarily have declared it illegal for a business corporation to become an accommodation indorser of commercial paper. But to-day there is no rule of public policy which prohibits a private corporation having a capital stock from becoming the accommodation indorser of commercial paper, provided such indorsement is made with the knowledge and assent of all the directors and stockholders, and provided corporate creditors are paid.[1]

Unless some statute prohibits, or a stockholder objects, or a creditor is injured, a corporation may declare a dividend out of its capital stock.[2]

mer is considered elsewhere. See § 7, *infra*.

It has been said that the essence of a corporation consists of a capacity (1) to have perpetual succession under a special name and in an artificial form; (2) to take and grant property, contract obligations, sue and be sued, by its corporate name as an individual; and (3) to receive and enjoy in common grants of privileges and immunities. Thomas *v.* Dakin, 22 Wend. 1, 71 (1839). The supreme court of Illinois, speaking of the above, says: "The first two describe the franchises which belong to the corporators; the last those which belong to the corporation." Snell *v.* Chicago, 133 Ill. 413 (1890). A corporation is not bound to exercise all the powers contained in its charter. Illinois, etc. Bank *v.* Doud, 105 Fed. Rep. 123 (1900).

A water-power corporation organized under a special act of the legislature by which the various owners of riparian rights and of the dam and of the water-power therefrom became interested in such company, no stock being issued, but each owner of water-power being entitled to one vote, cannot maintain suit against a city for diverting the water where the title to the water rights was not vested in the corporation, the business of the corporation being to maintain the dam and raceways and reserve the water-power, the expense being paid by assessment. Elgin, etc. Co. *v.* City of Elgin, 194 Ill. 476 (1902).

1 Quoted and approved in Murphy *v.* Arkansas, etc. Co., 97 Fed. Rep. 723, 727 (1899); Martin *v.* Niagara Falls, etc. Co., 122 N. Y. 165 (1890). See also § 774, *infra*.

2 A statutory liability for dividends paid out of the capital stock abrogates all common-law liability, and if such statute does not prohibit such dividends they may be declared and paid subject to such liability. People *v.* Barker, 141 N. Y. 251 (1894). The Penal Code of New York prohibits such a dividend. Penal Code, § 594. On this subject, see also §§ 535, 546, 548, 671, *infra*. Where a few persons own all the stock of a company and use the profits for per-

A corporation may execute its note for the personal indebtedness of its sole stockholder, and no one but the creditors of the corporation can complain.[1] A mortgage given by the corporation for the personal benefit of a part or all of the stockholders is legal, if all the stockholders assent.[2] Bonds of a corporation may be issued

sonal expenses and miscellaneous purposes, irrespective of the corporation, all the stockholders knowing thereof and assenting thereto, a policy of insurance belonging to one of them is his, even though the premiums were paid out of the corporate profits, it being shown that all this was done while the corporation was solvent, and that no rights of creditors then intervened, and that all the debts represented by the receiver arose subsequently. Little *v.* Garabrant, 90 Hun, 404 (1895); aff'd, 153 N. Y. 661 (1897). On a sale of all its assets, a corporation may distribute the proceeds. See § 671, *infra*.

1 Millsaps *v.* Merchants', etc. Bank, 71 Miss. 361 (1893).

2 Swift *v.* Smith, 65 Md. 428 (1886), is in point. In that case a person had purchased all the stock of a corporation and paid for it by notes secured by a mortgage of the corporation on all of its property. The corporation became insolvent. A general creditor of the corporation attacked the mortgage, but the court held that it was legal and could be enforced by the person to whom the notes were given. The court said: "A man can certainly do what he pleases with his own property, if he does not thereby prejudice any of the rights of subsisting creditors. It does not appear that any existing creditors were injuriously affected thereby." In the case of First Nat. Bank, etc. *v.* Winchester, 119 Ala. 168 (1898), where a private corporation had but four stockholders, and two of them bought the stock of the other two and paid therefor by notes signed by them and the corporation and secured by mortgage on the corporate property, the court held that the note was not enforcible against the corporation, but held that the mortgage was legal as against subsequent creditors, mortgagees and purchasers from the corporation who took with notice of the facts. Approving Swift *v.* Smith, 65 Md. 428 (1886). Where an individual who owes a debt transfers property to a corporation, and later the corporation with the consent of all the stockholders and creditors gives a bill of sale of certain property to pay such debt, the corporation itself cannot subsequently complain. Quee Drug Co. *v.* Plaut, 55 N. Y. App. Div. 87 (1900). Again, where three persons own all the stock of a company, two of them may buy the stock of the third and give the company's notes in partial payment of the same. The transaction is legal, inasmuch as no one is injured and all consent. Neither subsequent purchasers of the stock, nor those who become stockholders after the notes are paid, nor stockholders who consent to the arrangement, can complain of it. Schilling, etc. Co. *v.* Schneider, 110 Mo. 83 (1892). An improvement corporation may legally give a mortgage to secure the personal debt of its president, if none of the stockholders or the existing creditors object. Osborn *v.* Montelac Park, 89 Hun, 167 (1895); aff'd, 153 N. Y. 672. In Germania, etc. Co. *v.* Boynton, 71 Fed. Rep. 797 (1896), however, it was held that even though every stockholder and director acquiesces in corporate bonds being issued to secure the private debt of an officer, yet that a party receiving such bonds with notice could not enforce them.

With the consent of all the stock-

at any price which may be agreed upon,[1] and stock may be issued at less than par or even given away, provided all the stockholders assent,[2] or do not object within a reasonable time,[3] and provided

holders the officers of a manufacturing company may use fuel owned by the corporation, if creditors are not injured. Jorndt *v.* Reuter, etc. Co., 112 Mo. App. 341 (1905).

Persons sued at law by a corporation for accepting its money from its president and using it to pay the president's debt, may file a bill in equity to enjoin the suit at law on the ground that the president owned or controlled all the stock and used the corporation for his private purposes, and that the money was so paid with the consent of all the stockholders and officers. Leigh *v.* Kewanee, etc. Co., 127 Fed. Rep. 990 (1904).

Where there are but two stockholders in a corporation one may contract with the other that certain profits of the corporation shall belong to the latter. Giveen *v.* Gans, 91 N. Y. App. Div. 37 (1904), aff'd, 181 N. Y. 538.

A business corporation cannot defeat an accommodation note if all the stockholders assented thereto and there are no creditors. Perkins *v.* Trinity, etc. Co., 69 N. J. Eq. 723 (1905), the court saying: "To permit stockholders of corporations to unanimously make a disposition of the corporate property where no one else's rights are in any way prejudiced, and afterwards to repudiate their action upon the ground that it was beyond the power of the fictional body to do the act, could serve no useful purpose, and would be merely available in aid of fraud."

Where there are but a few stockholders in a corporation and without any formal corporate action they turn a part of the capital stock into preferred stock and thereafter divide the profits among themselves without declaring technical dividends with the knowledge and consent of all the stockholders, no one of them nor the corporation itself can subsequently complain and defeat a suit by one of them for the amount so credited to him on the books, corporate creditors not being injured. Breslin *v.* Fries-Breslin Co., 70 N. J. L. 274 (1904). The court said (p. 282): "In the present case we apply this doctrine to the nonobservance of legal forms respecting the creation of preferred stock, the abandonment by preferred stockholders of voting powers, the resignation of directors, the reduction of the number of directors from six to three, and the apportionment of dividends as between the stockholders entitled thereto. In respect to these matters the jury was fully justified in finding that unanimous consent of the stockholders of the defendant company had been given, and had been acted on in good faith by the plaintiff and others concerned during a course of years, and that plaintiff could not be restored to the *status quo ante*, were the assent of his fellow stockholders and of the company to be now withdrawn."

1 See § 766, *infra*.

2 §§ 38, 39, *infra*. Where all the stockholders unite in the issue of watered stock to the president for his own use, and assent to a contract between him and the company, the corporation itself cannot subsequently complain. Arkansas, etc. Co. *v.* Farmers', etc. Co., 13 Colo. 587 (1889). An agreement between a corporation and subscribers for its stock that only a certain portion of the par value of the stock shall be collected by the corporation is binding upon the corporation, but not upon the corporate creditors, unless such agreement was made a part of the recorded articles of incorporation. Bent *v.* Underdown, 156 Ind. 516 (1901).

3 See ch. XLIV, *infra*.

corporate creditors are not injured.[1] And even as to the latter, only those corporate creditors can object who become such after the watered stock was issued.[2]

A corporation may sell all its property and distribute the proceeds among its stockholders, if all its stockholders assent,[3] or may sell the corporate property and take in payment purchase-money mortgage bonds to be distributed among the stockholders.[4]

A bond dividend is legal[5] as well as a stock dividend.[6] The corporation may also, by consent of all, give away corporate assets,[7] and in a great variety of ways by which directors and corporate officers make a personal profit out of the corporation, a profit, which is fraudulent and illegal if any stockholder objects,[8] is legal and is upheld by the courts if all the stockholders assent[9] or do not object.[10]

In other words, the question is, who has been damaged? The state is not damaged and cannot enjoin the act;[11] neither can a stockholder who assents or delays after knowledge of the act;[12] nor can the purchaser or transferee of stock which assented to the act;[13] nor can a corporate creditor who is sure to be paid, or whose debt is not due, or who has not yet recovered judgment;[14] nor can the corporation itself.[15] If no one is injured no one can complain. If there is no damage there can be no suit. The theoretical idea that the act is *ultra vires* or that the corporation has exceeded its powers or has violated some shadowy principle of public policy is being rapidly abandoned, and the courts are basing their decisions on the logical principle of damage suffered or threatened.

The old theory of a corporation was that it could not legally do anything in excess of its express and implied powers. But the modern view is that a private corporation may, if all its stockholders assent and if creditors are paid. Public policy does not require

1 §§ 42, 43, *infra*.

2 § 42, *infra*.

3 See §§ 670, 671, *infra*.

4 United Lines Tel. Co. *v.* Boston, etc. Co., 147 U. S. 431 (1893). See also § 766, *infra*.

5 Wood *v.* Lary, 124 N. Y. 83 (1891).

6 See § 536, *infra*.

7 See §§ 766, 774, *infra*.

8 See §§ 647–663, *infra*, for illustrations. Thus, where the directors own all the stock of a corporation, the usual rules preventing a director from contracting with the corporation do not apply. McCracken *v.* Robison, 57 Fed. Rep. 375 (1893).

9 See §§ 647–663, *infra*.

10 See ch. XLIV, *infra*.

11 See §§ 37, 632, 635, *infra*.

12 See § 39 and ch. XLIV, *infra*.

13 See §§ 40, 730, *infra*.

14 See §§ 735, 863, *infra*.

15 §§ 38, 662, *infra*. As to public corporations,—as, for instance, a railroad,—the rule, of course, is different. See §§ 892–894, *infra*.

business corporations to confine themselves strictly within the limits of the words of their charter.[1]

In the case of railroad corporations public policy does intervene and does limit the implied powers. A railroad company has no *implied* power to sell, lease, or mortgage its road, or to charge such rates for service as it sees fit, or to charge one man more than another for the same service.[2] Yet even here the old doctrine is breaking down. The New York court of appeals has recently drawn the line between its decisions and the decisions of the supreme court of the United States, and has held that where a contract of a corporation is not immoral, and is not expressly prohibited by its charter, and has been performed by one of the parties thereto, the court will compel the other party to do substantial justice.[3]

§ 4. *The certificate of incorporation under the general act cannot legally contain any powers, restrictions, or provisions except those called for by the statute.*—Frequently the incorporators desire to obtain more powers than the statute specifies, or to restrict unalterably some of the powers possessed by the corporation, or to regulate in some unalterable way the business of the company. For the purpose of doing so they insert in the certificate of incorporation under the general act special provisions not called for by the act which authorizes the incorporation.

The law is clear that the articles of association of a corporation

1 The New York court of appeals said in Kent *v.* Quicksilver Min. Co., 78 N. Y. 159, 186 (1879): "A bank has no authority from the state to engage in benevolent enterprises; and a subscription, though formally made, for a charitable object would be out of its powers; but it would not be otherwise an illegal act; yet if every stockholder did expressly assent to such an application of the corporate funds, though it would still be in one sense *ultra vires*, no wrong would be done, no public interest harmed; and no stockholder could object, or claim that there was an infringement of his rights, and have redress or protection. Such an act, though beyond the power given by the charter, unless expressly prohibited, if confirmed by the stockholders could not be avoided by any of them to the harm of third persons. This arises from the principle that the trust for stockholders is not of a public nature." See also § 774, *infra*.

2 See ch. LIII, *infra*.

3 Bath Gaslight Co. *v.* Claffy, 151 N. Y. 24, 29–31, 33, 34, 37 (1896), where the court said: "The courts in this state from an early day, commencing as far back as the Utica insurance cases, have sought to regulate and restrict the defense of *ultra vires* so as to make it consistent with the obligations of justice." See also Augusta, etc. R. R. *v.* City Council, 100 Ga. 701 (1897). The old rule of *ultra vires* has been changed so that now only the state or a party interested in the corporation can complain. Farwell Co. *v.* Wolf, 96 Wis. 10 (1897).

organized under a general act are allowed to contain only those matters and statements which are required by the statute itself. The incorporators are not at liberty to insert additional provisions and regulations. If such additional provisions and regulations are inserted they are void. The law does not recognize them. They do not constitute a part of the charter, but are rejected as surplusage and extraneous matter. If the articles of association contain the matters required by the statute and also contain additional matters, the former are sufficient to sustain the charter, and the additional matter does not vitiate the legitimate part of the articles, but the additional matter is disregarded by the law as though it had not been written. All of the decisions hold that any statements of restrictions inserted in the articles of association, outside of the statements required by the general act allowing the incorporation, are unauthorized and void.[1]

1 Quoted and approved in State *v.* Anderson, 31 Ind. App. 34 (1903); Indiana, etc. Co. *v.* Ogle, 22 Ind. App. 593 (1899); Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546 (1856); Oregon Ry. etc. Co. *v.* Oregonian Ry., 130 U. S. 1, 25 (1889); Albright *v.* Lafayette, etc. Assoc., 102 Pa. St. 411 (1883); Becket *v.* Uniontown, etc. Assoc., 88 Pa. St. 211 (1878); Grangers', etc. Ins. Co. *v.* Kamper, 73 Ala. 325 (1882); Thomas *v.* Railroad Co., 101 U. S. 71 (1879); Pennsylvania R. R. Co. *v.* St. Louis, etc. R. R., 118 U. S. 290, 307 (1886); Bigelow *v.* Gregory, 73 Ill. 197 (1874); Rochester Ins. Co. *v.* Martin, 13 Minn. 59 (1868); Western Union T. Co. *v.* Union Pac. Ry., 3 Fed. Rep. 1, 4 (1880); Ancient, etc. Club *v.* Miller, 7 Lans. 412 (1873); People *v.* Utica Ins. Co., 15 Johns. 358 (1818).

A provision in the articles of incorporation, filed under the general act, is void, where such provision attempts to exempt the stockholders from liability to corporate creditors on their unpaid subscriptions. Van Pelt *v.* Gardner, 54 Neb. 701 (1898).

"In corporations formed under general laws it is no objection that the articles of association contain provisions not authorized by the act. If unauthorized provisions are added, all acts done in pursuance of such will be void; but until the corporation is proceeded against for an abuse of its franchises, its rights as a corporation will not be affected by such unauthorized powers." Commonwealth *v.* Yetter, 190 Pa. St. 488, 495 (1899).

The fact that a certificate of incorporation includes a purpose for which incorporation is not provided for by the statute does not invalidate the charter nor render the stockholders personally liable, there being other purposes in the certificate which are authorized. Tennessee, etc. Co. *v.* Massey, 56 S. W. Rep. 35 (Tenn. 1899).

A provision cannot be included in a charter under the general act, whereby stockholders are to vote according to their stock. Commonwealth *v.* Conover, 10 Phila. 55 (1873).

Where in addition to the articles of incorporation the statute provides for articles of association, the corporation may in the latter provide for a lien on the stock. Mohawk Nat. Bank *v.* Schenectady Bank, 78 Hun, 90 (1894); aff'd, 151 N. Y. 665.

Such a lien, however, is not good as against a *bona fide* purchaser of a

In New York and New Jersey and under the National Banking Act the statutes expressly allow the insertion of special provisions in the articles of incorporation, and a broad public policy certainly favors such provisions, inasmuch as thereby the stockholders may

certificate of stock, where the certificate does not contain any reference to the articles of incorporation or the lien. Lyman *v.* State Bank of Randolph, 81 N. Y. App. Div. 367 (1903); aff'd, 179 N. Y. 577.

The articles of incorporation filed under the general act may contain a provision that the corporation shall have a lien on stock for debts due from the holder thereof to the corporation. Dempster Mfg. Co. *v.* Downs, 126 Iowa, 80 (1904).

Where the statute allows the incorporators to include special provisions in their articles of incorporation, and a lien right is inserted, and the certificate of stock on its face refers to the articles of association, a purchaser of a certificate buys subject to such lien. Gibbs *v.* Long Island Bank, 83 Hun, 92 (1894); aff'd, 151 N. Y. 657.

Provisions in the certificate of incorporation which are inconsistent with or in addition to those called for by the statute are a surplusage. Renn *v.* United States, etc. Co., 36 Ind. App. 139 (1905).

A provision in a certificate of incorporation that directors named therein shall continue until they become incapacitated, resign, or die, is void and does not prevent an election. Such an unauthorized provision in the articles of association is not binding either as a part of the charter or as a by-law. State *v.* Anderson, 31 Ind. App. 34 (1903).

If a charter contains purposes, some of which are legal and some illegal, it is good to the extent of the former. Galveston Land & Imp. Co. *v.* Perkins, 26 S. W. Rep. 256 (Tex. 1894).

A provision in the charter of a manufacturing company organized under the general law, that it may buy, etc., a railroad, does not invalidate the charter, even though it cannot exercise such a power. People *v.* Mount Shasta Mfg. Co., 107 Cal. 256 (1895). For many decisions on this subject, see ch. XIII, §§ 231–234, notes, *infra*.

In incorporating under the general act no powers can be placed in the articles of incorporation except such powers as the general act authorizes. People *v.* Chicago Gas T. Co., 130 Ill. 268 (1889).

Where a land company is incorporated under the general act, and the general act does not provide for any statement in the articles of association as regards the amount of debts which the corporation may incur, a provision inserted in the articles of association that "the indebtedness of the company shall not exceed $500 at any one time," is not a part of the charter. The provision is at the most merely a by-law. The court said: "We think that the limitation of $500 in the charter of the corporation cannot be regarded of any more force than a by-law." Sherman, etc. Co. *v.* Morris, 43 Kan. 282 (1890).

A provision in the charter that the stock shall be divided in a certain way is binding upon the corporation so far as it is concerned, and upon the parties thereto, but may be contradicted by other evidence of what the agreement really was. Bates *v.* Wilson, 14 Colo. 140 (1890).

Provisions for internal management should not appear in a charter. *Re* Stevedores' Beneficial Assoc., 14 Phila. Rep. 130 (1880); *Re* M. E. Patterson Memorial Church, 41 Leg. Int. 253 (1884); *Re* St. Luke's Church, 41 Leg.

restrict the powers of the board of directors and otherwise regulate the corporation.[1]

The certificate of incorporation may, however, provide that the business shall be two or more of the kinds of business which are authorized by the statute.[2] The fact that a charter authorizes a cor-

Int. 74 (1884); *Re* Central Democratic Assoc., 46 Leg. Int. 380 (1889); Booz's Appeal, 109 Pa. St. 592 (1885). Where stock is issued for real estate at an overvaluation, the parties receiving the stock are liable for the difference, and it is no defense that the charter showed that the stock was to be so issued for the real estate. Lea *v.* Iron, etc. Co., 119 Ala. 271 (1898). *Cf.* ch. III, *infra.*

1 Under the New Jersey incorporating act which allows special provisions to be inserted, there may be a provision that stockholders of record shall be liable for calls. Under such a provision a stockholder of record is liable, although he has sold his certificate and notified the company of the sale, no transfer having been made on the books. Brown *v.* Morton, 71 N. J. L. 26 (1904).

Even though under the New Jersey statutes special provisions may be inserted in the certificate of incorporation, yet this will not sustain a special provision which is inserted to the effect that a resolution in writing, signed by all of the directors, shall have the same effect as though they had a meeting and passed a resolution. Audenreid *v.* East, etc. Co., 68 N. J. Eq. 450 (1904).

Where the statutes allow the incorporators to insert in the charter any provision relative to the powers of the company, or of its stockholders and directors, the right to vote may be withheld from the stockholders until a certain date, thus leaving the first directors in office during the intervening time, and a further provision that during that time the directors may do any act which the stockholders might do enables them to sell all the property, where that was the chief purpose of the corporation, and the corporation was unable to develop the property. Union T. Co., etc. *v.* Carter, 139 Fed. Rep. 717 (1905).

Even though the statutes of New York authorize an insertion of special provisions in a charter not inconsistent with law, yet the Secretary of State need not accept a certificate of incorporation which gives the power to sell all the property to any foreign or domestic corporation on a two-thirds vote, it appearing that the statute would require a 95% vote in case of a sale to a foreign corporation. People *v.* Whalen, 119 N. Y. App. Div. 749 (1907), aff'd, 189 N. Y. 560.

In Bent *v.* Underdown, 156 Ind. 516 (1901), the articles of incorporation expressly provided that only fifteen per cent of each share of stock subscribed shall be paid in by stockholders, and that "this possession of the articles cannot be amended or modified except by unanimous consent of all the stockholders," and the court held that the unpaid portion of the stock was not an asset for the benefit of corporate creditors on its becoming insolvent.

2 Bird *v.* Daggett, 97 Mass. 494 (1867). A statement in the articles of incorporation that the company may carry on such business as it thinks to be for the benefit of the stockholders is void. *Re* Crown Bank, L. R. 44 Ch. D. 634 (1890). See also § 236, *infra.*

Charters for enumerated objects "and other purposes" will be rejected. *Re* Journalists' Fund, 8

poration to do business at a certain place outside of the state does not prevent its doing business in other states.[1]

Of course the purposes of an incorporation under the general act must be legal in themselves as well as authorized by the words of the act.[2]

§ 4a. *By-laws of a corporation.*—According to Blackstone, one of the important features of a corporation is the power to make by-laws. A by-law is a permanent rule of action, in accordance with which the corporate affairs are to be conducted. A by-law differs from a resolution in that a resolution applies to a single act of the corporation, while a by-law is a permanent and continuing rule, which is to be applied on all future occasions.[3] The power to make by-laws is always stated to be one of the essential incidents and rights of a corporation. This power exists at common law. Frequently, however, it is given by the charter or statutes.[4]

By-laws are to be made by the stockholders in meeting assembled. The stockholders have few functions to perform, and this right to make by-laws is an essential and important one. The directors have no inherent power to make by-laws.[5] But the stockholders

Phila. 272 (1871). So as to mining for "minerals." *Re* Glenwood Co., 6 Pa. Co. Ct. Rep. 575 (1889).

1 Meredith *v.* New Jersey, etc. Co., 59 N. J. Eq. 257 (1899); aff'd, 60 N. J. Eq. 445 (1900).

2 See § 236, *infra.*

For instance, an application for a charter for a place of public worship to preach Christian Science was denied in *In re* First Church, etc., 205 Pa. St. 543 (1903), on the ground that it interfered with the proper treatment of disease.

A corporation cannot take out a license to practice medicine. State, etc. Inst. *v.* State, 103 N. W. Rep. 1078 (Neb. 1905); but may contract to furnish medical assistance. State, etc. Inst. *v.* Platner, 103 N. W. Rep. 1079 (Neb. 1905).

3 Quoted and approved in Steger *v.* Davis, 8 Tex. Civ. App. 23 (1894). "A by-law is a permanent and continuing rule for the government of the corporation and its officers." North, etc. Co. *v.* Bishop, 103 Wis. 492 (1899).

4 People *v.* Crossley, 69 Ill. 195 (1873); Kearney *v.* Andrews, 10 N. J. Eq. 70 (1854); Commonwealth *v.* Woelper, 3 Serg. & R. (Pa.) 29 (1817); Juker *v.* Commonwealth, 20 Pa. St. 484 (1853); Newling *v.* Francis, 3 T. R. 189 (1789), the last two cases holding that at common law the corporation may make by-laws regulating elections.

5 The board of directors have no power to adopt the by-laws unless the statute expressly gives them that power. North, etc. Co. *v.* Bishop, 103 Wis. 492 (1899); Morton, etc. Co. *v.* Wysong, 51 Ind. 4 (1875), holding that a by-law made by the directors is void; Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249 (1880); Brinkerhoff, etc. Co. *v.* Home Lumber Co., 118 Mo. 447 (1893), holding that a by-law made by the directors restricting the right to sell stock is void. A by-law may arise by custom. Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 324 (1827). See *Re* Regents', etc. Co., 2 W. N. 79 (1867). See also Rex *v.* Head, 4 Burr. 2515 (1770), where

may delegate to the directors the power to make by-laws.[1] Frequently the charter confers this power upon the directors.[2]

Where the statute states for what purpose by-laws may be passed, none others can be passed.[3] Where the by-laws conflict with the charter, the charter prevails.[4] By-laws must be reasonable; they

Lord Mansfield said "that the body at large had no power to make by-laws, because that power is, by the charter, given to the common council, consisting of the mayor and aldermen; and the common council could not by a by-law take away from the body at large the right of election which the charter had vested in the whole body." Unless authorized by the charter the board of directors have no power to make by-laws, nor to alter, amend, or repeal the same (United Fire Assoc. *v.* Benseman, 4 W. N. Cas. (Pa.) 1—1877); but when charter authority to enact by-laws is conferred upon the board of directors, they may validly adopt a by-law authorizing voting by proxy at all meetings of the corporation (Wilson *v.* American Acad. of Music, 43 Leg. Int. 86—1886); and even in the absence of authority the affirmations and acquiescence of a member may estop him from questioning the mode in which the by-laws have been enacted (Morrison *v.* Dorsey, 48 Md. 461—1877).

1 Rex *v.* Spencer, 3 Burr. 1827, 1837 (1766), where Lord Mansfield said that, "where the power of making by-laws is in the body at large, they may delegate their rights to a select body." See also, in an association, Heintzelman *v.* Druids' Relief Assoc., 38 Minn. 138 (1888). Although the stockholders authorize the directors to make by-laws, yet the directors cannot change or act contrary to a by-law made by the stockholders. Stevens *v.* Davison, 18 Gratt. (Va.) 819 (1868). The by-laws cannot delegate to the directors the exclusive right to make by-laws. Alters *v.* Journeymen, etc. Assoc., 19 Pa. Super. Ct. 272 (1902). City officials having power to elect new burgesses may delegate that power. Rex *v.* Westwood, 7 Bing. 1 (1830). So, also, as to the election of aldermen. Rex *v.* Ashwell, 12 East, 22 (1810).

A by-law that the by-laws shall be altered and amended only by the directors is illegal. Alters *v.* Journeymen, etc. Assoc., 19 Pa. Sup. 272 (1902).

2 Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124 (1845); Samuel *v.* Holladay, Woolw. 400 (1869); s. c., 21 Fed. Cas. 306; Commonwealth *v.* Gill, 3 Whart. (Pa.) 228 (1838). A by-law made by the stockholders instead of by the directors as prescribed by charter is nevertheless binding as to past acts on participating stockholders. People *v.* Sterling Mfg. Co., 82 Ill. 457 (1876).

Where a statute provides for by-laws being adopted by directors this takes the power away from the stockholders. Manufacturers', etc. Co. *v.* Landay, 219 Ill. 168 (1905).

Even though the charter gives the directors the power to make by-laws, yet if the stockholders adopt by-laws and the directors act upon them such by-laws are binding. Graebner *v.* Post, 119 Wis. 392 (1903).

3 Ireland *v.* Globe, etc. Co., 19 R. I. 180 (1895). See s. c. 20 R. I. 190; 21 R. I. 9.

4 Republican, etc. Mines *v.* Brown, 58 Fed. Rep. 644 (1893).

Where the statute authorizes the stockholders to change the number of directors by a vote of a majority in interest, a by-law requiring ninety per cent. in interest is illegal. Katz *v.* The H. & H. etc. Co., 183 N. Y. (1905).

A by-law cannot require a majority in interest of the stockholders to constitute a quorum where the statute

must not interfere with the vested and substantial rights of the stockholders; and they must not be contrary to public policy or the established law of the land.[1] This general rule, however, can be understood only by a study of the cases themselves, a collection of which is given in the notes.[2]

states that those who attend a meeting in person or by proxy shall constitute such quorum. Darrin *v.* Hoff, 99 Md. 491 (1904).

The by-laws cannot modify the articles of incorporation in any of the particulars required by statute to be stated in the articles of incorporation. Guinness *v.* Land Corp., L. R. 22 Ch. D. 349 (1882).

A by-law, even though passed upon the organization of the company, cannot legally provide that upon a sale of the company's property for stock in another company the stock going to dissenting stockholders might be sold in such manner as the old company thought fit, and the proceeds paid over to the dissenting stockholder, where the statute provided that the interest of dissenting stockholders should be ascertained by arbitration. Payne *v.* Cork Co., [1900] 1 Ch. 308.

1 Quoted and approved in State *v.* Anderson, 31 Ind. App. 34 (1903).

2 A by-law cannot change the nature of the business or deprive the members of their rights. Van Atten *v.* Modern, etc., 131 Iowa, 232 (1906).

A by-law in a mutual insurance association that payment of dues shall be made to a certain person, but that if the latter does not transmit them a member shall still be liable and subject to a forfeiture of his insurance, is unreasonable and void. Matter of Brown *v.* Order, etc., 176 N. Y. 132 (1903).

The benefits given by a certificate issued by a fraternal benefit or life insurance association, cannot be modified by amendments to the by-laws, even though the certificate provided that the applicant should conform to all by-laws then in force or thereafter adopted, and even though the certificate of incorporation provided that beneficiaries should receive such sums as the by-laws from time to time prescribed. Evans *v.* So. Tier, etc. Assoc., 182 N. Y. 453 (1905).

The holder of a policy of insurance taken in reliance on a statement that the entire profits of a certain department would be divided in the regular way, may enjoin a different provision, even though the original charter prescribed that the profits were to be divided as provided in the by-laws, and the by-laws were changed, but such change was after the policy of insurance was issued. Baily *v.* British, etc. Co., [1904] 1 Ch. 374.

Neither a by-law nor an unauthorized provision in the certificate of incorporation can provide that the first directors shall continue to be directors until they become incapacitated, resign or die. State *v.* Anderson, 31 Ind. App. 34 (1903).

A by-law of a mutual benefit association will not be constructed as retroactive, unless it is expressly made so, and it is then void if it impairs an existing obligation. Bornstein *v.* District, etc., 2 Cal. App. 624 (1906).

It is legal for a corporation to enact a by-law requiring stockholders to pay a small fee on making transfers of their stock upon the corporate books. Giesen *v.* London, etc. Mortg. Co., 102 Fed. Rep. 584 (1900). Even though a by-law confers upon the general manager, among other powers, the "general and exclusive charge and management of the business of the company," nevertheless the by-

A by-law, recited on the face of a certificate of stock, to the effect that a stockholder will not sell his stock without first offer-

law is not void as a whole, and until the general manager illegally exercises power the courts will not interfere. Burden *v.* Burden, 159 N. Y. 287 (1899).

Where by the by-laws salaries are to be fixed by the board of directors, and the salary of the president is not fixed until a year has expired, and is then reduced from $25,000 for the present year to $10,500 on account of personal hostility to him, the execution of the by-law was unreasonable, and the court fixed the amount at $17,500. Banigan *v.* United States, etc. Co., 22 R. I. 452 (1901). A by-law or provision in the certificate of incorporation to the effect that differences between the corporation and its stockholders shall be arbitrated is not binding. State *v.* North American, etc. Co., 106 La. 621 (1902). Even though the by-laws have to be recorded, yet if they are not recorded they are binding on the stockholders if they have been accepted and acted upon for many years. Ho Tung *v.* Man, etc. Co., 85 L. T. Rep. 617 (1902).

A by-law may give the corporation a lien on stock for debts due it from the stockholders. See ch. XXXI, *infra*. But cannot give the corporation the right to forfeit stock for non-payment of calls. See ch. VIII, *infra*. A by-law allowing a stockholder to return his stock to the corporation at a fixed value is illegal. Vercoutere *v.* Golden State Land Co., 116 Cal. 410 (1897). A by-law cannot release stockholders from their statutory liability. Wells *v.* Black, 117 Cal. 157 (1897). A by-law prohibiting a stockholder from applying for dissolution in accordance with the statute is invalid. *Re* Peveril, etc., Ltd., [1898] 1 Ch. 122. By-laws may regulate the manner of voting. Commonwealth *v.* Woelper, 3 Serg. & R. (Pa.) 29 (1817); Juker *v.* Commonwealth, 20 Pa. St. 484 (1853). May require bonds to be given by cashiers. Bank of Wilmington *v.* Wollaston, 3 Harr. (Del.) 90 (1840); Hannibal Sav. Bank *v.* Hunt, 72 Mo. 597 (1880). May prescribe qualifications for admission to membership. Regina *v.* Saddlers' Co., 10 H. L. Cas. 404 (1863). A by-law is illegal if it disturbs the vested property rights of the stockholders. Kent *v.* Quicksilver, etc. Co., 78 N. Y. 159 (1879), where preferred stock was issued. The by-laws of a mutual benefit association cannot be amended after a policy has been issued so as to render the policy void for suicide while insane within five years, when the original policy had a limit of only one year. Weber *v.* Supreme Tent, etc., 172 N. Y. 490 (1902). Even under the right to amend or repeal charters, a statute changing the amount which a member of a building association is entitled to upon withdrawal is unconstitutional. Intiso *v.* State, etc. Assoc., 68 N. J. L. 588 (1902). A by-law which provides for the administration of an oath to stockholders who vote is illegal. People *v.* Kip, 4 Cow. 382, n. (1825). If the by-law is illegal its effect cannot be obtained by printing it upon the face of the certificate of stock. Conklin *v.* Oswego Nat. Bank, 45 N. Y. 655 (1871), involving a lien on stock. A by-law by the directors excluding one of them from examining the corporate books is void. People *v.* Throop, 12 Wend. 183 (1834). A by-law may authorize stockholders to vote by proxy. People *v.* Crossley, 69 Ill. 195 (1873). See also § 610, *infra*. A by-law restricting the right of electors in a town to vote is void. Rex *v.* Spencer, 3 Burr. 1827 (1766); Rex *v.* Head, 4 Burr. 2515, 2521 (1770).

ing it to the directors at the same price, prevents the stockholder transferring the stock to his principal, he not having disclosed that

A by-law restricting the right of members of a church to vote as authorized by statute is void. People *v.* Phillips, 1 Denio, 388 (1845). A by-law may be good in part. Rogers *v.* Jones, 1 Wend. 237 (1828). A by-law of a bank that mistakes in pass-books must be corrected at once does not bind a depositor. Mechanics', etc. Bank *v.* Smith, 19 Johns. 115 (1821). A by-law that any five of a board of twenty-three directors should be a quorum for transacting business is valid. This is equivalent to an executive committee, except that the members may shift. Hoyt *v.* Thompson, 19 N. Y. 207, 216 (1859). By-laws may regulate the calling of meetings. Taylor *v.* Griswold, 14 N. J. L. 222 (1834). A by-law which limits or regulates the corporate powers which the charter confers on the directors may be disregarded by them. Union Mut. F. Ins. Co. *v.* Keyser, 32 N. H. 313 (1855). By-laws imposing fines for non-attendance or for refusal to accept office are valid, but a by-law making assessments is invalid. Tobacco Pipe Makers *v.* Woodroffe, 7 B. & C. 838 (1828). A by-law that voluntary contributions will be refunded is a contract which a contributor may enforce. Davis *v.* Second Union Meeting-house, 49 Mass. 321 (1844). A by-law imposing penalties for past acts is void. Pulford *v.* Detroit Fire Dep't, 31 Mich. 458 (1875). A by-law that transfers of stock are subject to the approval of the directors is void as against the rights of third persons. Farmers', etc. Bank *v.* Wasson, 48 Iowa, 336 (1878). See also § 622, *infra*. Or the approval of the president. Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829). It has been held that the by-laws of a building association cannot impose an unreasonable fine for non-payment of assessments. Lynn *v.* Freemansburg, etc. Assoc., 117 Pa. St. 1 (1887). It is legal for the by-laws to provide that the company may sell out all of its property at any time. Cotton *v.* Imperial, etc. Corp., [1892] 3 Ch. 454. The by-laws of a voluntary association—an exchange—forbidding the members from carrying on dealings outside of the exchange is legal. American, etc. Co. *v.* Chicago, etc. Exch., 143 Ill. 210 (1892). A corporation may pass a by-law prescribing the qualifications of its directors, and may prescribe that a person who is an attorney against it in a suit shall not be a director. Cross *v.* West Virginia, etc. Ry., 37 W. Va. 342 (1892). A by-law may authorize voting by proxy, and such a by-law may arise by long continuation and unbroken practice. Walker *v.* Johnson, 17 App. Cas. Dist. of Col., 144 (1900). A stockholder who is given a copy of the by-laws upon his becoming a stockholder is not bound to know that there are other by-laws not included in them. McKenny *v.* Diamond, etc. Assoc., 8 Houst. (Del.) 557 (1889). A by-law that the members of a news association shall not publish news furnished by other associations in the same territory is valid. The penalty for violation may be suspension. Matthews *v.* Associated Press, 61 Hun, 199 (1891); aff'd, 136 N. Y. 333. A by-law of an associated press association, organized under the laws of Illinois, to the effect that its patrons shall not receive news from any other associated press corporation which is competing with the former, is illegal as in restraint of trade, and the corporation may be enjoined from refusing to furnish news to a patron who takes news also from the competing corporation, a press association organized to gather and sell news as a quasi-public corporation, and has

he was acting as agent. Such a by-law is legal, and the corporation may refuse to transfer the stock in violation of the by-law.[1]

no right to discriminate in favor of some newspapers as against others. Inter-Ocean, etc. Co. *v.* Associated Press, 184 Ill. 438 (1900). A dealer in cattle cannot enjoin a voluntary association of other cattle dealers from expelling one of its members for violating a by-law prohibiting him from trading with the plaintiff. Downs *v.* Bennett, 63 Kan. 653 (1901). A by-law of a plumbers' association by which any member who does work in competition with another shall pay a certain sum to the association is illegal. Bailey *v.* Association of Master Plumbers, etc., 103 Tenn. 99 (1899). A by-law which prohibits members from working with persons who are not members is void. Thomas *v.* Mutual Protective Union, 49 Hun, 171 (1888). *Cf.* s. c., 121 N. Y. 45 (1890). Where stockholders in an apartment-house corporation are entitled to rent apartments at a rental to be fixed by a majority vote of the stockholders, an increased rental so voted is legal. The by-laws providing for such a vote override a general statement in a prospectus to the contrary, the stockholders knowing of the by-law. Compton *v.* The Chelsea, 128 N. Y. 537 (1891). Where a land company is incorporated under the general act, and the general act does not provide for any statement in the articles of association as regards the amount of debts which the corporation may incur, a provision inserted in the articles of association that "the indebtedness of the company shall not exceed $500 at any time" is not a part of the charter. The provision is at the most merely a by-law. The court said: "We think that the limitation of $500 in the charter of the corporation cannot be regarded of any more force than a by-law." Sherman, etc. Co. *v.* Morris, 43 Kan. 282 (1890).

A by-law authorizing the corporation to sue a subscriber for the difference between the subscription and the price for which the stock sold on forfeiture is void. Jay Bridge Corp. *v.* Woodman, 31 Me. 573 (1850); Kennebec R. R. *v.* Kendall, 31 Me. 470 (1850). See also ch. VIII, *infra*. The following by-laws have been held void: compelling members of an exchange to submit their controversies to arbitration on pain of expulsion or suspension, State *v.* Union Merchants' Exchange, 2 Mo. App. 96 (1876); providing that suits to collect insurance shall be brought in the county where the company exists, Nute *v.* Hamilton, Mut. Ins. Co., 72 Mass. 174 (1856); enlarging the liability of stockholders for debts of the corporation, Free School Trustees *v.*

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[1] Barrett *v.* King, 181 Mass. 476 (1902). See also § 622, *infra*. A by-law that the stock shall not be transferable except to the corporation itself is illegal, even though it is expressed on the face of the stock certificates, and hence a stockholder cannot compel a corporation to purchase his stock, even though the corporation has purchased the stock of other members, and even though the corporation is essentially a community of property affair, having a capital stock. Herring *v.* Ruskin, etc. Assoc., 52 S. W. Rep. 327 (Tenn. 1899). A by-law of a farmers' grain and mercantile stock corporation may provide that on the decease of any stockholder the corporation shall buy his stock, and such provision may be enforced where the corporation has undivided profits sufficient to purchase the stock of a deceased stockholder. Howe, etc. Co. *v.* Jones, 21 Tex. Civ. App. 198 (1899).

A by-law of a corporation, organized to own and maintain a hunting park, may authorize assessments on the stock to pay any annual deficiency, and such by-law is binding on stockholders who accept the certificate of stock, which on its face refers to the by-law. The by-law is valid as a contract, even though it is not valid as a by-law.[1]

Frequently the by-laws provide that the contracts of the corporation shall be authorized only in a certain way, and shall be signed by certain officers in order to be valid corporate obligations. Such a by-law, however, does not affect the validity of a contract executed in violation of the by-law, so far as such contract affects persons

Flint, 54 Mass. 539 (1847); certainly so where the creditor did not expressly rely on the by-law, Flint *v.* Pierce, 99 Mass. 68 (1868); or where an assignee of the corporate creditor seeks to enforce the liability, Gamwell *v.* Pomeroy, 121 Mass. 207 (1876); see also § 241, *infra;* authorizing less than a majority of directors to act when the statute required a majority, State *v.* Curtis, 9 Nev. 325 (1874); compelling stockholders to retire a part of their stock, Bergman *v.* St. Paul, etc. Assoc. 29 Minn. 275, 282 (1882); prohibiting the use of the company's canal on Sundays, Calder, etc. Nav. Co. *v.* Pilling, 14 M. & W. 76 (1845); restricting the members as to their fishing business, Adley *v.* Whitstable Co., 17 Ves. Jr. 315 (1810); 19 Ves. Jr. 304 (1815); restricting the number of apprentices which members may have, Rex *v.* Coopers' Co., 7 T. R. 543 (1798); Rex *v.* Tappenden, 3 East, 186 (1802); restricting the sale of guns, Gunmakers *v.* Fell, Willes, 384 (1742); restricting the transfer of seats in an exchange, Ritterband *v.* Baggett, 42 N. Y. Super. Ct. 556 (1877). Railroad regulations as to passengers, etc., are not by-laws. Their validity, however, depends on their reasonableness. State *v.* Overton, 24 N. J. L. 435 (1854). The by-laws of a city cannot exclude from business all painters who do not belong to a guild. Clark *v.* Le Cren, 9 B. & C. 52 (1829). See, however, as to city by-laws, 1 Dillon, Mun. Corp., ch. 12, etc. If a by-law is divisible, the invalidity of part does not invalidate the remaining part. Amesbury *v.* Bowditch, etc. Co., 72 Mass. 596 (1856). For a valuable statement of the law in relation to by-laws, see *Re* Long Island R. R., 19 Wend. 37, 41 (1837); Lumley, By-laws (English, 1877); 2 Am. & Eng. Ency. L. 705. By-laws are construed as they are construed by the corporation, if that construction be reasonable. State *v.* Conklin, 34 Wis. 21 (1874). By-laws are binding on all members. Cummings *v.* Webster, 43 Me. 192 (1857). But strangers are not bound to know them. Kingsley *v.* New England, etc. Co., 62 Mass. 393 (1851), where the by-law was printed on an insurance policy; Wait *v.* Smith, 92 Ill. 385 (1879); Royal Bank, etc. Case, L. R. 4 Ch. App. 252 (1869). See also § 725, *infra*, relative to contracts by agents in violation of by-laws. A by-law cannot give the president a casting vote in addition to his regular vote. State *v.* Curtis, 9 Nev. 325 (1874).

1 Blue Mountain, etc. Assoc. *v.* Borrowe, 71 N. H. 69 (1901). The fact that the by-laws require a stockholder, in case he wishes to sell, to first offer the stock to the corporation or other stockholders before selling to others, and that the validity of this is doubtful, does not affect the validity of another by-law authorizing assessments on the stock. Farmers', etc. Co. *v.* Smith, 74 Conn. 625 (1902).

having no knowledge of the by-law.[1] A stockholder is chargeable with notice of the by-laws.[2]

A lien created by articles of association of a bank, being the same as by-laws, is not good as against a bona fide pledgee of the certificate of stock where the certificate does not refer to such articles of association nor to the lien.[3]

A by-law authorizing the forfeiture of stock for non-payment of a call is discussed elsewhere;[4] as is also the right of the corporation to create a lien on stock by by-law.[5] There are no particular rules in regard to the method of enacting, amending or repealing by-laws.[6]

Although a law library corporation has a capital stock which is fully paid, yet a by-law may assess annual dues upon the members. Omaha L. L. Assoc. *v.* Connell, 55 Neb. 396 (1898). A member of the club may object to an increase of the annual dues where there was no provision in the rules authorizing the alteration thereof. Harrington *v.* Sendall, [1903] 1 Ch. 921.

1 See § 725, *infra.*

2 Richardson *v.* Devine, 193 Mass. 336 (1907).

3 Lyman *v.* State Bank, etc., 81 N. Y. App. Div. 367 (1903), aff'd 179 N. Y. 577.

4 See § 123, *infra.*

5 See §§ 522, 524, *infra.*

6 They need not be written. Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 324, 413 (1827). A by-law may be proved by oral evidence where there was no written entry of the same in the corporate records. Masonic, etc. Assoc. *v.* Severson, 71 Conn. 719 (1899). Where the statutes require a corporation to post its by-laws, a person really interested may compel such posting by *mandamus.* Boardman *v.* Marshalltown Grocery Co., 105 Iowa, 445 (1898). Where a bank's charter is renewed the by-laws continue. Campbell *v.* Watson, 62 N. J. Eq. 396 (1901). A court will not take judicial notice of the by-laws of a corporation. Simpson *v.* South Carolina, etc. Co., 59 S. C. 195 (1900). The corporation may adopt Cushing's Manual. People *v.* American Institute, 44 How. Pr. 468 (1873). By-laws may be modified by usage. Henry *v.* Jackson, 37 Vt. 431 (1865). The charter may require by-laws to be enacted under seal. Dunston *v.* Imperial, etc. Co., 3 B. & Ad. 125 (1832). If amendments to the by-laws are, by the by-laws, to be made only after notice, that notice is necessary. French *v.* O'Brien, 52 How. Pr. 394 (1876). By-laws of mutual insurance associations may be changed. Supreme Lodge, etc. *v.* Knight, 117 Ind. 489 (1889). A fund accumulated by an exchange under its charter, for the benefit of the widows and families of deceased members, cannot, by an amendment of the by-laws, be distributed among the members. Parish *v.* New York, etc. Exchange, 169 N. Y. 34 (1901). Even though the by-laws of a natural gas company provide that stockholders shall have gas free, yet such by-law may be changed so as to authorize the company to charge a uniform price to the stockholders for gas. Redkey, etc. Co. *v.* Orr, 27 Ind. App. 1 (1901). Inasmuch as by the laws of England an English corporation may amend its by-laws so as to give it a lien on stock which will be prior to any existing unregistered pledge or assignment of the certificates of stock, an American pledgee or holder of such certificates of stock is bound by such by-law. Hudson, etc. Co. *v.* Warner & Co., 99 Fed. Rep. 187 (1900). A by-law may be repealed by

Stockholders may at a meeting called for that purpose amend the by-laws so as to increase the number of directors and may elect such additional directors.[1] A company cannot contract not to alter its by-laws.[2] Where a bank's charter is renewed the by-laws continue.[3] Directors in liquidating a company may call in unpaid subscriptions, even though the by-laws provide that no calls shall be made except upon a two-thirds vote of the outstanding stock.[4] By-laws which are disregarded for a long time may be deemed to have been repealed.[5]

a resolution inconsistent with it. Royal Bank, etc. Case, L. R. 4 Ch. App. 252 (1869). Power to make by-laws implies power to repeal them. Rex *v.* Ashwell, 12 East, 22 (1810).

1 *In re* Griffing Iron Co., 63 N. J. Law, 168 (1898); aff'd, 63 N. J. Law, 357. Stockholders may amend the by-laws so as to increase the number of directors, and may at the same meeting elect the additional directors. Gold Bluff, etc. Co. *v.* Whitlock, 75 Conn. 669 (1903).

2 Malleson *v.* National, etc. Corp., [1894] 1 Ch. 200, holding that a provision in the by-laws that the subscriptions should be called in at certain times only, may be modified. In New Jersey it has been held that a provision in the by-laws that they shall not be changed except on a two-thirds vote is legal and binding when the original by-laws so provided and the enterprise was organized on that basis. Loewenthal *v.* Rubber, etc. Co., 52 N. J. Eq. 440 (1894), holding also that the original by-laws constituted a contract between the stockholders, and that a by-law providing for cumulative voting could not be repealed. Although the by-laws provide for changes therein only on a two-thirds vote, yet a majority may make changes. Smith *v.* Nelson, 18 Vt. 511 (1846). A company cannot contract not to alter a by-law which provides that a certain vendor of property to the corporation shall be governing director and shall have the power to appoint other directors and to remove them at any time, even though such contract is contained in the by-laws themselves. Punt *v.* Symons & Co. Ltd., [1903] 2 Ch. 506.

3 Campbell *v.* Watson, 62 N. J. Eq. 396 (1901).

4 Union, etc. *v.* Leiter, 145 Cal. 696 (1905).

5 A by-law requiring five directors is deemed to have been amended where for ten years the corporation has but three directors. Buck *v.* Troy, etc. Co., 76 Vt. 75 (1903).

Even though the by-laws require notice to be given by publication of assessment, yet if no attention is ever paid to the by-law and actual notice is given of an assessment and the stockholder objects to the assessment on another ground, but not on that ground, he cannot thereafter raise the objection on that ground. Grand Valley, etc. Co. *v.* Fruita Imp. Co., 86 Pac. Rep. 324 (Col. 1906).

Directors may disregard their own by-laws. Martino *v.* Commerce F. Ins. Co., 47 N. Y. Super. Ct. 520 (1881). By-laws which are continually disregarded by the officers, acquiesced in by the stockholders, may thereby be substantially abrogated. Blair *v.* Metropolitan, etc. Bank, 27 Wash. 192 (1902). A by-law that a land company will accept its stock in payment for land will not sustain a suit for specific performance brought by a purchaser of land who wishes to pay in stock, the by-law having been practically disregarded. Kelley *v.* York, etc. Co., 94 Me. 374 (1900). The

§ 5. *Mistakes, irregularities, and illegalities in becoming incorporated.*—Often it happens that mistakes are made in organizing a corporation. The certificate of incorporation may be defective, or it may not be filed or published as required by the statutes, or the corporation itself may be irregularly organized thereafter. Complicated questions then arise as to the rights and liabilities of the various parties. Stockholders cannot set up such irregularities as a defense to an action by the corporation to enforce their subscriptions to stock.[1] On the other hand corporate creditors cannot hold the stockholders liable as partners by reason of the irregular incorporation.[2] Indeed, the general rule now is, with few exceptions, that no one can question the regularity of the incorporation except the state, where the statutes allow incorporation and the company has endeavored to incorporate and is acting as a corporation.[3] But where the purpose for which the corporation is organized is illegal or not specified in the act authorizing the incorporation, then the rule is different.[4]

§ 6. *"Dummy" corporations—Fraudulent corporations—The court will sometimes ignore the corporate existence in order to do justice—Corporations as distinguished from partnerships.*—A corporation is an entity and existence separate from its officers and stockholders, and the inclination of some writers to assimilate a corporation as nearly as possible to a partnership and to apply to the former the rules applicable to the latter leads only to confusion and is contrary to the law.[5]

fact that a by-law of a bank requiring the directors to examine the bank every three months has been long disregarded does not raise a presumption of repeal and does not release the directors from liability for negligence leading to a defalcation. Campbell *v.* Watson, 62 N. J. Eq. 396 (1901).

1 See § 183, *infra.*

2 See §§ 231–239, *infra.*

3 See § 637, *infra.* For a detailed digest of the decisions on what may and what must be stated in certificates of incorporation and what informalities will be fatal, and what meaning is given to the usual provisions of general statutes for incorporations, see also 12 Am. R. R. & Corp. Cases, pp. 474–522.

4 See § 236, *infra.* The organization of a company to carry on the lottery business in foreign countries was held to be legal in Macnee *v.* Persian Investment Corp., L. R. 44 Ch. D. 306 (1890).

5 The House of Lords in England has pointed out the fact that there is no real analogy between an ordinary partnership and a corporation. Birch *v.* Cropper, L. R. 14 App. Cas. 525 (1889) (reversing *Re* Bridgewater Nav. Co., L. R. 39 Ch. D. 1), refusing to apply the analogy, and saying that to apply it would in the case before it "work inequality and injustice and not equity."

A trading corporation is governed by the ordinary rules of partnership, except so far as special conditions may be inserted into their constitution by the legislature or by their own articles of association. Oakes *v.* Tur-

The difference between a corporation and a partnership and the advantages of a corporation over a partnership as a means of doing business are very marked and should not be limited by construction.[1]

quand, L. R. 2 H. L. 325 (1867), as referred to in Whiting *v.* Hovey, 13 Ont. App. 7 (1886).

In speaking of the fact that decisions concerning municipal corporations and the powers of their officers are not at all applicable to private corporations, Ruger, C. J., in Wallace *v.* Walsh, 125 N. Y. 26, 36 (1890), said: "It is manifest that no analogy exists between the action of a body of men invested with the exercise of political power under special conditions and the action of the trustees of a private corporation in the conduct of its ordinary business operations. The one relates to the execution of powers and the other to the performance of duties and the enjoyment of privileges. The one is controlled by the principles governing the relations of principal and agent, and the other to the general rules regulating the consequences following a neglect or disobedience of the requirements of statutes affecting private relations. In the one case the question as to what is a good execution of a power is involved, and in the other as to what may be considered an adequate performance of a duty. These questions are manifestly controlled by different rules, and that which is required in one is not an authority for the requirements of the other."

1 There are certain advantages which a corporation presents as compared with a copartnership.

In large enterprises the partnership has been found to be clumsy, dangerous and insufficient. If unsuccessful it brings ruin upon all of its members, because each partner is liable absolutely for all debts. Any member may bind the firm by his contract and each one has an equal voice in deciding its policy. Its capital and credit, and consequently its amount of business, are limited necessarily by the capital and credit of a very few men—the members themselves. The death of a member or the transfer of his interest dissolves the firm. Any member may arbitrarily cause a dissolution at any time, and the insolvency of a member renders the partnership property subject to levy of execution for his debt. Upon the death of a partner the surviving partners have the sole charge of winding up the business, and the executor of the deceased partner is not allowed to come in. A partner may withdraw his money only at a sacrifice, or by long and expensive proceedings. He cannot conveniently sell his interest or borrow money upon it. New partners cannot readily or safely be admitted.

The partnership is restricted in its capital, dangerous in its liabilities, narrow in its exclusion of new members, too free in its mode of making contracts, and too contracted in its opportunities for withdrawal. It is becoming obsolete as a mode of doing business on a large scale.

In a corporation all this is changed. The members are not liable for the debts. The amount already invested may be lost, but the private fortunes of the stockholders are not involved. The business is done and contracts made not by all, but by a select few, called directors. A large capital is created by the union of funds from many sources. A person may safely invest in many enterprises and yet not take part in the management nor watch the business of any one of them. The leading spirit in an enterprise may hold a majority of the stock and may admit associates, employees, or strangers as holders of a minority of the stock, and yet he will retain the management as though he

A corporation is an entity, an existence, irrespective of the persons who own all its stock. The fact that one person owns all the stock does not make him and the corporation one and the same person.[1] Although one railroad corporation owns all the stock of another railroad corporation, yet the separate existence of the two corporations continues and they are not thereby merged.[2]

Not only is the identity of the corporation preserved as distinct from its stockholders, but it is also distinct from its promoters, incorporators and antecedents. It is not liable on the contracts and obligations of its promoters.[3] Nor is it liable for the debts of a prior corporation to whose property it succeeds by foreclosure sale.[4] Where a partnership or a corporation is merged into another corporation, the creditors of the former may pursue the property, but they cannot hold the latter corporation liable for the debt,[5] unless the latter took with such notice that it may be held to account.[6]

But there are occasions where the courts will ignore the corporate existence and will hold that its acts are the acts of its stockholders and *vice versa* the same as in a partnership. Thus, where

were the single owner of the concern. Persons may easily buy into or retire from the enterprise. Dissolution is not brought about by the death or withdrawal or dissatisfaction of a stockholder. The insolvency of a stockholder does not affect the business of the corporation. Upon the death of a stockholder his executor votes his stock and has a voice in the continuation of the business. A stockholder may sell or pledge his interest readily and intelligibly by reason of the reports, dividends, and market quotations of his stock. The corporation is a protection in that the liability is limited; it is capable in that it renders possible the collection of a great capital; it is efficient because the directors and they alone govern its policy and its contracts; and it is convenient because it is easy to sell or buy or pledge or bequeath one's interest in the concern.

The advantages of incorporation are set forth in the Law Quarterly Review for April, 1895 (p. 185), as follows: "Incorporation secures first of all the benefit of limited liability. It further preserves the continuity of the partnership unaffected by the death, lunacy, or bankruptcy of the members or by other contingencies. It minimizes the dangers of a dishonest partner by restricting the agency of the directors in articles of which all persons dealing with the company have constructive notice. It facilitates dealing with the shares of the partners by sale, mortgage, or settlement. It affords greater facilities for borrowing, more particularly for raising money on debentures. A stockholder who lends money to the company is not at the disadvantage of being postponed to other creditors as an ordinary partner is who lends to the firm."

1 Quoted and approved in Monongahela, etc. Co. *v.* Pittsburg, etc. Co., 196 Pa. St. 25 (1900). Also in Rhawn *v.* Edge Hill, etc. Co., 201 Pa. St. 637 (1902). See also § 709, *infra*.

2 Quoted and approved in Exchange Bank *v.* Macon, etc. Co., 97 Ga. 1 (1895). See also § 663, *infra*.

3 See § 707, *infra*.

4 See § 890, *infra*.

5 See § 673, *infra*.

6 See § 673, *infra*.

an individual organizes a corporation to violate a contract which he himself would not be allowed to violate, the court will enjoin the corporation as though it were the person himself.[1] So, also, where a director causes the corporation to give a valuable contract to a corporation in which he is secretly interested, this may be the same as though he were interested in a firm which received that contract.[2] Property acquired by and in the name of a "dummy" corporation may be held to be subject to a mortgage executed by the owner of such "dummy" corporation.[3] A contract between three local companies by which one runs over the tracks of another for a consideration paid to the third is legal as to the second corporation where such second corporation is a mere dummy of the third corporation and the earnings of both corporations go together.[4] Where one family own all the stock of a mercantile corporation and one of them is president and has entire control and management of its affairs and he wilfully fires the property in order that the insurance may be collected, the insurance company is not liable.[5]

Where one corporation owns all the stock and purchases all the property for another corporation, and employs a person to do work for the latter, it is liable for his wages on the ground that the subordinate company was merely an agency or instrumentality for carrying out the purposes of the former.[6] A corporation may be held liable for the fraud of its board of directors against another corporation which the same board controlled.[7] The New York court of appeals have said: "We have of late refused to be always and utterly trammeled by the logic derived from corporate existence where it only serves to distort or hide the truth." [8]

This same principle applies to trade combinations of corporations called "Trusts." [9] The corporate existence will be disregarded and the acts and contracts of the persons holding all the stock will be considered the acts and contracts of the corporation itself, where the effect is the same as though the corporation had acted or con-

1 See § 663, *infra*.

2 See § 649, *infra*.

3 See § 857, *infra*.

4 Union Pac. Ry. *v.* Chicago, etc. Ry., 163 U. S. 564, 592 (1896).

5 Meily Co. *v.* London, etc. Co., 142 Fed. Rep. 873 (1906), aff'd 148 Fed. Rep. 683.

6 Kelly *v.* Ning, etc. Assoc., 2 Cal. App. 460 (1905).

7 Fitzgerald *v.* Fitzgerald, etc. Co., 41 Neb. 374 (1894).

8 Anthony *v.* American Glucose Co., 146 N. Y. 407 (1895), holding that, where one corporation sells out to another for stock of the latter, a stockholder in the former may sue the purchasing corporation for his part of such stock, it not having been delivered.

9 See ch. XXIX, *infra*.

tracted as a corporation. Hence, where all the stock is combined with all the stock of other companies in order to form a combination which is illegal, the state will forfeit the charter of the corporation, although technically it is not a party to the agreement.[1]

It was held by the lower courts in England that where a merchant incorporates a company to take over the business, he being practically the only stockholder, he is liable personally for all the corporate debts, on the theory that the corporation was a fraud or a mere "dummy." The House of Lords, however, very properly reversed this decision.[2]

§ 7. *Classes of corporations, and the class considered herein.*— For the better understanding of the law of corporations, and for the treatment of special branches of that law, the early writers, like Kyd, Blackstone, Kent, Angell and Ames, and many subsequent authors, subdivided corporations into distinct classes. These subdivisions have been made on various principles of classification. When divided with respect to the members of corporations they are aggregate and sole. As regards their functions they are public, such as cities and towns; quasi-public, such as counties and school districts; and private; and again private corporations are divided into ecclesiastical and lay; and still further, lay corporations are divided into eleemosynary or charitable,[3] and civil, the latter of which include all private corporations that are created for temporal purposes, such as banking, insurance, trading, railroad, manufacturing, turnpike, bridge and canal corporations, and certain educational institutions. There has been much discussion as to whether a railroad company is a public corporation or a *quasi-public* corporation or a private corporation.[4] It seems clear that as regards

1 See ch. XXIX, *infra;* also State *v.* Standard Oil Co., 49 Ohio St. 137 (1892).

2 Salomon *v.* Salomon, etc. Co., [1897] A. C. 22, reversing Broderip *v.* Salomon, [1895] 2 Ch. 323. See also Munkittrick *v.* Perryman, 74 L. T. Rep. 149 (1896), where the court held that two partners might incorporate and that they would not thereafter be personally liable on the contracts of the company. The court, however, intimated that if both of the partners and the corporation had been before the court a different conclusion might have been reached. The supreme court of Louisiana has held that in such a case the corporate existence will be ignored. Samuel, etc. Co. *v.* Illinois, etc. Co., 51 La. Ann. 64 (1898).

3 A library association is a public charity and hence its property cannot be sold under levy of execution. Fordyce, etc. *v.* Woman's, etc. Ass'n, 79 Ark. 550 (1906).

4 In United States *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 321 (1897), the court said: "It cannot be disputed that a railroad is a public corporation, and its business pertains to and greatly affects the public, and that it is of a public nature." "Though the corporation was

its stockholders it is a private corporation, and as regards its duties towards the public it is a public corporation, and hence it may well be called a *"quasi* public" corporation. The term, *quasi* public corporation, may well be applied to a steam railroad, street railway, telegraph, telephone, cable, gas, electric light, subway or water works corporation, and in fact to every other corporation, which is authorized to exercise the power of eminent domain or to occupy the public streets.

private, its work was public, as much so as if it were to be constructed by the State." Township of Pine Grove *v.* Talcott, 19 Wall, 666, 676 (1873). "The corporations referred to in the statute were not in any sense, here involved, 'strictly private.' Authors who class these corporations as such, because individuals own their shares, warn the reader against the use of this classification made in People *v.* Salem. They say most fully that when they are created for public purposes, perform public duties and exercise delegated sovereign rights for that purpose, they are *public* in their nature. As said in Swan *v.* Williams (2 Mich. 427), a fourth of a century since in Michigan, they are *quasi public*, and stand in a distinct class, by themselves." Talcott *v.* Pine Grove, 23 Fed. Cas. 652 (1872). "Railroads are quasi public corporations." Dinsmore *v.* Louisville, etc. Ry., 2 Fed. Rep. 465 (1880). That a railroad is a quasi public corporation, see Chicago, etc. Ry. *v.* Wabash, etc. Ry., 61 Fed. Rep. 993 (1894). See 209 U. S. 118

"Railway companies are more than mere private corporations—they are in many respects, and for many purposes, quasi public bodies, invested with large and peculiar franchises and privileges, and owing important duties, and under varied responsibilities to the public." Kelley *v.* Trustees, etc. R. R., 58 Ala. 489, 501 (1877). "There are several classes of corporations, such as public municipal corporations, the leading object of which is to promote the public interest; corporations technically private, but yet of a quasi public character, having in view some great public enterprise, in which the public interests are directly involved to such an extent as to justify conferring upon them important governmental powers, such as an exercise of the right of eminent domain. Of this class are railroad, turnpike, and canal companies; and corporations strictly private, the direct object of which is to promote private interests, and in which the public has no concern, except the indirect benefits resulting from the promotion of trade, and the development of the general resources of the country." Miners' Ditch Company *v.* Zellerbach, 37 Cal. 543, 577 (1869). "Railroad companies are held to be quasi public corporations and agencies." Pueblo, etc. R. R. *v.* Taylor, 6 Colo. 1, 8 (1881). "A railroad company is a quasi public corporation." Board Commissioners *v.* Lafayette, etc. R. R., 50 Ind. 85, 108 (1875). "A railroad corporation differs in some important respects from private corporations in general." State v. Central Iowa Ry., 71 Iowa 410, 415 (1887). "Railroad companies are private corporations; yet they are declared to be quasi public agencies, and their roads to subserve to a certain extent public purposes, so much so that the public may be taxed to aid in their construction." St. Joseph, etc. R. R. *v.* Ryan, 11 Kan. 602, 608 (1873). "Railroads, like all other public thoroughfares, are public instrumentalities. The power to construct and

A domestic corporation is one that has been organized under the laws of the state referred to. A foreign corporation is one that has

maintain railroads is granted to corporations for a public purpose. The right to exercise the very high attributes of sovereignty, the power of eminent domain and of taxation, to further the construction of railways, could not be granted to aid a purely private enterprise." State *v.* Dodge City, etc. Ry., 53 Kan. 377, 378 (1894). "Most certain it is, that as to all their rights, powers, and responsibilities, three grand classes of corporations exist. 1st: Political or municipal corporations, such as counties, towns, cities and villages, which, from their nature, are subject to the unlimited control of the Legislature; 2nd: Those associations which are created for public benefit, and to which the government delegates a portion of its sovereign power, to be exercised for public utility, such as turnpike, bridge, canal, and railroad companies; and 3d: Strictly private corporations, where the private interest of the corporators is the primary object of the association, such as banking, insurance, manufacturing and trading companies. . . . But the object and the origin of that class of corporations represented by the defendants in this case, and which might with far more propriety be styled public than private corporations, are of an altogether different nature and character. Their very existence is based upon the delegation to them of the sovereign power to take private property for public use, and upon the continued exercise of that power in the use of the property for the purposes for which it was condemned. They are the means employed to carry into execution a given power. That private property can be taken by the government from one and bestowed upon another for private use, will not for a moment be contended, and these corporations can only be sustained upon the assumption that the powers delegated, are to a public agent, to work out a public use." Swan *v.* Williams, 2 Mich. 427, 434, 435 (1852). "A corporation like the Lake Superior and Mississippi Railroad Company, though denominated a private corporation, is a quasi public corporation, from the nature of the purpose for which it is created, of the powers with which it is endowed, and of the functions which it performs." Stewart *v.* Erie, etc. Company, 17 Minn. 372, 395 (1871). "The individual corporators, in the anticipated pecuniary benefit which may result to them, have an object and an interest distinct from that of the public. In that respect the enterprise is individual, and the corporation private. But the object and purpose of the incorporation are the public advantage. This gives to the work its public character." Brown *v.* Beatty, 34 Miss. 227, 240 (1857). "A railroad company is a private corporation, within the meaning of a constitutional prohibition against general laws being suspended for the benefit of a private corporation." Yazoo, etc. R. R. *v.* Southern Ry., 83 Miss. 746 (1904). "But the broad position is taken that the company is a private corporation, and has the right to buy and hold all kinds of property the same as an individual. This position is wholly indefensible. Whilst it is true, in one sense, that it is a private corporation, yet the public is deeply interested in it. Its chartered privileges and franchises were not granted solely and exclusively for private benefit and emolument, but to subserve a great public interest." Pacific R. R. *v.* Seely, 45 Mo. 212, 217 (1870). "It is a radical error to regard these corporations as simply private. They have a public as well as a private aspect, and it is on this

been organized under the laws of another state or of a foreign government. An alien corporation is one that has been organized under the laws of a foreign government.[1]

account that the immunity in question belongs to them. That they possess, in some degree, the nature of a public corporation cannot, and will not, be denied, for they could not otherwise acquire a foot of land for their roadway in this state by condemnation." Beseman *v.* Pennsylvania R. R., 50 N. J. L. 235, 240 (1888). "I entirely agree with the Chief Justice that, in the grant of a franchise of building and using a public railway, that there is an implied condition that it is held as a quasi public trust, for the benefit of all the public, and that the company possessed of the grant must exercise a perfect impartiality to all who seek the benefit of the trust. It is true that these railroad corporations are private, and, in the nature of their business, are subject to, and bound by the doctrine of common carriers, yet, beyond that, and in a peculiar sense, they are entrusted with certain functions of the government, in order to afford the public necessary means of transportation." Messenger *v.* Pennsylvania R. R., 37 N. J. L. 531, 536 (1874). "The United Companies are quasi-public corporations." Black *v.* Delaware, etc. Canal Co. 24 N. J. Eq. 455, 469 (1873). "It is settled law in this State that railway companies are private, as distinguished from public corporations. But when the power of eminent domain is delegated for the purpose of enabling these companies to discharge duties for the public benefit they occupy a different relation to the State and the people from that of ordinary private corporations, the powers of which are given and exercised exclusively for the profit or advantage of their stockholders, and are therefore called quasi-public, though they fall within the classification of private corporations." Logan *v.* Railroad, 116 N. C. 940, 944 (1895). "It is because of the fact that such corporations are public corporations, being vested with a portion of sovereign power delegated to them by the state, and owing duties to the public, that they have been held subject to the right of mandamus to oblige them to fairly and fully carry out the public object of their creation." Scofield *v.* Railway Company, 43 Ohio St., 571, 594 (1885). Concerning the question of whether a railroad company is a private corporation, the court said in Pierce *v.* Commonwealth, 104 Pa. St. 155 (1883): "Railroad and canal companies are private corporations. This we have decided in point twice within the last two years; once in the case of Timlow *v.* Philadelphia, etc. R. R., 99 Pa. St. 284 (1882), and again in the case of Pittsburgh, etc. R. R. *v.* Bruce, 102 Pa. St. 23 (1882). . . . So in the case of Presbyterian Soc. *v.* Auburn, etc. R. R., 3 Hill, 567 (1842), it is said that a railroad company is not public nor does it stand in the place of the public; it is but a private corporation over whose rails the public may travel if they choose to ride in its cars. Indeed, we regard it as a misnomer to attach even the name 'quasi-public corporation' to a railroad company, for it has none of the features of such corporation, if we ex-

1 An English corporation is an alien corporation. Eureka, etc. Co. *v.* Richmond, etc. Co., 2 Fed. Rep. 829 (1880).

The residence of a corporation is the town or city specified in its articles of incorporation. Rossie Iron Works *v.* Westbrook, 59 Hun, 345 (1891). See also § 1, *supra*.

At an early day private corporations for business purposes were few in number and of little importance in the law. The English East India Company was organized in 1600 and the Dutch East India Company in 1602. The latter was "the first great joint-stock company whose shares were bought and sold from hand to hand."[1] As Fiske well says,[2] "those events mark the beginning of a new era in European commerce." Chancellor Bland, of Maryland, believed that no instance of such a corporation in the colonial times of America could be found.[3] Judge Baldwin, of Connecticut, however, calls attention to the fact that the "New London Society for Trade and Commerce United" was incorporated by the Colony of Connecticut in 1731, and that it not only had a capital stock but issued circulating bills as currency. The Connecticut Land Company was organized in Connecticut in 1795 and owned the entire Connecticut "Western Reserve." This land was held in the

cept its qualified right of eminent domain, and this it has because of the right reserved to the public to use its way for travel and transportation. Its officers are not public officers, and its business transactions are as private as those of a banking-house. Its road may be called a quasi-public highway, but the company itself is a private corporation and nothing more." "That railroads are quasi-public corporations is admitted on all hands." Moore *v.* Railroad Company, 38 S. C. 1, 24 (1892). "Until a comparatively recent period corporations aggregate were divided by text-writers as well as by judges into but two classes, private corporations created for private purposes as distinguished from governmental purposes and public corporations created for public purposes exclusively. This division really included almost all corporations which had any actual existence until a comparatively recent period. Sixty years ago there were actually in existence scarcely any of the corporations which I have called *quasi* public corporations; and therefore it is not strange, that text-writers and judges spoke of corporations being divided into but two classes, private and public corporations." Laurel Fork, etc. R. R. *v.* West Va. etc. Co., 25 W. Va. 324, 358 (1884). "A railroad company may be, as to its capacity to assume and exercise in the name of the state the power of eminent domain delegated to it; so far a public or *quasi* public corporation, yet in all its other powers, functions and capacities it is essentially a private corporation, not distinguishable from any other of that name or character." Whiting *v.* Sheboygan, etc. R. R., 25 Wis. 167, 181 (1870). See also § 891, *infra*, and the various sections of ch. LV. Railroads in some respects may be private carriers. See Elliott on Railroads, p. 2172, and 209 U. S. 108, 118.

1 Payne, European Colonies, p. 55.

2 Writings of John Fiske, vol. IV, p. 60.

3 McKim *v.* Odom, 3 Bland, Ch. (Md.) 407, 418 (1829). For a list of the first incorporated business companies in America, see Harvard Law Review, vol. 2, p. 165.

In the case of McKean *v.* Biddle, 181 Pa. St. 361 (1897), it appears that a mutual insurance company had not paid dividends for one hundred and thirty years, but had gradually accumulated a surplus of over $4,000,000. The court held that it might resume the payment of dividends.

names of trustees for the benefit of the stockholders of the company until 1809, when the company partitioned the land among its stockholders and divided its assets and was dissolved.[1]

Nevertheless, during the eighteenth century, private corporations for profit were of small consequence, and it has only been during the past fifty years that the relative importance of the different classes of corporations has changed, and that private corporations for business purposes have overshadowed all other kinds. This has been due chiefly to the limited liability feature of modern business corporations, a feature that has rendered possible the union of many persons and many contributions of capital, with a limit to their risks. President Eliot of Harvard University has pointed out this distinguishing characteristic.[2] Strange to say this feature of business corporations has been of slow growth, both in England and the United States.[3]

1 Holmes *v.* Cleveland R. R., 93 Fed. Rep. 100 (1861), where the court held that a small parcel of land which accidentally was omitted in making such division of the assets could not be claimed by the heirs of the stockholders fifty years after the division was made.

2 In an address at Chicago, March 10th, 1906, President Eliot said:

"A large part of the work of the world is still done by individuals and partnerships; but the corporation is the great new factor in modern business, the privilege of limited liability being the corporation's most precious characteristic. The principle of limited liability is by far the most effective legal invention for business purposes made in the nineteenth century—not that corporations have not other advantages over partnerships, such as the advantageous holding of real estate, the easy transference of a stockholder's interest and convenience as to suing and being sued; but the fundamental advantage of a corporation, the advantage which enables it to mass and direct capital, is the privilege of limited liability. Therefore, corporations multiply and have become indispensable.

"It is no wonder that the ethics of corporation management are in some respects indeterminate, and are therefore an urgent subject of public discussion; for the invention of the business corporation itself is hardly more than fifty years old, and this new creation deals with forms of property which are highly novel."

3 In England, before 1855, stockholders in business and manufacturing corporations were liable for all the debts of the concern the same as a partner. This was because the acts of parliament authorizing incorporation for manufacturing and business purposes expressly provided for such full liability. See 8 Vict. Ch. 110. In 1855, however, by 18 and 19 Vict. Ch. 133, the liability of such stockholders might be limited by papers to that effect being filed in accordance with the terms of the statute.

In 1811 New York enacted a statute, authorizing incorporation for certain manufacturing purposes, and the stockholders were to be liable for corporate debts only "to the extent of their respective shares of stock." L. 1811, Ch. 67. In Massachusetts by statute enacted in 1809 (L. 1809, Ch. 65) stockholders in manufacturing corporations were liable individually for all the debts of the company. But by the Act of 1830 (L. 1830, Ch. 53) stockholders in manufacturing

The modern text-books on corporations treat very little of the older classes of corporations and the principles which govern them, but fully and explicitly of corporations having a capital stock. Corporations without a capital stock are governed largely by principles of law that have changed little since the days of Blackstone, Kyd, and Kent. It is with this feature of modern corporations, as distinguished from the characteristics of the early corporations, which have sunk into comparative unimportance,[1] that this work is chiefly concerned.

§ 8. *Corporations having a capital stock—Definition of capital stock.*—The questions which arise in connection with corporations having a capital stock may be divided into two groups. The first includes those principles of law which affect all corporations, whether they have a capital stock or not. Of such a kind are the old questions of how a corporation shall contract; whether a seal is necessary; whether and how it may act through an agent; the right to sue and be sued in various courts; and to hold and dispose of property. These questions, capacities and incidents, for the most part, have become so well settled as to give rise to comparatively little litigation at the present day.

On the other hand, it is believed that the modern law of corporations, as regards its litigated questions, its unsettled principles, its new problems and its rapidly crystallizing results, is the law of corporations having a capital stock.

Capital stock is the sum fixed by the corporate charter as the amount paid in or to be paid in by the stockholders, for the prosecution of the business of the corporation and for the benefit of corporate creditors.[2] The capital stock is to be clearly distinguished

corporations were not to be further liable after the whole capital stock had been paid in and a certificate to that effect filed.

1 The subject of municipal corporations forms an exception to this statement, but the great work of Judge Dillon on Municipal Corporations has clearly stated, and thereby settled, most of the difficult subjects connected with that branch of the law.

2 Quoted and approved in Cooke *v.* Marshall, 191 Pa. St. 315 (1899), s. c. 196 Pa. St. 200; American, etc. Co. *v.* State Board, 56 N. J. L. 389 (1894); Tradesman Pub. Co. *v.* Car Wheel Co., 95 Tenn. 634 (1895), and in Commercial F. Ins. Co. *v.* Board of Revenue, 99 Ala. 1 (1892). For various definitions see Barry *v.* Merchants' Ex. Co., 1 Sandf. Ch. 280, 305 (1844); Christensen *v.* Eno, 106 N. Y. 97, 100 (1887); Hightower *v.* Thornton, 8 Ga. 486, 500 (1850); Hannibal, etc. R. R. *v.* Shacklett, 30 Mo. 550, 553 (1860); St. Louis, etc. R. R. *v.* Loftin, 30 Ark. 693, 709 (1875); Bent *v.* Hart, 10 Mo. App. 143, 146 (1881); Mutual Ins. Co. *v.* Erie County, 4 N. Y. 442 (1851); Bailey *v.* Clark, 21 Wall. 284 (1874), where Field, J., says "it applies only to the property or means contributed by the stock-

from the amount of property possessed by the corporation. Occasionally it happens that, under the terms of statutes relating to taxation which have been drawn without regard to the technical meaning of words, the courts will construe the capital stock to mean all the actual property of the corporation.[1] But this is for the purpose of carrying out the intent of the statute, and is not the real meaning of the term. Capital stock as used in a taxation statute may be construed to mean property contributed by the stockhold-

holders as the fund or basis for the business or enterprise for which the corporation or association was formed;" Jones *v.* Davis, 35 Ohio St. 474, 476 (1880); Railway Co. *v.* Furnace Co., 49 Ohio St. 102 (1892); Burrall *v.* Bushwick R. R., 75 N. Y. 211 (1878), where Folger, J., defines it as "that money or property which is put into a single corporate fund by those who, by subscription therefor, become members of the corporate body;" Williams *v.* Western Union Tel. Co., 93 N. Y. 162, 188 (1883), where Earl, J., tersely says it is "the property of the corporation contributed by its stockholders or otherwise obtained by it, to the extent required by its charter;" Sanger *v.* Upton, 91 U. S. 56, 60 (1875); State *v.* Morristown Fire Assoc., 23 N. J. L. 195 (1851); State *v.* Cheraw, etc. R. R., 16 S. C. 524 (1881). "The capital of a corporation is the property or means which the corporation owns, and it may vary in amount, while the capital stock is fixed, and represents the interests of the stockholders, and is their property." Wells *v.* Green Bay, etc. Co., 90 Wis. 442 (1895). A savings bank corporation may be formed without any capital stock, the profits going to depositors. Huntington *v.* Savings Bank, 96 U. S. 388 (1877). Such is the statute law of New York.

For a definition of capital stock, see People *v.* Coleman, 126 N. Y. 433 (1891).

"Capital stock of a corporation is a different thing from shares of stock. Lycoming Co. *v.* Gamble, 47 Pa. St. 106, 110 (1864). The capital stock represents the property and assets of the company, which may consist in whole or in part of real estate. The certificates or shares of stock are the evidence of an interest which the holder has in the corporation, and it is well settled that this interest is personal property." Wilkes Barre, etc. Bank *v.* Wilkes Barre, 148 Pa. St. 601 (1892).

Where the charter gives power to borrow not exceeding one-half of the capital stock, capital stock means the paid-in capital stock and not the capital stock as stated in the charter. Commonwealth *v.* Lehigh Avenue Ry., 129 Pa. St. 405 (1889).

[1] Quoted and approved in Henderson Bridge Co. *v.* Commonwealth, 99 Ky. 623 (1895); aff'd, 166 U. S. 150; Ohio, etc. R. R. *v.* Weber, 96 Ill. 443 (1880); Philadelphia *v.* Ridge Ave. etc. Ry., 102 Pa. St. 190 (1883); Security Co. *v.* Hartford, 61 Conn. 89 (1891). In New York the words "capital stock" as used in the tax laws are construed to mean actual property and not share capital. People *v.* Coleman, 126 N. Y. 433 (1891); People *v.* Wemple, 150 N. Y. 46, 50 (1896).

An exemption of "stock" from taxation does not exempt shares of stock. Georgia, etc. Co. *v.* Wright, 132 Fed. Rep. 912 (1904).

In a tax on the market value of stock less a proportion of the "capital" invested in real estate, the word "capital" means the excess of assets over liabilities. Appeal of Bulkeley, 77 Conn. 45 (1904).

ers or otherwise obtained to the extent required by the charter.[1] For taxation purposes stock may be located in the state where the company is incorporated.[2] A tax on the value of the capital stock is a tax on the property in which that capital is invested, and hence if a portion of the property is beyond the limits of the state, and thus exempt from taxation in the state, that portion of the capital stock cannot be taxed.[3] Bonds in which an insurance company has invested its money may be considered a part of the capital stock, within the meaning of a tax statute.[4] The capital stock of a corporation remains fixed, although the actual property of the corporation may fluctuate widely in value, and may be diminished by losses or increased by gains. The term "stock" has been used at times to indicate the same thing as capital stock.[5] Generally, however, it means shares of stock, and in this sense it is used in this treatise. The words capital and profits, as used in connection with life estates and remainders in stocks, have a different meaning from what they have in determining the right of a corporation to declare dividends. In passing upon the relative interests of a remainderman and life tenant in shares of stock and the dividends therefrom, the courts will sometimes include in capital stock, extensions, improvements, plant and working capital which have been obtained from past profits and not from subscriptions to the capital stock.[6] Where a stock corporation has received no stock subscription and issued no stock it cannot maintain a suit.[7] A corporation has no power to issue

1 People, etc. *v.* Morgan, 178 N. Y. 433 (1904).

2 Corry *v.* Baltimore, 196 U. S. 466 (1905).

3 Delaware, etc. R. R. *v.* Pennsylvania, 198 U. S. 341 (1905).

4 Scottish, etc. Co. *v.* Bowland, 196 U. S. 611 (1905).

5 See § 12, *infra.*

6 Matter of Rogers, 161 N. Y. 108 (1899), the court saying: "What then is capital and what is profits? In a manufacturing business a plant is of first importance, and as the business increases an enlargement thereof, with the necessary tools, fixtures and machinery, is one of the things to which the earnings of the company may properly be devoted. This must be deemed to be fairly within the contemplation of the testator in creating the trusts with the capital stock of this company. After the plant there arises a necessity for raw material and labor to manufacture it. This requires what is usually termed a working capital, and it, of necessity, varies in amount depending upon the magnitude of the business. It must, therefore, also have been within the contemplation of the testator that a reasonable amount would be retained by the directors for this purpose."

7 Aspen, etc. Co. *v.* Aspen, 5 Colo. App. 12 (1894). Even though a gas company issues stock without the consent of a state board, as required by statute, yet this is no defense to a tax levied on the corporation based on the amount of its capital stock, including such stock. Attorney-General *v.* Massachusetts, etc. Co., 179 Mass. 15 (1901). Under the Montana statutes, even though no organization

stock unless expressly authorized so to do.[1] And authority in a charter to a cemetery corporation to do all things incident to a corporation does not give power to issue stock. Hence an election by so-called stockholders is not legal.[2] A stock corporation cannot be formed under the laws of West Virginia to promote religion by aiding in the support of Baptist ministers and in the erection of churches.[3] It is legal for a corporation to hold property in excess of the amount of its capital stock.[4]

§ 9. *Is the capital stock a trust fund for the benefit of corporate creditors?*—In 1824 Mr. Justice Story, in a celebrated case,[5] originated and announced the doctrine that the capital stock of a corporation is a trust fund, so far as corporate creditors are concerned, and should be protected and administered as a trust fund by courts of equity. This doctrine was supposed to have been adopted by the supreme court of the United States,[6] and by the courts of nearly every state of the Union. On this doctrine rest the decisions that unpaid subscriptions for stock cannot be evaded by release, cancellation, or fraudulent transfer;[7] that the holders of "watered" stock issued for cash at less than par or for property at an overvaluation are liable to corporate creditors;[8] that dividends paid from the capital stock may be recovered back;[9] and that a corporation cannot use its capital stock to purchase outstanding shares of its capital stock.[10]

In 1893, however, the supreme court of the United States passed again upon this theory of the capital stock being a trust fund, and

meetings of the stockholders and directors are held, yet a deed of property to the corporation may be valid. Morrison *v.* Clark, 24 Mont. 515 (1900).

1 Cooke *v.* Marshall, 191 Pa. St. 315 (1899), involving a cemetery corporation.

2 Cooke *v.* Marshall, 196 Pa. St. 200 (1900). Under a general act authorizing incorporation for purposes other than profit, a cemetery cannot be organized for profit, and hence the incorporators are not entitled to moneys received from the sale of lots, but are bound to use such moneys to improve the property. Brown *v.* Maplewood, etc. Assoc., 85 Minn. 498 (1902).

3 Powell *v.* Dawson, 45 W. Va. 780 (1899).

As to whether a medical school, which is incorporated and has a capital stock, may sell all its property to another corporation, see McLeod *v.* Lincoln, etc. Co., 69 Neb. 555 (1904), rev'g 69 Neb. 550.

4 Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844). Where a corporation owns property in excess of an amount specified and limited by the charter, an exemption from taxation does not apply to such excess. Seashore House, etc. *v.* City of Atlantic City, 48 Atl. Rep. 242 (N. J. 1900).

5 Wood *v.* Dummer, 3 Mason, 308 (1824); s. c., 30 Fed. Cas. 435.

6 Sawyer *v.* Hoag, 17 Wall. 610, 620 (1873).

7 See §§ 199, 253, 263, *infra.*

8 See §§ 42, 46, *infra.*

9 See § 548, *infra.*

10 See § 312, *infra.*

decided that, if there be any trust at all, it is rather a trust in the administration after possession by the court than a trust attaching to the property itself.[1] This conclusion does not change the law as to subscriptions, "watered stock," dividends and purchases of stock, as mentioned above. It changes only the theory or reasoning upon

[1] The court said: "While it is true language has been frequently used to the effect that the assets of a corporation are a trust fund held by a corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. . . . In other words, and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation, the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free also from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first, for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder." Hollins *v.* Brierfield, etc. Co., 150 U. S. 371, 381, 383 (1893). To the same effect, see O'Bear Jewelry Co. *v.* Volfer, 106 Ala. 205, 227 (1894); Hospes *v.* Northwestern, etc. Co., 48 Minn. 174 (1892).

"When a corporation is solvent, the theory that its capital is a trust fund upon which there is any lien for the payment of its debts has in fact very little foundation. No general creditor has any lien upon the fund under such circumstances, and the right of the corporation to deal with its property is absolute so long as it does not violate its charter or the law applicable to such corporation." McDonald *v.* Williams, 174 U. S. 397, 401 (1899).

A solvent corporation does not hold its property in trust for its creditors, even though it is in process of liquidation, and hence a partial distribution of the assets of a bank to the stockholders during liquidation, when the bank was solvent and retained sufficient assets to pay its liabilities, cannot be recovered back subsequently by the receiver in an action at law, although it turned out that the remaining assets were not sufficient to pay all liabilities, no bad faith being involved. Lawrence *v.* Greenup, 97 Fed. Rep. 906 (1899).

"As between the corporation and its creditors, the corporation does not hold its property in trust for its creditors in any other sense than does an individual debtor, and that, until a court takes charge of the property of an insolvent corporation, it has the same control over its property that an individual would have over its property under like circumstances." Nappanee, etc. Co. *v.* Reid, etc. Co., 60 N. E. Rep. 1068 (Ind. 1901); rev'd on another point in s. c. 159 Ind. 614.

The agreement of a corporation to pay a specified sum of money, with the provision that it shall not be chargeable against a certain part of the capital stock, can be enforced in equity only, inasmuch as an accounting is involved. Heflin, etc. Co. *v.* Hilton, 124 Ala. 365 (1899).

which that law is based. In this respect the supreme court is in harmony with the English decisions. The trust-fund theory does not exist in England. It is purely an American doctrine. The fact is that the trust-fund theory has beclouded rather than clarified the subject. For instance, on account of this theory some of the courts have fallen into error and held that when a corporation is insolvent it cannot prefer one creditor as against another. The trust-fund theory may well be superseded by the fact that the capital stock of a corporation is like the capital of a business man, and that just as he cannot, as against his creditors, give it away or forgive the debts of those who owe him, so a corporation cannot, as against its creditors, release subscriptions, give away its assets to its stockholders by way of dividends, or buy its own stock with funds which, upon insolvency, belong to its creditors instead of its stockholders.

§ 10. *Definitions of corporator, subscriber, shareholder, stockholder, and officer.*—A corporator is one of those to whom a charter is granted, or of those who file a certificate of incorporation under a general incorporating statute.[1] A subscriber is one who has agreed to take stock from the corporation on the original issue of such stock.[2] A shareholder in this country means the same

1 Chase *v.* Lord, 77 N. Y. 1, 11 (1879), the court saying: "Corporators exist before stockholders, and do not exist with them. When stockholders come in, corporators cease to be." *Cf. Re* Lady Bryan, 1 Sawy. 349 (1870); s. c., 14 Fed. Cas. 926. In Pennsylvania, under a peculiar statute, it has been held that the incorporators thereof need not be subscribers. See Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43, 54 (1870).

It has frequently been held that where a statute authorizes persons to form a corporation, although the statute does not, in express terms, say that they must be of full age, yet it is implied that they shall be of full age. *Re* Globe, etc. Assoc., 63 Hun, 263 (1892); aff'd, 135 N. Y. 280. *Cf. Re* Laxon, [1893] 1 Ch. 210 (1892).

A married woman is not at common law qualified to act as an incorporator nor as treasurer. 9 Ry. & Corp. L. J. 197.

A married woman may be an incorporator. Good Land Co. *v.* Cole, 110 N. W. Rep. 895 (Wis. 1907).

A corporation is legally organized although the incorporators are not stockholders as required by statute. Welch *v.* Importers', etc. Bank, 122 N. Y. 177 (1890).

An incorporator need not be a stockholder unless the statutes so require. Bristol, etc. Trust Co. *v.* Jonesboro, etc. Trust Co., 101 Tenn. 545 (1898).

2 Busey *v.* Hooper, 35 Md. 15 (1871); Spear *v.* Crawford, 14 Wend. 20, 23 (1835). In the Thames Tunnel Co. *v.* Sheldon, 6 B. & C. 341 (1827), the word "subscriber" is elaborately defined, and it is held to mean only such persons as have entered into an express contract to take up a certain definite number of shares. See also a definition at some length by Cooley, J., in Peninsular Ry. *v.* Duncan, 28 Mich. 130 (1873).

Subscribers are stockholders, although no certificates have been is-

thing as a stockholder, and the terms are used interchangeably to indicate one who owns stock in a corporation and has been accepted as a stockholder by the corporation.[1] "The stockholders are the equitable owners of the corporate property."[2] A stockholder does not stand in the attitude of a partner towards the corporation. A director is an "officer," and a paying teller may be one within the meaning of a criminal statute.[3] An attorney is an officer of the company and may verify a petition in condemnation proceedings.[4] In England, the auditors of a company are officials, and are liable for dividends improperly paid, based on balance sheets improperly made up by the auditors, especially where the auditors included as regular investments loans for which there was no proper security.[5]

§ 11. *Relation of stockholders towards the corporation.*—A corporation may contract with its stockholders to the same extent and in the same manner that it may with any other persons.[6] Where

sued to them and no payments made. McComb *v.* Barcelona, etc. Assoc., 10 N. Y. Supp. 546 (1890); aff'd, 134 N. Y. 598.

A "subscription" for stock is different from a "sale." A "subscription" applies to an original issue. Bates *v.* Great Western Tel. Co., 134 Ill. 536 (1890).

1 See Rosevelt *v.* Brown, 11 N. Y. 148, 152 (1854); State *v.* Ferris, 42 Conn. 560 (1875); Adderly *v.* Storm, 6 Hill, 624 (1844); Worrall *v.* Judson, 5 Barb. 210 (1849). Where the registered holder is merely a nominal holder he will not be entitled to special privileges, such as free admission to a place of amusement. Academy of Music's Appeal, 108 Pa. St. 510 (1885).

A person is held to be a stockholder, although no certificate has been issued to him. See § 192, *infra*. Moreover, he may be held to be a stockholder, although he has sold and transferred his certificate of stock, if such transfer has not been recorded on the corporate stock-book. See ch. XV, *infra*.

2 Martin *v.* Niagara, etc. Co., 122 N. Y. 165 (1890).

3 United States *v.* Means, 42 Fed. Rep. 599 (1890).

A director is an officer under a statute making officers liable for debts in certain cases. Brand *v.* Godwin, 8 N. Y. Supp. 339 (1890). The president and directors are "officers" within the meaning of a criminal statute. Commonwealth *v.* Wyman, 49 Mass. 247 (1844). So, also, of the treasurer. Commonwealth *v.* Tuckerman, 76 Mass. 173 (1857). In certain cases an "officer" is construed to mean merely an agent and not a director. So held in regard to appointing a receiver of a foreign corporation. Moran *v.* Alvas, etc. Co., N. Y. Law J., Dec. 5, 1891.

4 Matter of St. Lawrence, etc. R. R., 133 N. Y. 270, 278 (1892).

5 *Re* London & Gen. Bank, 72 L. T. Rep. 227 (1894); aff'd, (1895) 2 Ch. 166, 673. Auditors are not officers in the true sense of the word. *Re* Western, etc. Co., [1897] 1 Ch. 617, rev'g 75 L. T. Rep. 648.

6 Hartford, etc. R. R. *v.* Kennedy, 12 Conn. 499, 509 (1838); Gordon *v.* Preston, 1 Watts (Pa.), 385 (1833); Central R. R. *v.* Claghorn, 1 Speers' Eq. (S. C.) 545, 562 (1844). Although a stockholder purchases corporate property at a tax sale, this does not constitute payment of the taxes in favor of the mortgagee of

a state is a stockholder in a railroad corporation, its rights are no different from those of a private individual who is a stockholder.[1]

A stockholder, as a creditor of the corporation, may obtain security for his debt to the exclusion of other creditors.[2]

A stockholder has no legal title to the property or profits of the corporation until a dividend is declared, or a division made on the dissolution of the corporation.[3] Although a deed of a corporation

the property. Jenks *v.* Brewster, 96 Fed. Rep. 625 (1899). An insolvent individual who owes a bank may convey land to the bank for the benefit of its depositors; and the doctrine that individual assets must be applied to individual debts before being applied to partnership debts does not apply, even though he owns one-half of the stock of the bank. Steinke *v.* Yetzer, 108 Iowa, 512 (1899).

Where one subscribed for stock and paid for it by mortgages payable at times mutually agreed upon between the parties, "this was merely a mode of payment. . . . He stands in two capacities; one as debtor to the association, one as stockholder in it. These capacities are independent of each other." Ely *v.* Sprague, 1 Clarke, Ch. (N. Y.) 351 (1840); Longley *v.* Longley Stage Co., 23 Me. 39 (1843), holding that where a creditor consented, as a stockholder, to the reorganization of the company which had become indebted to him under the former organization, he had not thereby forfeited his right to recover from the newly-organized corporation, to which he had become a subscriber; American Bank *v.* Baker, 45 Mass. 164, 176 (1842), holding that a corporation vote to compromise certain securities to the detriment of a member who was also a creditor could not be regarded as consented to by him in his absence.

A stockholder may contract with the corporation the same as a stranger. Bramblet *v.* Commonwealth, etc. Co., 83 S. W. Rep. 599 (Ky. 1904).

A contract between a corporation and all its stockholders cannot be attacked by the corporation or its receiver, and can be attacked only by creditors who have been actually defrauded thereby. Great Western, etc. Co. *v.* Harris, 128 Fed. Rep. 321 (1903); aff'd, 198 U. S. 561.

1 Southern Ry. *v.* North Carolina R. R., 81 Fed. Rep. 595 (1897). See also § 99, *infra*.

2 Reichwald *v.* Commercial Hotel Co., 106 Ill. 439 (1883). See also § 692, *infra*. A stockholder may also be a creditor and may take security the same as any other creditor, but the transaction must be free from fraud, actual or constructive. Moore *v.* Universal, etc. Co., 122 Mich. 48 (1899). A stockholder in a bank may recover back a deposit fraudulently received by the bank from him, the same as any other creditor, where he did not know of the insolvency. Richardson *v.* Olivier, 105 Fed. Rep. 277 (1900). A stockholder having a claim on real estate owned by the corporation may maintain his rights as against a mortgagee of the corporation, where the stockholder took no part in authorizing the mortgage, and the mortgagee took with notice. Martin *v.* Eagle, etc. Co., 41 Or. 448 (1902).

3 Hyatt *v.* Allen, 56 N. Y. 553 (1874); Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196 (1874); Brundage *v.* Brundage, 1 Thomp. & C. (N. Y.) 82 (1873); aff'd, 60 N. Y. 544; Goodwin *v.* Hardy, 57 Me. 143 (1869); Minot *v.* Paine, 99 Mass. 101 (1868); Granger *v.* Bassett, 98 Mass. 462 (1868); Phelps *v.* Farmers', etc. Bank, 26 Conn. 269 (1857); Burroughs *v.*

provides that in a certain contingency the land "should revert to the stockholders, their heirs and assigns," yet such reversion is to the corporation and not to the stockholders.[1] A stockholder may sue the corporation or be sued by it, both at law and in equity.[2]

The stockholder is not liable for the debts of the corporation,[3] except so far as his subscription price is unpaid,[4] and except where

North Carolina R. R., 67 N. C. 376 (1872); Curry *v.* Woodward, 44 Ala. 305 (1870); s. c., 53 Ala. 371; Lockhart *v.* Van Alstyne, 31 Mich. 76, 78 (1875). See also ch. XXXII.

A statute taxing property in the hands of a bailee does not make a corporation liable for the tax upon shares of stock, inasmuch as the corporation is not a bailee of such stock. Commonwealth *v.* Chesapeake, etc. Ry., 116 Ky. 951 (1903).

The right of one of the owners of a mining claim to forfeit the interest of his co-owners for failure to contribute to certain work is not lost, even though the former conveys the property to a corporation for stock, it appearing that the corporation joined with him in signing and serving the notice. Badger, etc. Co. *v.* Stockton, etc. Co., 139 Fed. Rep. 838 (1905).

1 Pettit *v.* Stuttgart, etc. Institute, 67 Ark. 430 (1900).

2 Waring *v.* Cahawba Co., 2 Bay (S. C.) 109 (1797), where this right of a stockholder was the question directly in litigation; Rogers *v.* Danby Univ. Soc., 19 Vt. 187 (1847); Culbertson *v.* Wabash Nav. Co., 4 McLean, 544; s. c., 6 Fed. Cas. 944 (1849); Peirce *v.* Partridge, 44 Mass. 44 (1841); Barnstead *v.* Empire Min. Co., 5 Cal. 299 (1855); *Ex parte* Booker, 18 Ark. 338 (1857); Sanborn *v.* Lefferts, 58 N. Y. 179 (1874); Cary *v.* Schoharie, etc. Co., 2 Hun, 110 (1874); Wausau, etc. Co. *v.* Plumer, 35 Wis. 274 (1874); Sawyer *v.* Methodist Ep. Soc., 18 Vt. 405 (1846); Dunstan *v.* Imperial, etc. Co., 3 B. & Ad. 125 (1832); Gifford *v.* New Jersey, etc. Co., 10 N. J. Eq. 171 (1854); Samuel *v.* Holladay, 1 Woolw. 400, 418; s. c., 21 Fed. Cas. 306 (1869). A stockholder may collect his debt the same as other creditors. Lang *v.* Dougherty, 74 Tex. 226 (1889). See also O'Connor *v.* North Truckee Ditch Co., 17 Nev. 245 (1883). A grantor of land to a corporation may insist on his vendor's lien even though he is also a stockholder. Biggs *v.* Elliston Dev. Co., 93 Va. 404 (1896).

A stockholder who is also a director may nevertheless sue to compel his corporation to abate a nuisance. Leonard *v.* Spencer, 108 N. Y. 338 (1888). A stockholder may sue the corporation for an injury done to him by the company by reason of the acts of other stockholders, such as diverting the water from an irrigation canal. O'Connor *v.* North Truckee Ditch Co., 17 Nev. 245 (1883).

3 See §§ 241, 242, *infra.* Stockholders are not personally liable for corporate debts. Gorder *v.* Connor, 56 Neb. 781 (1898). A stockholder is not personally liable for a tort of the corporation in diverting water. Poley *v.* Lacert, 35 Oreg. 166 (1899).

Even though the stockholders and officers of a lumber company and a railroad company are substantially the same, and even though the lumber company has sold its railroad to the railroad company, yet the lumber company is not liable for the negligence of the railroad company. Goodwin *v.* Bodcaw Lumber Co., 109 La. 1050 (1902). *Cf.* § 663, *infra.*

4 See chs. XI and III, *infra.*

a statute renders him liable.[1] Neither is he liable for the criminal acts of the corporation, unless he was a *particeps criminis*.[2]

The admissions or declarations of stockholders do not bind the corporation;[3] nor do the admissions of one stockholder bind another stockholder;[4] nor do the admissions of the corporation always bind a stockholder.[5]

Notice to individual stockholders is not notice to the corporation, and their knowledge of facts is not notice of those facts to the corporation.[6] Service of process on a stockholder is not service on the corporation.[7] A judgment against a corporation as to the infringement of a patent is not binding on the stockholders in subsequent suits against them, even though they were present at the trial and testified.[8]

1 See ch. XII, *infra*. The charter of a stock corporation organized under the general act in Minnesota may limit the stockholders to Norwegians, but if the corporation allows other persons to become members, such other persons cannot avoid the statutory liability by that defense. Blien *v.* Rand, 77 Minn. 110 (1899).

2 Even though the stockholders of a newspaper company may be held liable criminally for its publication of an illegal liquor advertisement, if they knew of the publication, yet it must be shown that they were stockholders at the time. State *v.* Bass, 101 Me. 481 (1906).

The president of a newspaper corporation is not personally liable in damages for a libel published in the newspaper, even though he was editor in chief and the principal stockholder, it appearing that he had no personal knowledge of the publication before it was made. Folwell *v.* Miller, 145 Fed. Rep. 495 (1906).

A criminal prosecution by a government against persons for illegally receiving rebates from a railroad fails, if they were merely stockholders in a corporation that received the rebate. United States *v.* Wood, 145 Fed. Rep. 405 (1906).

A majority stockholder who purchases property from a corporation is not liable on a claim that the corporation acquired such property by conversion, he having no knowledge of such conversion. Liebhardt *v.* Wilson, 88 Pac. Rep. 173 (Colo. 1906).

3 See § 726, *infra*.

4 Simmons *v.* Sisson, 26 N. Y. 264 (1863).

5 A stockholder in a corporation that is carrying on a patent litigation is not bound by its admissions as affecting subsequent litigations. American, etc. Co. *v.* Phœnix, etc. Co., 113 Fed. Rep. 629 (1902).

The owners of goods in a warehouse may hold a railroad liable for a fire burning the goods, even though they are stockholders in the corporation that owns the warehouse and such corporation has released the railroad from liability. Orient Ins. Co. *v.* Northern, etc. Ry., 31 Mont. 502 (1905).

A stockholder having a claim on real estate owned by the corporation may maintain his rights as against a mortgagee of the corporation, where the stockholder took no part in authorizing the mortgage, and the mortgagee took with notice. Martin *v.* Eagle, etc. Co., 41 Or. 448 (1902).

6 See § 727, *infra*.

7 See § 752, *infra*.

8 Wilgus *v.* Germain, 72 Fed. Rep. 773 (1896).

A stockholder in an insurance company has the same rights as has a stockholder in any other corporation.[1]

The stockholder is an individual, distinct from the corporation in its contracts and transaction of business.[2] The mere fact that he is a stockholder does not make him an agent to contract for it or bind it by his acts.[3] It is legal for a person who is endeavoring to purchase all the property of a corporation to pay a stockholder for consenting thereto.[4]

One person may own all the stock, and yet the existence, relations and business methods of the corporation continue.[5]

1 Thus a stockholder in an insurance company, conducted on both the stock and the mutual-insurance plan, is entitled to all the rights in the guaranty accumulations that a stockholder in any other corporation has in the corporate assets. Traders', etc. Ins. Co. *v.* Brown, 142 Mass. 403 (1886).

A holder of a contract of a corporation, whereby he is to be entitled to a diamond on payment of certain money, is not a stockholder and cannot have a receiver appointed because of mismanagement. Mann *v.* German, etc. Co., 70 Neb. 454 (1903).

2 Where a statute forbids contracts in restraint of a person carrying on a trade or business except where he sells a good will, a contract for the sale of stock with an agreement not to engage in the business carried on by the corporation is not enforcible as to the latter part of the contract. Merchants', etc. Co. *v.* Sterling, 124 Cal. 429 (1899).

An officer of a corporation is not entitled to claim administratorship, even though the corporation is a creditor of an estate and a statute states that a creditor may be entitled to letters of administration. *Re* Owens' Estate, 30 Utah, 351 (1906).

A stockholder in a corporation owning farm lands is not an owner entitling him to hunt without a license under a statute requiring such license, except from the owners of farm lands. Cummings *v.* People, 211 Ill. 392 (1904).

Where on foreclosure sale of property purchased by a corporation subject to a mortgage, there is a surplus it belongs to the corporation without deduction for debts of its stockholders to the purchaser, even though such stockholders are the only stockholders in the company. Hardy *v.* Pecot, 113 La. 350 (1904).

3 See §§ 708, etc., *infra.*

Where the law permits punishment or confiscation of property, but not both, the conviction of a stockholder for violation of the internal revenue law prevents a confiscation of the corporation property. U. S. *v.* Distillery, 43 Fed. Rep. 846 (1890).

Damages may be recovered by a corporation for a fraud practiced upon it, even though an agent of the corporation, who aided in the perpetration of the fraud, was a stockholder in the corporation. Grand Rapids, etc. Co. *v.* Cincinnati, etc. Co., 45 Fed. Rep. 671 (1891). A company is not liable for the contract of a person who makes a construction contract with it, even though that person is the principal stockholder and dominates and controls the action of the corporation. Although other stockholders, bondholders or the corporation itself might question such a contract, yet subcontractors cannot. Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893).

4 Lamkin *v.* Palmer, 24 N. Y. App. Div. 255 (1897); aff'd, 164 N. Y. 201.

5 See §§ 709, etc., *infra.*

The stockholders, assembled together in a corporate meeting, have the powers to elect officers; make by-laws; increase or reduce the capital stock, if the statute permits; authorize auxiliary or fundamental changes in the charter, if constitutional; and perform a few other acts for and in behalf of the corporation. But there their powers cease. The making of corporate contracts; the management of corporate business; the employment and direction of agents; the bringing or defending of suits, and all the infinite details of corporate management, are under the control of the directors and their agents. The stockholders have no power herein, either individually or in meeting assembled.[1]

A stockholder is chargeable with notice of entries made upon the corporate books, if they were made in his presence and he presumably assented thereto.[2] A stockholder is bound to take notice of the charter and by-laws,[3] but a purchaser of stock is not unless they appear on the face of the certificate of stock.[4]

A stockholder in a corporation which does not properly insure its property has an insurable interest in the property, and he may recover upon a policy thereon, taken in his own name, for an amount which, added to the company's insurance, would cover his interest.[5]

At common law the stockholder, on account of his interest in the corporation, was not a competent witness for the corporation in a suit in which the corporation was a party.[6] In some states, how-

1 See § 712, *infra*.

"The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incumber nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law." Humphreys *v.* McKissock, 140 U. S. 304 (1891).

2 See § 727, *infra*.

3 See § 4*a*, *supra*.

4 See § 727, *infra*.

A purchaser of stock in a corporation is bound to take notice of special provisions in its charter relative to liability. Brown *v.* Morton, 71 N. J. L. 26 (1904).

A pledgee or transferee of a certificate of stock is not bound to take notice of a by-law giving the corporation a lien on the stock unless the by-law appears on the face of the certificate. Bank of Culloden *v.* Bank of Forsyth, 120 Ga. 575 (1904).

5 Warren *v.* Davenport F. Ins. Co., 31 Iowa, 464 (1871), distinguishing Phillips *v.* Knox County Ins. Co., 20 Ohio, 174 (1851). *Cf.* Seaman *v.* Enterprise F. & M. Ins. Co., 18 Fed. Rep. 250 (1883). See Greenhood, Pub. Policy, 255; Angell, Fire & L. Ins., ch. XI, and cases cited.

A stockholder has an insurable interest in the property of the corporation. Riggs *v.* Commercial, etc. Ins. Co., 125 N. Y. 7 (1890). A stockholder may insure his interest. Wilson *v.* Jones, L. R. 2 Ex. 129 (1867).

6 Porter *v.* Bank of Rutland, 19 Vt. 410 (1847); McAuley *v.* York Min.

ever, this rule has been changed by statute; and in others it is easily evaded by a sale and transfer of the certificate of stock to another

Co., 6 Cal. 80 (1856). See cases in next note.

In Pierce *v.* Kearney, 5 Hill, 82 (1843), a stockholder was held incompetent to testify that the defendant, in an action to enforce a statutory liability of stockholders, was a stockholder. Compare, however, *Re* Kip, 1 Paige, 601 (1829), involving the testimony of a corporator and pew-holder in a church corporation; Mokelumne, etc. Co. *v.* Woodbury, 14 Cal. 265 (1859), in which, in passing upon the competency of a stockholder as a witness, the court held that "members of a corporation who are answerable personally for the corporate debts and liabilities stand in the same position, in relation to the creditors of the corporation, as if they were conducting their business as a common partnership." To same effect, Mitchell *v.* Beckman, 64 Cal. 117 (1883).

A stockholder is an interested witness, and under the New York code cannot testify in behalf of the corporation in a suit against it by the representatives of a deceased person for damages for negligence causing death. Andrews *v.* Reiners, 112 N. Y. App. Div. 378 (1906), stating that Montgomery, etc. Bank *v.* Marsh, 7 N. Y. 481, and Washington Bank *v.* Palmer, 2 Sandf. 686, were under a statute which has been repealed.

The president, though a stockholder, is a competent witness for the company if he is willing to testify, where his private interest is greater than his stockholder interest. Church *v.* Sterling, 16 Conn. 388 (1844).

A stockholder who knowingly transfers his stock but expects to get it back is not a competent witness for a corporation. Bank of Michigan *v.* Gray, 1 Q. B. Rep. (Can.) 422 (1841).

A stockholder in a company which is a creditor of a party to a suit may testify in behalf of the latter. Simons *v.* Vulcan, etc. Co., 61 Pa. St. 202 (1869).

The purchase by a bank of its own stock, in order to enable the stockholder to testify for it, was upheld, though its charter prohibited it from purchasing goods, etc. Farmers', etc. Bank *v.* Champlain Transp. Co., 18 Vt. 131 (1846).

A stockholder who has nothing to do with the negotiation of a corporate contract may testify although the other party is dead and the statute prohibits the living party in interest from testifying. Banking, etc. Co. *v.* Rood, 132 Mo. 256 (1896).

The officers or directors of a corporation may testify in its behalf although a statute says that in actions where one party is dead the other party shall not testify. New Jersey, etc. Co. *v.* Camden, etc. Co., 58 N. J. L. 196 (1895).

A stockholder need not testify against his corporation. Bank of Oldtown *v.* Houlton, 21 Me. 501 (1842).

A stockholder, under the New York statute, cannot testify to a personal communication between the corporation and a deceased person. Keller *v.* West, etc. Co., 39 Hun, 348 (1886).

A party dealing with a corporation cannot testify as to what was said between him and the agent of the corporation, where the agent is dead. Hoskins *v.* Rochester, etc. Assoc., 133 Mich. 505 (1903).

A witness who is agent of a corporation, the latter being a party to the suit, is entitled to the same privilege as to libelous statements made by him as witness that a party has. Nissen *v.* Cramer, 104 N. C. 574 (1889). The secretary of a corporation is not an interested witness in a suit brought by a corporation. University, etc. *v.* Emmert, 108 Iowa, 500 (1899).

person.[1] An officer of the bank who was present at the time a deposit was made, but who sold his stock and severed his connection with the bank long before litigation arose thereon, may be a witness in the case as to the transaction with the deceased depositary.[2] A party claiming a contract with a corporation cannot testify that he made it with the agent of the corporation, if the agent is dead at the time of the trial.[3] A stockholder is incompetent to serve as a judge in a case where the corporation is a party,[4] neither is he

The plaintiff in a suit against a corporation may offer a stockholder as a witness. Hart *v.* New Orleans, etc. R. R., 1 Am. St. Ry. Dec. 4 (La. 1841).

1 That a transfer will render the transferrer competent, see Illinois Mut. F. Ins. Co. *v.* Marseilles Mfg. Co., 6 Ill. 236 (1844); Union Bank *v.* Owen, 4 Humph. (Tenn.) 338 (1843); Bell *v.* Hull, etc. Ry., 6 M. & W. 699 (1840); 1 Greenleaf's Evidence, § 429. He is competent though the transfer has not been registered. Bank of Utica *v.* Smalley, 2 Cow. 770 (1824); Gilbert *v.* Manchester, etc. Co., 11 Wend. 627 (1834); Delaware, etc. R. R. *v.* Irick, 23 N. J. L. 321 (1852); and although he expects to buy it back; but there must be no agreement expressly to that effect. Utica Ins. Co. *v.* Cadwell, 3 Wend. 296 (1829); Stall *v.* Catskill Bank, 18 Wend. 466 (1837). *Contra*, Carver *v.* Braintree Mfg. Co., 2 Story, 432 (1843); s. c., 5 Fed. Cas. 235.

2 Tecumseh, etc. Bank *v.* McGee, 61 Neb. 709 (1901). Under the West Virginia statute the directors and stockholders of a corporation cannot testify as to a personal transaction between a deceased person and the corporation, unless the representatives and heirs testify as to the same. Huntington, etc. Co. *v.* Thornburg, 46 W. Va. 99 (1899).

3 Florida, etc. Co. *v.* Usina, 111 Ga. 697 (1900). One who contracts with the authorized agent of a corporation is not a competent witness as to the contract, or of the admissions and declarations of the agent, after the latter's death. Central Bank, etc. *v.* Thayer, 184 Mo. 61 (1904). As to a lost deed to a corporation, a stockholder may testify that he saw it, although he may not be allowed to testify as to what the grantor did, the latter being dead. Kendall *v.* Hillsboro, etc. Road, 67 S. W. Rep. 376 (Ky. 1902). A parol contract with a corporation may be proved although the director with whom it was made is dead. South Baltimore Co. *v.* Muhlbach, 69 Md. 395 (1888).

4 Dimes *v.* Grand Junction Canal, 3 H. L. Cas. 759 (1852), where the lord chancellor was a stockholder in the defendant company, and had affirmed a decree by the vice-chancellor in the case. The House of Lords reversed the decision on this ground. Cooley, Const. Lim., pp. *410, *411; Washington Ins. Co. *v.* Price, 1 Hopk. Ch. 1 (1823), Chancellor Sandford therein refusing to follow Chancellor Kent in Stuart *v.* Mechanics', etc. Bank, 19 Johns. 496, 501 (1822). In Peninsular Ry. *v.* Howard, 20 Mich. 18 (1870), the court said: "It is not a matter of discretion with the judge or other person acting in a judicial capacity, nor is it left to his own sense of propriety or decency; but the principle forbids him to act in such capacity at all when he is thus interested, or when he may possibly be subject to this limitation." Even though a judge is related to some of the stockholders, yet if the parties know the fact and do not promptly object they cannot afterwards object. Buena Vista, etc. Bank *v.* Grier, 114

qualified to act as a juror.[1] He should not act as a notary public in taking an acknowledgment by the corporation.[2] A contract be-

Ga. 398 (1901). A judge cannot sit in a case involving the validity of bonds owned by a bank in which he is a stockholder. Adams *v.* Minor, 121 Cal. 372 (1898). After a judge has sold his stock in a corporation he is competent to sit in a case in which that corporation is a party. Matter of Brooklyn El. R. R., 32 N. Y. App. Div. 221 (1898). The fact that both the judge and the plaintiff are stockholders in an outside company does not disqualify the judge. Hyde, etc. Co. *v.* Shepardson, 72 Vt. 188 (1900). A judge is not incompetent by reason of the fact that he is a stockholder in a trust company that is guardian of a party whose sanity is being tried. *In re* Leonard's Estate, 95 Mich. 295 (1893). In New York the statute prevents an interested judge from sitting. See Cregin *v.* Brooklyn, etc. R. R., 19 Hun, 349 (1879). Being related to a stockholder does not disqualify. Searsburgh Turnp. Co. *v.* Cutler, 6 Vt. 315 (1834). A judge may hear a case although he is a cousin of one of the stockholders of one of the parties. Robinson *v.* Southern Pac. Co., 105 Cal. 526 (1895).

A judge is not disqualified merely because he formerly owned stock. Nicholson *v.* Showalter, 83 Tex. 99 (1892). A judge who is a brother-in-law of a stockholder and president of a corporation is qualified to try a case in which the corporation is a party. Lewis *v.* Hillsboro, etc. Co., 23 S. W. Rep. 338 (Tex. 1893). A commissioner, appointed by the court to sell the assets of a company, cannot sell to a bank in which he is a stockholder and director, irrespective of whether the sale and price were fair. McCullough, etc. Co. *v.* Nat. Bank, etc., 111 Ga. 132 (1900).

1 Page *v.* Contoocook Valley R. R., 21 N. H. 438 (1850); Peninsular R. R. *v.* Howard, 20 Mich. 18 (1870); Fleeson *v.* Savage S. M. Co., 3 Nev. 157 (1867); Silvis *v.* Ely, 3 Watts & S. (Pa.) 420 (1842); McLaughlin *v.* Louisville, etc. Co., 100 Ky. 173 (1896). *Cf.* Williams *v.* Smith, 6 Cow. 166 (1826). The incompetency extends to the son of a stockholder. Georgia R. R. *v.* Hart, 60 Ga. 550 (1878). A person donating to the railroad is incompetent to serve in condemnation proceedings. Michigan Air Line Ry. *v.* Barnes, 40 Mich. 383 (1879). But the fact that the corporation is interested in a subsequent case on the same facts does not render the stockholder incompetent. Commonwealth *v.* Boston, etc. R. R., 57 Mass. 25 (1849).

Objection to competency must be raised at the trial. It cannot be raised for the first time by motion for a new trial. Williams *v.* Great Western Ry., 3 H. & N. 869 (1858).

The fact that a juror and plaintiff are both stockholders in the same corporation is no cause for challenge in a suit not involving the corporation. Brittain *v.* Allen, 1 Dev. L. (N. C.) 120 (1829).

A juror is qualified although his wife is related to a stockholder. Butler *v.* Glens Falls, etc. R. R., 121 N. Y. 112 (1890). In Ohio a person litigating with a corporation may have a change of venue when the corporation has more than fifty stockholders at its principal office in the county where the litigation is pending, if the party swears that he does not think he can obtain a fair and impartial trial in that county, and five credible persons residing in the county sustain his application. Snell *v.* Cincinnati, etc. Ry., 60 Ohio St. 256 (1899).

Even though the foreman of a grand jury is a stockholder in a corporation and another member is a stockholder and director, yet an indictment for an attempt to defraud it will not be quashed. State *v.* Turner, 72 N. J. L. 404 (1905).

2 See § 722, *infra*.

tween a corporation and a city may be illegal by reason of the fact that the aldermen who voted for the contract are stockholders.[1] A stockholder cannot bring suit to enforce the ordinary claims of the corporation.[2] The directors control such matters and decide whether a suit shall be brought, prosecuted or compromised.[3] Sometimes the stockholder is allowed to intervene in the suit, however,[4] and there are certain cases involving fraud on the part of the directors or *ultra vires* acts where the stockholder may sue in behalf of the corporation.[5] A stockholder or director of an insolvent corporation is competent and qualified to act as its receiver or assignee.[6] A director need not necessarily be a stockholder, unless a statute or the charter expressly so provides.[7] In the sale of the corporate property the stockholders may legally agree not to engage in the same business for the term of ten years.[8]

In corporations having a capital stock no power of expulsion can be exercised unless expressly conferred by the charter or by statute.[9] It is doubtful whether a stock corporation can impose a fine upon the stockholders for a violation of its by-laws.[10]

§ 12. *Shares of stock defined—What law governs—Common stock—Preferred stock—Deferred stock—Overissued stock—Special stock.*—A share of stock may be defined as a right which its owner has in the management, profits and ultimate assets of the corporation.[11] By the court of appeals of New York it is said that

1 See § 913, *infra.*

2 See § 750.

3 See § 750.

4 See § 750.

5 See chs. XXXIX, XL and XLV.

6 See § 864, *infra.*

7 See § 623, *infra.*

8 Davis *v.* Booth & Co., 131 Fed. Rep. 31 (1904).

The agreement of the stockholders upon a sale of the corporate property not to engage in that line of business in a certain county is binding upon them. Union Mills *v.* Harder, 116 N. Y. App. Div. 22 (1906).

The agreement of a corporation on selling its property not to engage in the same business, does not prevent one of its officers and stockholders engaging in that business, and the stockholders are not individually liable or subject to an injunction because of unfair competition practiced by the corporation. Hall's, etc. Co. *v.* Herring, etc. Co., 146 Fed. Rep. 37 (1906).

The vendor of stock in a California corporation cannot legally contract not to engage in the line of business conducted by the corporation, because the California statutes prohibit such a contract, unless the vendor sells the good will of the business. Dodge Stationery Co. *v.* Dodge, 145 Cal. 380 (1904).

9 See §§ 504, 710, *infra.*

10 Monroe, etc. Assoc. *v.* Webb, 40 N. Y. App. Div. 49 (1899). See § 4*a*, *supra.*

11 Quoted and approved in Cummings *v.* People, 211 Ill. 392 (1904); Mann *v.* German, etc. Co., 70 Neb. 454 (1903); Jones *v.* Concord, etc. R. R., 67 N. H. 119 (1891); s. c., 67 N. H. 234 (1892); Lamkin *v.* Palmer, 24 N. Y. App. Div. 255 (1897); aff'd, 164 N. Y. 201; and in American, etc. Co. *v.* State Board, 56 N. J. L. 389 (1894).

"the right which a shareholder in a corporation has, by reason of his ownership of shares, is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately, on its dissolution, in the assets remaining after payment of its debts."[1]

It is said that the rights which a share of stock secures to its owner are the rights "to meet at stockholders' meetings, to participate in the profits of the business, and to require that the corporate property and funds shall not be diverted from their original purpose."[2]

In England a share means the same as it does in this country; but the word "stock" there signifies paid-up shares, or a debt, so united that the owner may divide it and transfer it in large or small

See also Oatbank Oil Co. *v.* Crum, L. R. 8 App. Cas. 65 (1882); State *v.* Mitchell, 104 Tenn. 336 (1899).

1 Plimpton *v.* Bigelow, 93 N. Y. 592, 599 (1883); Hall *v.* Henderson, 126 Ala. 449 (1899). To the same effect see Burrall *v.* Bushwick R. R., 75 N. Y. 211, 216 (1878); Kent *v.* Quicksilver Min. Co., 78 N. Y. 159 (1879); Jermain *v.* Lake Shore, etc. R. R., 91 N. Y. 483, 492 (1883); Tubb *v.* Fowler, 99 S. W. Rep. 988 (Tenn. 1907); Field *v.* Pierce, 102 Mass. 253, 261 (1869); Jones *v.* Davis, 35 Ohio St. 474, 477 (1880); Bradley *v.* Bauder, 36 Ohio St. 28, 35 (1880); Bent *v.* Hart, 10 Mo. App. 143 (1881); Harrison *v.* Vines, 46 Tex. 15, 21 (1876); Brightwell *v.* Mallory, 10 Yerg. (Tenn.) 196 (1836); Barksdale *v.* Finney, 14 Gratt. (Va.) 338, 357 (1858); Van Allen *v.* Assessors, 3 Wall. 573, 584 (1865); Union Nat. Bank *v.* Byram, 131 Ill. 92 (1889).

"The interest of each stockholder consists in the right to a proportionate part of the profits whenever dividends are declared by the corporation during its existence under its charter, and to a like proportion of the property remaining, upon the termination or dissolution of the corporation, after payment of its debts." Gibbons *v.* Mahon, 136 U. S. 549 (1890).

Chief Justice Shaw, by way of a definition of a share of stock, says: "The right is, strictly speaking, a right to participate, in a certain proportion, in the immunities and benefits of the corporation; to vote in the choice of their officers, and the management of their concerns; to share in the dividends of profits, and to receive an aliquot part of the proceeds of the capital on winding up and terminating the active existence and operations of the corporation." Fisher *v.* Essex Bank, 71 Mass. 373, 378 (1855). *Cf.* Arnold *v.* Ruggles, 1 R. I. 165 (1837).

2 Forbes *v.* Memphis, etc. R. R., 2 Woods, 323, 331 (1872); s. c., 9 Fed. Cas. 408. *Cf.* Payne *v.* Elliot, 54 Cal. 339 (1880). Mr. Justice Sharswood says: "A share of stock is an incorporeal, intangible thing. It is a right to a certain proportion of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation,—with the right to receive, in the meantime, such profits as may be made and declared in the shape of dividends." Neiler *v.* Kelley, 69 Pa. St. 403, 407 (1871). See also Bridgman *v.* Keokuk, 72 Iowa, 42 (1887).

quantities, irrespective of the number and par value of the shares or debt which have been thus merged into "stock."[1]

The term "stock" has also been used at times to indicate the same thing as capital stock.[2]

It is well settled that shares of stock are personalty and not realty. A share of stock is not real estate, has nothing to give it the character of real estate, is not land, nor an hereditament, nor an interest in any of them.[3]

1 Morrice *v.* Aylmer, L. R. 7 H. L. 717 (1875), says: "Shares are not necessarily converted into stock as soon as they are paid up; they may exist either as paid-up or as not paid-up shares. But, as regards stock, that can only exist in the paid-up state. . . . There is a certain extent of change, as well as consolidation, in these paid-up shares. They are changed from ordinary shares in this respect, that they are no longer incapable of being subdivided."

Stock is "a fund or capital which is capable of being divided into and held in any irregular amount. Thus, the ordinary government funds (consols, new threes, etc.) are called 'stocks' because a person can buy them in any amount (such as £99 19*s.* 11*d.* as well as £100). A share or debenture, on the other hand, is of a fixed amount (such as £10, £50, £100), and is incapable of subdivision or consolidation." Rapalje & L. Law Dict. 1224. Shares may be converted by the company into stock, so as to enable their holders to dispose of them in small or irregular amounts. Hurrell & Hyde, Joint-Stock Companies, 47.

2 Burr *v.* Wilcox, 22 N. Y. 551, 556 (1860); People *v.* Tax Commissioners, etc., 23 N. Y. 192, 220 (1861); Bailey *v.* Railroad Co., 22 Wall. 604, 637 (1874). Formerly government bonds were called "stock," both in England and in this country. People *v.* Tax Commissioners, 2 Black, 620 (1862); Weston *v.* Charleston, 2 Pet. 449 (1829); Cavanagh, Law of Money Securities (2d ed.), 488–494. This use of the term still prevails in England, but is generally obsolete in this country, although the securities of the city of New York are still called "stock."

In Ehrlich *v.* Jennings, 58 S. E. Rep. 922 (S. C. 1907), stock issued by the state was exchangeable into coupon bonds.

In tax statutes, "stock" may be defined to mean shares of stock. Lockwood *v.* Weston, 61 Conn. 211 (1891). See also § 8, *supra*.

3 Quoted and approved in Cummings *v.* People, 211 Ill. 392 (1904); and McKane *v.* Burke, 132 Fed. Rep. 688 (1904); Putnam *v.* Lincoln, etc. Co., 118 N. Y. App. Div. 469 (1907); Judy *v.* Beckwith, 114 N. W. Rep. 565 (Iowa 1908); Bligh *v.* Brent, 2 Younge & C. (Exch.) 268 (1837); Edwards *v.* Hall, 6 De G., M. & G. 74 (1855); Bradley *v.* Holdsworth, 3 M. & W. 422 (1838); *Ex parte* Lancaster Canal Nav. Co., 1 Dea. & Ch. 411 (1832); Watson *v.* Spratley, 10 Exch. 222. In Allen *v.* Pegram, 16 Iowa, 163, 173 (1864), Mr. Justice Dillon says: "Mr. Williams treats of shares in corporations as 'incorporeal, personal property'—a very neat and accurate designation. Wms. Pers. Prop. [*191]." See also Johns *v.* Johns, 1 Ohio St. 350 (1853), Thurman, J.; Arnold *v.* Ruggles, 1 R. I. 165 (1837); Dyer *v.* Osborne, 11 R. I. 321, 325 (1876); Tippets *v.* Walker, 4 Mass. 595, 596 (1808), Parsons, C. J.; Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Weyer *v.* Second Nat. Bank, 57 Ind. 198 (1877); Manns *v.* Brookville Nat. Bank, 73 Ind. 243 (1881); Seward *v.*

In some of the earlier cases, upon the theory, perhaps, that the shareholders had a direct interest in the tangible property of the corporation, shares were held to be real estate where the corporate property consisted wholly or chiefly of realty.[1]

But as a result of all the authorities it is clearly settled that shares of stock are to be regarded as personalty,[2] a view which has frequently found expression in declaratory statutes both in England[3] and the various states of the Union.

Stock, though personalty, is not a chattel;[4] it is rather a chose in action,[5] or, as some older authorities declare, property in the nature

Rising Sun, 79 Ind. 351 (1881); Southwestern R. R. *v.* Thomason, 40 Ga. 408 (1869). *Cf.* Wheelock *v.* Moulton, 15 Vt. 519 (1843); Russell *v.* Temple (Mass. 1798), 3 Dane, Abr. 108, 110. Water rights represented by shares of stock in a water company are personal property. George *v.* Robison, 23 Utah, 79 (1901). Stock is personal property, although the property of the corporation is mostly real estate. Champollion *v.* Corbin, 71 N. H. 78 (1901).

[1] Price *v.* Price, 6 Dana (Ky.), 107 (1838); Copeland *v.* Copeland, 7 Bush, 349 (1870). But as soon as this latter decision was handed down, the legislature passed an act declaring shares of stock in Kentucky to be personal property. In Meason's Estate, 4 Watts (Pa.), 341 (1835), there is to be found a tendency to hold shares in a toll-bridge, real estate. Turnpike stock was held to be realty in Welles *v.* Cowels, 2 Conn. 567 (1818); S. P., Knapp *v.* Williams, 4 Ves. Jr. 430, note (1798). So of canal shares. Tomlinson *v.* Tomlinson, 9 Beav. 459 (1823). *Cf.* Buckeridge *v.* Ingram, 2 Ves. Jr. 652 (1795); Drybutter *v.* Bartholomew, 2 P. Wms. 127 (1723); Rex *v.* Winstanley, 8 Price, 180 (1820). *Contra*, Walker *v.* Milne, 11 Beav. 507 (1849). See also Sparling *v.* Parker, 9 Beav. 450 (1846); Myers *v.* Perrigal, 18 L. J. (Ch.) 185 (1849); s. c., 21 L. J. (C. P.) 217 (1852); Ashton *v.* Langdale, 4 Eng. L. & Eq. 80 (1851), and an interesting discussion of the question in 3 Dane, Abr. 108 *et seq.*

[2] See cases cited *supra*. Also an essay on Stock, its Nature and Transfer, 7 South. L. Rev. (N. S.) 430 (1881).

Shares of stock in a joint stock association are personal property, even though the property of the association consists of real estate, so far as the question of inheritance taxes is concerned. Matter of Jones, 172 N. Y. 575 (1902).

Even though the property of an unincorporated joint stock association consists of real estate, yet the stock is personal property and cannot be sold under an execution as real estate. *In re* Pittsburg, etc., 204 Pa. St. 432 (1903).

Stock is personal property. Elkhorn, etc. Co. *v.* Childers, 100 S. W. Rep. 222 (Ky. 1907).

Stock in a canal or ditch company is personal property. Watson *v.* Molden, 10 Idaho, 570 (1905).

[3] 41 Geo. III., ch. 3; Watson *v.* Spratley, 10 Exch. 222 (1854); *Ex parte* Vallance, 2 Deacon, 354 (1837); *Ex parte* Lancaster Canal Nav. Co., 1 Dea. & Ch. 411 (1832).

[4] Rex *v.* Capper, 5 Price (Exch.), 217 (1817).

[5] A share of stock is a chose in action. Attorney-General *v.* New York, etc. Co., [1898] 1 Q. B. 205; aff'd, H. of L., [1899] A. C. 62; Harrold *v.*

of a chose in action.[1] It is, moreover, of such a nature that it cannot ordinarily, either by act of the law, or act of its owner, be taken into tangible possession, although, of course, its representative—the certificate of stock—may be.[2]

It is an English doctrine that shares of stock are not "goods, wares or merchandise," as those terms are to be understood in construing that section of the statute of frauds which requires delivery, payment or memorandum in writing of a sale thereof.[3] In this country, however, the courts have taken the opposite view.[4] Furthermore, it is said that shares are not money,[5] nor are they security for money,[6] nor a credit.[7]

Shares of stock, being in the nature of a chose in action, are, at common law, not subject to attachment or levy of execution;[8] but most of the states have enacted statutes which have changed this rule. This species of property may be made subject to taxation;[9]

Plenty, [1901] 2 Ch. 314; Lipscomb's Adm'r *v.* Condon, 49 S. E. Rep. 392 (W. Va. 1904).

1 Quoted and approved in Mayor, etc. *v.* Allegany, etc. Com'rs, 99 Md. 1 (1904); Wildman *v.* Wildman, 9 Ves. 174 (1803); Howe *v.* Starkweather, 17 Mass. 240, 243 (1821); Hutchins *v.* State Bank, 53 Mass. 421, 426 (1847); Union Bank *v.* State, 9 Yerg. (Tenn.) 490, 500 (1836); Allen *v.* Pegram, 16 Iowa, 163, 173 (1864); Arnold *v.* Ruggles, 1 R. I. 165 (1837); Slaymaker *v.* Bank of Gettysburg, 10 Pa. St. 373 (1849); Denton *v.* Livingston, 9 Johns. 96 (1812); Chesapeake, etc. R. R. *v.* Paine, 29 Gratt. (Va.) 502, 506 (1877); Barksdale *v.* Finney, 14 Gratt. (Va.) 338, 357 (1858); Fisher *v.* Essex Bank, 71 Mass. 373, 377 (1855); People's Bank *v.* Kurtz, 99 Pa. St. 344, 349 (1882); Humble *v.* Mitchell, 11 Ad. & El. 205, 208 (1839). *Cf.* Kellogg *v.* Stockwell, 75 Ill. 68 (1874); *In re* Jackson, L. R. 12 Eq. 354 (1871). See also Atty. Gen. *v.* New York, etc. Co. [1898] 1 Q. B. 205; aff'd, [1899] A. C. 62

2 Jermain *v.* Lake Shore, etc. R. R., 91 N. Y. 483, 492 (1883); Neiler *v.* Kelley, 69 Pa. St. 403, 407 (1871); Payne *v.* Elliot, 54 Cal. 339, 341 (1880).

3 See §§ 339, 340, *infra*.

4 See §§ 339, 340, *infra*.

5 Nightingal *v.* Devisme, 5 Burr. 2589; s. c., 2 W. Bl. 684 (1770); Jones *v.* Brinley, 1 East, 1 (1800); Douglas *v.* Congreve, 1 Keen, 410 (1836); Gosden *v.* Dotterill, 1 My. & K. 56 (1832); Lowe *v.* Thomas, 5 De G., M. & G. 315 (1854); Hotham *v.* Sutton, 15 Ves. 319 (1808).

6 Ogle *v.* Knipe, L. R. 8 Eq. 434 (1869); Atkins *v.* Gamble, 42 Cal. 86 (1871); Wilson *v.* Little, 2 N. Y. 443 (1849); Mechanics' Bank *v.* New York, etc. R. R., 13 N. Y. 599, 626 (1856).

A certificate of stock is not a security in the proper signification of that term. Culp *v.* Mulvane, 66 Kan. 143 (1903).

7 New Orleans, etc. Assoc. *v.* Wiltz, 10 Fed. Rep. 330 (1881). See also Smith *v.* Crescent City, etc. Co., 30 La. Ann. 1378 (1878).

An obligation to pay is a note, even though it is called stock. Greenwood, etc. *v.* Priebatsch, 83 Miss. 120 (1903).

8 See ch. XXVII.

9 See ch. XXXIV.

and for purposes of taxation it exists apart from the corporation, the corporate property, the corporate franchises and the capital stock. The situs of stock held by non-residents is at the domicile of such non-residents, unless the statute requires the corporation to report the stock as the agent of the owners.[1]

The issue of stock generally means the issue of the certificates.[2] In most of the states, and in the federal courts, trover lies for the conversion of stock. In Pennsylvania, however, a contrary rule prevails, although conversion is held to lie in reference to certificates of stock.[3]

Justice Story, in his Conflict of Laws, says that questions relating to shares of stocks are to be determined by the law of the state of the corporation.[4] As regards the taxation of stock, however, the stock may follow the domicile of the stockholder, and may be taxed in accordance with the law of the domicile of such stockholder;[5] or for purposes of taxation, and especially inheritance taxes, it may exist where the corporation is incorporated.[6] In ref-

1 Covington *v.* First Nat. Bank, 198 U. S. 100 (1905).

A will giving all personal property in the United Kingdom to one party and all personal property in South Africa to another party, gives to the former legatee shares of stock in a South African corporation, where such corporation has a transfer office in London as well as in South Africa, and the certificates themselves are on deposit in London. But bonds issued by a South African Company will not pass to the London legatee, even though such bonds are on deposit in London. *Re* Clark, [1904] 1 Ch. 294.

2 See § 13, *infra*.

3 See ch. XXXV.

4 Story, Confl. Laws (8th ed.), § 383. And see the discussion of this subject in Black *v.* Zacharie, 3 How. 483 (1845). As to the *situs* of stock see article in 45 Alb. L. J. 330; Glenn *v.* Garth, 147 U. S. 360 (1892); Glenn *v.* Liggett, 135 U. S. 533 (1890); Morris *v.* Glenn, 87 Ala. 628 (1888); also Lowndes *v.* Cooch, 87 Md. 478 (1898); Atty. Gen. *v.* New York, etc. Co., [1898] 1 Q. B. 205; aff'd, H. of L. [1899] A. C. 62.

5 See ch. XXXIV. The *situs* of stock for the purposes of taxation may be where the owner of the stock resides. Stanford *v.* City, etc., 131 Cal. 34 (1900). The case of Glenn *v.* Clabaugh, 65 Md. 65 (1886), holds that the insolvent laws of Maryland cannot discharge a Maryland subscriber to a Virginia corporation.

6 See ch. XXXIV, *infra*. In the case of Attorney-General *v.* N. Y. Breweries Co., [1898] 1 Q. B. 205; aff'd, H. of L. [1899] A. C. 62, the court, in holding that an English corporation was liable for an inheritance tax on shares of stock which it had allowed to be transferred on its books by American executors of the estate of a deceased American owning such stock, said: "The American will, as regards these English assets, had no validity whatever in this country, nor had the American executors any right under it to receive the testator's assets here. Until they had taken out representation to their testator in this country, they were pure strangers to the English assets. This American will, to the knowledge of all parties, was never to come into operation as a will in this coun-

erence to sales of stock it would seem that the law of the forum or of the place of making or the place of performing the contract should govern as between the parties to the contract, but as to the duty of the corporation relative to transfers, the law of the state wherein the corporation was organized should govern.[1] Legal proceedings against the stock may be initiated at the domicile of the corporation.[2] A claimant of stock in a corporation may institute suit at the place where the company is incorporated for the purpose of obtaining possession of the stock, even though the holders of the stock are non-residents and are brought into the case only by publication and substituted service. The court acquires jurisdiction over the defendants.[3] Especially is this the case where the certificates are within the jurisdiction.[4] A person to whom a corporation issues stock is not bound by any prior contracts of the

try; the American executors were never to become executors in this country, it being the express intention of all parties that they should not."

1 See ch. XXII. An executor is entitled to have stock belonging to the estate transferred into his own name as executor, and the corporation is liable in damages for refusal to make such transfer, even though the corporation has a lien on the stock for a debt owed it by the decedent. Under the statutes of California this rule applies to an alien corporation doing business in that state, the statutes of the state requiring such corporations to make transfers in that state. It applies even though the statutes of Great Britain forbid transfers of stock "without administration upon such property under the laws of England and Great Britain." London, etc. Bank *v.* Aronstein, 117 Fed. Rep. 601 (1902).

2 See ch. XXVII, and §§ 363, 364, *infra;* and, in general, see Richmondville Mfg. Co. *v.* Prall, 9 Conn. 487 (1833); Black *v.* Zacharie, 3 How. 483 (1845); Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616 (1874). As regards national banks, see Scott *v.* Pequonnock Nat. Bank, 15 Fed. Rep. 494 (1883); Continental Nat. Bank *v.* Eliot Nat. Bank, 12 Rep. 351 (1881); s. c., 7 Fed. Rep. 369; Dickinson *v.* Central Nat. Bank, 129 Mass. 279 (1880); Sibley *v.* Quinsigamond Nat. Bank, 133 Mass. 515 (1882); State *v.* First Nat. Bank, 89 Ind. 302 (1883).

3 Stock is located where the corporation is incorporated, and a non-resident stockholder may file a bill in the United States court in the district where the corporation was organized to set aside an illegal forfeiture of the stock for non-payment of assessments, and in such suit he may bring in non-resident defendants by substituted service. Jellenik *v.* Huron, etc. Co., 177 U. S. 1 (1899). A careful discussion of the *situs* of stock will be found in the case of Matter of Bronson, 150 N. Y. 1, 17, 24 (1896).

A suit in equity does not lie in the United States court in Nevada, at the instance of a resident of that state, to recover stock owned by non-residents in an Arizona corporation where service upon them is made only upon the publication. The stock is not within that district, within the meaning of the federal statute. McKane *v.* Burke, 132 Fed. Rep. 688 (1904). See also §§ 363, 485, *infra.*

4 See § 363, *infra.*

corporation in regard to that stock where he took the stock without notice of such contracts.[1]

In regard to shares of stock owned by married women, the payment of dividends is governed by the law of the domicile of the corporation.[2] It would seem that as to transfers of stock by her the law of her domicile should govern as between her and the party with whom she deals, but that the duty of the corporation as to transfers is according to the law of the state wherein the corporation is organized.[3] A legacy of stock may be governed by the law of the state where the testator resided.[4] A transfer of stock belonging to an estate must comply with the laws of the state wherein the corporation is incorporated.[5]

A guardian's sale of stock is governed by the law of the state of the guardianship,[6] so far as the party dealing with the guardian is concerned, but as to the corporation the same rule should apply as in the case of transfers by married women. Stock held in pledge may be sold in accordance with the law of the state where the pledge exists.[7]

As regards the common-law and statutory liability of a stockholder

1 Angle *v.* Chicago, etc. Ry., 94 Fed. Rep. 717 (1899). See also § 766c, *infra.*

2 See § 538, *infra.*

3 See on this subject Story on Conflict of Laws, 8th ed., §§ 146, etc., and §§ 423, 159 and 186. Where the husband and wife reside in Tennessee and the wife holds stock in an Alabama corporation, the law of Tennessee governs as to the right of the husband to appropriate to his own use the stock so owned by the wife. Birmingham, etc. Co. *v.* Hume, 121 Ala. 168 (1899). See also § 319, *infra.* The question of whether a married woman may assign a life insurance policy is governed by the law of the state where the woman resides, and not by the law of the state where the insurance company is incorporated. Mutual, etc. Co. of New York *v.* Allen, 138 Mass. 24 (1884). See also Brick *v.* Campbell, 122 N. Y. 337, 345 (1890).

4 Where stock in a Maryland bank is owned by a citizen of Delaware, the law of Delaware governs a legacy of such stock. Lowndes *v.* Cooch, 87 Md. 478 (1898).

5 See §§ 327, 330, *infra.* Even though a Minnesota executor of a deceased Minnesota stockholder in a California corporation sells the stock, yet if a local administrator has been appointed in California the sale and transfer by the Minnesota executor is not good, inasmuch as by the California statutes personal property descends to the heirs the same as real estate. Moreover, the *situs* of the stock is where the corporation exists. Murphy *v.* Crouse, 135 Cal. 14 (1901).

6 See § 328, *infra.*

7 Where an Oregon corporation pledges its bonds in California to secure notes payable in California, the law of California applies as to the mode of selling such bonds on default of the pledgor. Morris, etc. *v.* East Side Ry., 104 Fed. Rep. 409 (1900), revg. 95 Fed. Rep. 13.

on his stock, the law of the *forum* as well as the law of the domicile of the corporation has to be considered.[1]

The capital stock of a corporation may be either common or preferred. By *common stock* is meant that stock which entitles the owners of it to an equal *pro rata* division of profits, if any there be; one stockholder or class of stockholders having no advantage, priority or preference over any other shareholder or class of stockholders in the division. By *preferred stock* is meant stock which entitles its owners to dividends out of the net profits before or in preference to the holders of the common stock. Common stock entitles the owner to *pro rata* dividends equally with all other holders of the stock except preferred stockholders; while preferred stock entitles the owner to a priority in dividends.[2]

By *deferred stock* or *bonds* is meant stock or bonds the payment of dividends or interest upon which is expressly postponed until some other class of stockholders are paid a dividend, or until some certain obligation or liability of the corporation is satisfied.[3]

By *overissued* or *spurious stock* is meant stock issued in excess of the full amount of capital stock authorized by the charter of the corporation.[4] Such stock is void even though issued in good faith.

In Massachusetts some classes of corporations issue what is there known as *special stock*. This is a peculiar kind of stock, essentially local in character, provided for by statute, and unknown before the year 1855. Its characteristics are that it is limited in amount to two-fifths of the actual capital; it is subject to redemption by the corporation at par after a fixed time, to be specified in the certificate; the corporation is bound to pay a fixed half-yearly sum or dividend upon it as a debt; the holders of it are in no event liable for the debts of the corporation beyond the amount of their stock, and the issue of special stock makes all the general stockholders liable for all debts and contracts of the corporation until the special stock is fully redeemed.[5]

In England the word "stock" has a very different meaning from what it has in the United States.[6]

The "flotation" of a property means a sale thereof at a profit to a substantial company.[7]

1 See chs. XI and XII, *infra*.

2 See ch. XVI, *infra*. Stock issued as "preferred debenture shares of the capital stock" under the New York statute is a legal contradiction on its face, and in regard to taxation will be construed as being preferred stock. People *v.* Miller, 180 N. Y. 16 (1904).

3 See §§ 267, 773, *infra*.

4 See §§ 291–298, *infra*.

5 See ch. XVI, *infra*.

6 See § 14, *infra*.

7 Torva, etc. Syndicate *v.* Kelly, [1900] A. C. 612.

§ 13. *Certificates of stock.*—A certificate of stock is from one point of view a mere muniment of title, like a title deed. It is not the stock itself, but evidence of the ownership of the stock; that is to say, it is a written acknowledgment by the corporation of the interest of the stockholder in the corporate property and franchises;[1] it operates to transfer nothing from the corporation to the stockholder, but merely affords to the latter evidence of his rights.[2] It should be clearly understood that the certificate is not the stock, but merely written evidence of the ownership of stock.[3] Accord-

1 Higgins *v.* Lansingh, 154 Ill. 301 (1895).

An American form of a certificate of stock is so common it need not be given here. The English form is different. The following is a specimen:

No. 2007. 1000 fully paid ordinary shares.

The ——— Company, Limited.

Incorporated under the Companies Acts, 1862 to 1890.

CAPITAL, £200,000.

Divided into

112,000 seven per cent. preference shares of £1 each, 80,000 ordinary shares of £1 each, and 400 founders' shares of £20 each.

THIS IS TO CERTIFY that —— of —— street, London, E. C., is the Registered Holder of One Thousand Ordinary Shares of £1 each, Nos. 113,751 to 114,750, inclusive, in the —— Company, Limited, subject to the Regulations of the said Company, and that the said Shares are fully paid up.

GIVEN under the Common Seal of the Company this —— day of ——, 189—.

——— } Directors.
———

(Seal.)

——, Secretary.

No transfer of all or any portion of these shares can be registered without the production of this certificate.

In the case of Reno, etc. Co. *v.* Culver, 60 N. Y. App. Div. 129 (1901), it was held that a corporation does not have any common-law power to issue certificates of stock, but that such right must be statutory. This can hardly be said to be good law, unless the court was referring to the issue of stock as to which see § 8, p. 42, *supra*.

2 Quoted and approved in Nelson *v.* Owen, 113 Ala. 372 (1896). A certificate of stock is the written evidence of the right of a party to a pro rata share of the net profits of a coporation when declared, or to a like share of all its property, after the payment of its debts, in case of a dissolution of the artificial being. Beckwith *v.* Galice, etc. Co., 93 Pac. Rep. 453 (Ore. 1908).

3 Williams *v.* Ashurst Oil, etc. Co., 144 Cal. 619 (1904); Clevenger *v.* Moore, 71 N. J. L. 148 (1904); Hawley *v.* Brumagim, 33 Cal. 394 (1867); Campbell *v.* Morgan, 4 Bradw. (Ill.) 100 (1879); People's Bank *v.* Kurtz, 99 Pa. St. 344 (1882); Hubbell *v.* Drexel, 11 Fed. Rep. 115 (1882); Van Allen *v.* Assessors, 3 Wall. 573 598 (1865); Burr *v.* Wilcox, 22 N. Y. 551 (1860); Birmingham Nat. Bank *v.* Roden, 97 Ala. 404 (1892). "Stock is one thing, and certificates another. The former is the substance, and the latter is the evidence of it." Hawley *v.* Brumagim, 33 Cal. 394 (1867). The fact that certificates of stock in foreign corporations are in New York state does not render them subject to taxation in that state. *Re* James, 144 N. Y. 6 (1894). Certificates of stock issued in contemplation of incorporation may be accepted and adopted by the corporation after organization and will be good. Thorpe *v.* Pennock, etc. Co., 99 Minn. 22 (1906). See also 209 U. S. 365 (1908).

ingly it follows that shares of stock have no "ear-marks"—that one share cannot be distinguished from another share,—but that it is only the certificates which are distinguishable one from the other by their numbers and in other ways.[1] The certificate, therefore, has value in itself as evidence, but apart from the shares which it represents it is utterly worthless.[2] It is a convenient voucher, which the stockholder has a right to receive if he asks for it.[3] Notwithstanding all this a certificate of stock has almost as much negotiability as a promissory note. The New York court of appeals well says that "certificates of stock may be treated as property from the function they perform and the use that is made of them. They may well be regarded as a distinct species of property, for they now represent the bulk of property in the state and are the universal medium of transfer."[4] Such a certificate may represent the stock sufficiently to carry the stock when the certificate itself is attached or sold on execution.[5] One element of its value to the stockholder

1 Hubbell *v.* Drexel, 11 Fed. Rep. 115 (1882). See also § 469, *infra.*

As to the numbers of the shares in England, the court said, in Inds case, L. R. 7 Ch. App. 485 (1872), "the numbers of the shares are simply directory for the purposes of enabling the title of particular persons to be traced."

2 Quoted and approved in Pietsch *v.* Krause, 116 Wis. 344 (1903); Payne *v.* Elliot, 54 Cal. 339 (1880). "But in the business world such obligations or securities are treated as something more than mere muniments of title. They are daily bought and sold like ordinary chattels; they may be hypothecated or pledged; they have an inherent market value, and, while different in some respects from chattels, they are generally classified as personal property." Merritt *v.* American, etc. Co., 79 Fed. Rep. 228, 235 (1897).

3 Johnson *v.* Albany, etc. R. R., 40 How. Pr. 193 (1870), rev'd on another point in 54 N. Y. 416. *Cf.* Arnold *v.* Suffolk Bank, 27 Barb. 424 (1857), a case in which the distinction between a refusal on the part of a corporation to issue a certificate in a certain form and a refusal to recognize the owner of shares as owner—a denial of his property in the stock—is clearly drawn. The supreme court of Indiana has noted the distinction to the effect that a certificate is not the title, but only evidence of the title, to shares. The court says: "The certificate did not constitute the title to the stock. . . . In legal contemplation the certificate was merely an additional and convenient evidence of the ownership of the stock." Cincinnati, etc. R. R. *v.* Pearce, 28 Ind. 502 (1867).

4 People *v.* Reardon, 184 N. Y. 431, 450 (1906).

5 See § 485, *infra.* The New York court of appeals has recently held that where certificates of stock issued by a New Jersey corporation are within the state of New York, an attachment may be levied upon them and the interest of the owner or pledgor therein sold, such certificates being a property right within the state. Simpson *v.* Jersey City, etc. Co., 165 N. Y. 193 (1900), the court distinguishing the case of Plimpton *v.* Bigelow, 93 N. Y. 592 (1883), on the ground that the certificates of stock in that case were not within the state. The court said: "Certifi-

is that it is *prima facie* evidence of his title.[1] A certificate of stock need not be under seal,[2] and need not be in any particular form, unless required by statute.[3] If by its words the signature of a registrar is required, such condition must be observed.[4] When certificates are executed by a part only of the officers required by law to sign them, they may be void.[5] But a certificate issued to an officer of the corporation who is a stockholder, although the certificate is signed by that officer, is valid.[6]

A certificate of stock is not necessary to the complete ownership of the stock;[7] nor is payment of the subscription necessary thereto.[8]

cates of stock are treated by business men as property for all practical purposes. They are sold in the market and they are transferred as collateral security for loans, and they are used in various ways as property. They pass by delivery from hand to hand and they are the subject of larceny." The mere fact that certificates of stock owned by a citizen of New York in a New York corporation happened to be in Missouri at the time of his death, does not authorize the public administrator in Missouri to administer such stock as property within the state. Richardson *v.* Busch, 198 Mo. 171 (1906).

[1] Broadway Bank *v.* McElrath, 13 N. J. Eq. 24 (1860); Courtright *v.* Deeds, 37 Iowa, 503 (1873); Walker *v.* Detroit Transit Ry., 47 Mich. 338 (1882).

[2] Halstead *v.* Dodge, 51 N. Y. Super. Ct. 169 (1884). There is no common-law rule requiring certificates of stock to have the corporate seal placed upon them. Coddington *v.* Railroad, 103 U. S. 409 (1880), *dictum*. Revenue stamps omitted by oversight from certificates of stock may be affixed at any time. Jones *v.* Western, etc. Co., 27 Wash. 136 (1902).

If the certificate is not signed by the president and is not under seal, a purchaser must take notice of facts contained in the corporate books relative to such stock. Byers *v.* Rollins, 13 Colo. 22 (1889).

[3] The statutory provision that a certificate of stock shall state on its face to what extent it is paid up, and whether in money or property, does not invalidate an issue of stock without such statement appearing on the certificate. French *v.* Northwestern Laundry, 107 N. W. Rep. 430 (Iowa 1906).

[4] Where a certificate of stock provides on its face that it must be signed by a transfer agent the corporation is not liable on a certificate to which the transfer agent's name had been forged by an employee of the corporation. Dollar, etc. Co. *v.* Pittsburg, etc. Co., 213 Pa. St. 307 (1906). See also § 293 *infra*.

[5] Holbrook *v.* Fauquier, etc. Co., 3 Cranch, C. C. 425 (1829); s. c. 12 Fed. Cas. 322. See §§ 293, 365, *infra*.

[6] Titus *v.* Great Western Turnp. Road, 61 N. Y. 237 (1874).

[7] Wheeler *v.* Millar, 90 N. Y. 353 (1882); Burr *v.* Wilcox, 22 N. Y. 551, 555 (1860); Thorp *v.* Woodhull, 1 Sandf. Ch. 411 (1844).

[8] Quoted and approved in Reed *v.* Gold, 102 Va. 37 (1903); Wheeler *v.* Millar, 90 N. Y. 353 (1882). A subscriber cannot rescind his subscription on the ground that the certificates had never been issued to him. Cotter *v.* Butte, etc. Co., 31 Mont. 129 (1904). Even though no certificates of stock are issued the subscriber is a stockholder and entitled to dividends. South Dakota *v.* North Caro-

But the corporation is bound, upon demand, to issue certificates of stock to its stockholders,[1] and, if it refuses, the stockholder may bring suit in equity to compel its issuance;[2] or he may sue it in an action at law for damages.[3] The corporation in transferring stock to the trustee in bankruptcy of a stockholder has no right to write on the face of the certificate that it is subject to a lien belonging to the corporation, even though such lien exists, all other certificates of stock not having any such writing on them.[4] It is not essential to the existence of the corporation that certificates of stock be issued.[5] Without a certificate the stockholder has a complete power to transfer his stock,[6] to receive dividends,[7] and to vote,[8] and he is individually liable as a stockholder.[9] A certificate of stock may be a valid subject of a *donatio causa mortis*, of a legacy, a contract of sale, a pledge, or a gift.[10] Under the English statute an issue of stock by a corporation has reference only to the issue of the certificates and means an original putting out of the shares.[11] In New York, making out and mailing the certificates has been held to constitute a due issue thereof.[12] And in Maryland, the stub of a book from which certificates have been detached is evidence of their regular issue.[13] Stock may be said to be issued when it is

lina, 192 U. S. 286 (1904), the court saying (p. 309) "there was no formal issue of certificates by the company to the State, but that was a matter of arrangement between the parties to the subscription. The State's right as a stockholder was not abridged by lack of the certificates, and in fact it has been receiving dividends on the stock exactly as though certificates had been issued."

1 See § 61, *infra*.

2 See § 61, *infra*.

3 Quoted and approved in Westminster Nat. Bank *v.* New England, etc., 73 N. H. 465 (1906). See also § 61, *infra*.

4 *Re* W. Key, etc., [1902] 1 Ch. 467.

5 Quoted and approved in Pietsch *v.* Krause, 116 Wis. 344 (1903); Chester Glass Co. *v.* Dewey, 16 Mass. 94 (1819); Burr *v.* Wilcox, 22 N. Y. 551 (1860).

6 First Nat. Bank *v.* Gifford, 47 Iowa, 575 (1877); National Bank *v.* Watsontown Bank, 105 U. S. 217 (1881). *Cf.* Brigham *v.* Mead, 92 Mass. 245 (1865). A subscription of stock may be assigned, even though only a part of the subscription has been called for and paid, and even though no certificate of stock has ever been issued. Such assignment may be oral. Manchester St. Ry. *v.* Williams, 71 N. H. 312 (1902).

7 Ellis *v.* Essex Merrimack Bridge, 19 Mass. 243 (1824).

8 Beckett *v.* Houston, 32 Ind. 393 (1869).

9 Agricultural Bank *v.* Wilson, 24 Me. 273 (1844); Mitchell *v.* Beckman, 64 Cal. 117 (1883).

10 See ch. XVIII.

11 East Gloucestershire Ry. *v.* Bartholomew, L. R. 3 Exch, 15 (1867), Bush's Case, L. R. 9 Ch. App. 554 (1874).

12 Jones *v.* Terre Haute, etc. R. R., 17 How. Pr. 529 (1859). *Cf.* § 12, *supra*.

13 Weber *v.* Fickey, 47 Md. 196 (1877), s. c. 52 Md. 501.

paid for.[1] A tax on transfers of stock does not apply to an original issue of stock.[2]

Certificates of stock are not negotiable instruments, but they come very close to having all the elements of negotiability.[3] They have sometimes been said to have a quasi-negotiability, but this phraseology throws little light upon the real character of the transferability of stock. It may be said in general that by the operation of the law of estoppel the purchaser of a certificate of stock, in good faith and for value, may take it free from many claims of previous holders which would be allowed to come in, in the case of a sale of an ordinary chose in action.[4] In England it has been held that a certificate of fully paid up stock running to "bearer" is negotiable, and if stolen and then sold to a *bona fide* holder for value without notice, the latter might compel the company to pay subsequent dividends to him in respect to a share warrant.[5] A forged transfer of a certificate of stock conveys no title.[6] An ordinary certificate of stock has not as many qualities of negotiability in England as in the United States.[7]

1 As regards taxation it is issued when subscribed for. American, etc. Co. *v.* State Board, 56 N. J. L. 389 (1894). Stock issued is stock that has been subscribed, but does not necessarily include all stock that has been subscribed. San Francisco, etc. *v.* Miller, 87 Pac. Rep. 630 (Cal. 1906).

Stock is "issued" within the meaning of the New York statute, rendering stockholders personally liable, even though the certificates therefor have not been actually issued. Flour City Natl. Bank *v.* Shire, 88 N. Y. App. Div. 401 (1903). A tax on stock "issued and outstanding" applies to treasury stock. Knickerbocker, etc. Co. *v.* State Board, etc., 65 Atl. Rep. 913 (N. J. 1907). The court in the preceding case intimated that the treasury stock was illegally acquired by the corporation as a gift because it was originally illegally issued, there being no proof that it was issued for full value, but the reasoning of the opinion in that respect can hardly be commended. Even though a statute declares that stock not issued at its par value shall be void, yet this refers to the certificate and not to the stock itself. Pietsch *v.* Krause, 116 Wis. 344 (1903). Stock purchased by a corporation and then sold is issued stock. Hartley *v.* Pioneer Iron Works, 181 N. Y. 73 (1905).

2 People *v.* Duffy, etc. Co., 122 N. Y. App. Div. 336 (1907).

3 See § 412, *infra*.

4 See ch. XXIV. The words on a certificate of stock that it is transferable only on the books of the company are "only for the convenience and protection of the corporation itself," and if the certificate is endorsed in blank on the back, it can be sold and any purchaser can fill in his name and have a new certificate issued to him, the court saying: "As a rule, stocks are so sold and bought in this busy age, and pass from seller to buyer, *quasi* negotiable. . . . The convenience and necessities of commercial centers will always require such a usage." Shattuck *v.* American Cement Co., 205 Pa. St. 197 (1903).

5 Webb, etc. Co. *v.* Alexandria, etc. Co. Ltd., 93 L. T. Rep. 339 (1905).

6 See §§ 365-370, *infra*.

7 In England shares of the capital stock cannot be transferred without

By reason of certificates of stock having many elements of negotiability, a pledge of the certificates may be enforced by suit in a state where the certificates are deposited.[1] A provision in a certificate of stock to the effect that the corporation shall have a lien on the stock for debts due to the corporation from the registered stockholders may be valid and enforceable, even though neither the statutes of the state nor the charter nor the by-laws nor the proceedings of the directors or stockholders provide for such a lien. It is sufficient that the certificate of stock was the one used by the corporation.[2] A stockholder has the right to break up into smaller amounts his certificate of stock.[3]

Stock may be transferred without a transfer of the certificate, and if the transferrer afterwards transfers the certificate to another party he is liable to the first transferee.[4]

§ 14. *Definition of bond, mortgage, deed of trust, debenture, articles of association, memoranda of association, scrip, certificate book, transfer book, stock ledger, underwriting, founders' shares.*—A *bond* of a corporation is an instrument executed under the seal of the corporation, acknowledging the loan and agreeing to pay the same upon terms set forth therein. A coupon bond is one that has coupons attached, usually in the form of promissory notes, to pay an amount of money equal to the annual or semi-annual interest

the production of the certificate, where the certificate recites on its face that no transfer can be registered without its production, and hence the company is liable to a pledgee of the certificate, even though he does not apply for a transfer until after the owner has transferred the shares to a third person, without producing the original certificate. Rainford *v.* Keith, etc. Co. Ltd., [1905] 2 Ch. 147; rev'g [1905] 1 Ch. 296.

In England, even if the secretary by mistake delivers the old certificates back to the transferer and he pledges them, the pledgee is not protected, the basis of this decision being that the proximate cause of the loss was the transferrer and not the secretary, but in England the transfers are made by instruments separate from the certificates. Longman *v.* Bath, etc. Ltd., [1905] 1 Ch. 646. See also § 412, *infra*.

1 Certificates of stock represent the stock itself sufficiently to sustain a suit commenced by substituted service for the purpose of establishing a lien, even though the corporation is located in another state. Merritt *v.* American, etc. Co., 79 Fed. Rep. 228 (1897). *Cf.* § 485, *infra*.

2 Stafford *v.* Produce, etc. Co., 61 Ohio St. 160 (1899). See also ch. XXXI, *infra*.

3 It is unreasonable for a stockholder owning twenty-five shares in one certificate, to demand that the corporation issue twenty-five share certificates of one share each in exchange therefor. Schell *v.* Alston Mfg. Co., 149 Fed. Rep. 439 (1906).

4 Mahaney *v.* Walsh, 16 N. Y. App. Div. 601 (1897). See § 358, *infra*.

on the bond.[1] A registered bond is one whose negotiability is temporarily withdrawn by a writing on the bond that it belongs to a specified person, and by a registry to that effect at an office specified by the company.

A *mortgage* given by a corporation may be similar to the ordinary mortgage given by an individual.

But usually a corporate mortgage is made in the form of a *mortgage deed of trust.* Such a deed of trust is a mortgage to a trustee for bondholders, the bonds being secured by the mortgage deed of trust. The trustee may be an individual, but generally is a trust company. Where the mortgage is to secure a large number of bonds, it is almost necessary that a deed of trust be used. Otherwise the mortgage would run to the bondholders, who are constantly changing, and many of whom are soon unknown to the corporation mortgagor. Moreover in foreclosing such a mortgage serious difficulties would arise. Hence, where a corporation gives a mortgage to secure bonds, this mortgage is made in the form of a deed of trust.

The word *"debenture"* has no definite legal meaning, except that it always means a debt. It may be applied to any promise or security of the company to pay money. It may be a mere promise to pay, or a covenant under seal to pay, or a mortgage or charge under the seal of the company.[2]

The word *"stock"* has a peculiar meaning in England. It applies to debentures as well as share capital. Shares, bonds and debentures are of fixed amounts, but "stock" is issued in any amount or multiples of certain sums, subject to a minimum, usually of £1.

In the United States investors prefer "bearer securities," while in England registered securities are most preferred. One advantage of

[1] A coupon bond is payable to the bearer. It may be bought and sold without formality as freely as any kind of property and without indorsements of any kind. Owing to the freedom of transfer, coupon bonds are usually preferred by persons who expect to hold them but a short time. Their disadvantage for the person who wishes to make a permanent investment lies in the danger that they might be lost or stolen, in which case the loss to the owner would be as complete as would be the loss of a bank note. The coupon bonds take their name from the method by which interest is collected by the holder.

Printed on the same sheet with the bond is a series of coupons or small certificates of interest due, which are so designed that one is cut off at each interest period. Each coupon bears the number of the bond and shows the date of the coupon's maturity. The holder of a coupon bond, at each interest period, detaches the coupon due that day and collects it. The coupons may be collected through any bank.

[2] See also § 776, *infra.* People *v.* Miller, 180 N. Y. 16 (1904).

"stock" is that an investor may buy any amount from £1 upward, and thus can invest just as many pounds sterling as he has available. Another advantage is that, without any trouble on his part, he receives his interest or dividend by cheque through the post, while yet another advantage is that, even should he lose his certificate, his dividend or interest reaches him as before, and by putting on record his loss, the risk of the stock being transferred by forgery is reduced to a minimum, while in the event of his desiring to sell his stock before he has found his lost certificate, it is customary on his giving an adequate indemnity, to place no further obstacle in the way of his doing so. A holder of "stock" usually gets a certificate for every purchase he makes, and so may have several certificates. The voting power on capital stock is the same as with shares. Debenture stock does not vote except in very special cases. Debentures have coupons attached, and are usually not registered, but frequently they are registered and are then transferable by deed. Debentures usually are to become due at a certain fixed date, while debenture stock may be perpetual or redeemable by drawings or otherwise at agreed periods and prices. Sometimes shares and debentures are first issued and subsequently converted into stock. Usually this is done for the convenience of making calls as the capital is required, because there is no liability on stock, and only fully paid shares can be consolidated into stock. As to debentures it is so much easier to borrow on them than on debenture stock that it is more convenient to commence in that form. Colonial Governments generally follow this course.

"Debenture stock" is an English term. It does not mean shares of stock, as in America, but means an English bond, an absolute obligation of the corporation to pay principal and interest at fixed times. It is the English form of bond, and may or may not be secured by a mortgage.[1] A holder of debenture stock is generally given a certificate by the corporation, similar in many respects to a certificate of shares of stock, except that the former represents a portion of a lump debt, while the latter represents a portion of the capital stock.[2] In this country practically the same kind of

1 A debenture is "a writing acknowledging a debt." People *v.* Miller, 180 N. Y. 16 (1904).

2 Lindley, Company Law, p. 195. See also § 777, *infra*. "Debenture stock is of the same nature as ordinary debentures, except that instead of each bond securing a definite amount the whole sum secured is treated as a single stock, and bonds are issued declaring the holder to be entitled to a definite sum, part of this stock. This sum is not necessarily a round sum, but may be for any number of pounds, and may include fractions of a pound unless express limitation is made in that respect. The debenture stock may be repay-

security is issued by giving to a bondholder, in exchange for coupon bonds, a certificate entitling him, and him alone, to a specified sum and interest in the meantime. The United States government issues such a certificate and calls it a registered bond. An American mortgage may be so drawn as to secure both American bonds and English debenture stock, with suitable provisions for the exchange of bonds for debenture stock.[1]

In England *articles of association* are similar to by-laws, and are for the regulation and management of the corporation.[2]

Memoranda of association are the same as the American articles of incorporation required to be filed under general statutes for incorporation.[3]

In England *scrip* is a written acknowledgment by a corporation that the holder will be entitled to certain shares of stock and a certificate therefor when the unpaid instalments on such shares are all paid in. It is a negotiable instrument.[4]

The *certificate book* of a corporation contains the printed, lithographed or engraved certificates of stock, which are filled out and signed by the proper officers and then delivered to the stockholders. A stub in the book, opposite each certificate, states the name, amount, date, etc., of the certificate which is issued. When the certificate is returned, upon a transfer to a new person, it is canceled and attached to the old stub. On the back of the certificate

able at a fixed date, or may be irredeemable, according to the deed creating it, and may be secured in any manner in which a debenture may be secured. The loans of the large railway companies are almost invariably in the form of stock, and are usually perpetual." Jordan & Brown on Joint-Stock Companies (20th ed.) p. 138. A bequest of stocks does not carry debentures, even though the debentures after a period were to be convertible into stock. Connecticut, etc. Co. *v.* Chase, 75 Conn. 683 (1903).

1 See § 777, *infra*.

2 A lien created by articles of association of a bank, being the same as by-laws, is not good as against a *bona fide* pledgee of the certificate of stock where the certificate does not refer to such articles of association nor to the lien. Lyman *v.* State Bank, etc., 81 N. Y. App. Div. 367 (1903); aff'd 179 N. Y. 577. *Cf.* § 4, *supra*.

3 "Deed of settlement" is a term that was used in England, prior to 1862, to indicate the same as the modern articles of association and memoranda of association. See Burrows *v.* Smith, 10 N. Y. 550, 556 (1853); Rapalje & L. Law Dict. 361; London Financial Assoc. *v.* Kelk, L. R. 20 Ch. D. 107 (1884); Guinness *v.* Land Corporation, L. R. 22 Ch. D. 349 (1882).

4 Goodwin *v.* Robarts, L. R. 1 App. Cas. 476 (1876); Rumball *v.* Metropolitan Bank, L. R. 2 Q. B. D. 194 (1877).

In this country scrip generally means a kind of dividend: *e. g.*, land scrip dividend entitling the holder to take so much land; and a scrip dividend entitling the holder to future

a blank form for a transfer of the stock represented by it is given.

The *transfer book* is for the purpose of keeping a record of transfers of stock. The entries in it correspond to the transfers on the backs of the canceled certificates of stock. The entries in the transfer book are generally made by a clerk as attorney in fact for the transferrer. The form of transfer on the back of the certificate contains such a power of attorney. Transfer books are kept by all important corporations and yet their necessity and utility may well be doubted.[1] Even though the statute requires transfer books to be kept, yet the certificate of stock book is sufficient.[2]

The *stock ledger* contains a statement of how much stock the past and present stockholders have owned or now own.[3]

Underwriting means an agreement, made before the shares are

dividends the same as stock receives, but without the voting privilege of stock. See ch. XXXII, *infra*.

1 See § 382, *infra*. Probably the transfer book and the power of attorney on the back of certificates of stock and the provision in the certificate of stock that it can be transferred on the books of the company only in person or by duly authorized attorney might be abolished without harm. In these days a sale and assignment of the *certificate* of stock should be sufficient to warrant a corporation making a transfer on its corporate books upon the presentation of the old certificate so assigned. The fact is that the transfer on the transfer book is a mere repetition of the transfer on the back of the certificate of stock, and as the stock ledger can be posted directly from the canceled certificates of stock, the transfer book might well be abolished. A stock journal might be convenient to show daily transfers. Certificate of stock book, stock journal and ledger would then correspond to day-book, journal and ledger in ordinary book-keeping. But in these days, when it is the rule to issue certificates of stock, and a transfer thereof transfers the equitable title to the stock itself in all the states, and the legal title in most of the states, every legal and equitable right can be preserved as well without a transfer book and power of attorney as with them. The practical result would be the saving of transfer books and much book-keeping. Many small corporations even now have only a certificate of stock book. See § 382, *infra*. Of course where the statutes of a state, as in New Jersey, require the keeping of a transfer book, the above suggestions could not be adopted.

2 *In re* Election, etc., 65 Atl. Rep. 849 (N. J. 1907).

3 "The keeping of a stock book, in which the original issue and all subsequent transfers must be entered, enables the holder or purchaser to trace his shares back to the original issue by the numbers of the different certificates, and thus identify the shares upon which any assessment has been made, and enables him to ascertain with certainty, in connection with the other records of the corporation relating to assessments and delinquent sales, whether his shares are free from liens or liability in favor of the corporation, and in the same manner enables the corporation to enforce its delinquent assessment upon the shares liable therefor, no matter how many transfers have been made subsequent to the

brought before the public, that in the event of the public not taking all the shares or the number mentioned in the agreement, the underwriter will take the shares which the public do not take.[1] An underwriter may be held liable, even though the entire amount is not underwritten, there being nothing in the agreement requiring that.[2]

A bill in equity does not lie to compel an underwriting syndicate to assign to plaintiff an interest therein, which they had contracted to sell to him, even though he alleges that the value is uncertain and that specific performance is the only full and adequate relief.[3] Of course the rights of persons interested in an underwriting agreement depend largely on the terms of the agreement itself.[4]

assessment; each transferee taking the legal title, but subject to the assessment, just as the grantee of the legal title to land takes it subject to all valid recorded liens." Craig *v.* Hesperia, etc. Co., 113 Cal. 7 (1896). See also § 382, *infra*. It may be added that the stock ledger also enables the corporation to ascertain quickly who is entitled to vote and on how much stock; also who is entitled to dividends and on how much stock. It is not necessary for the corporation to keep either a transfer book or a stock ledger. See § 382, *infra*.

1 Underwriting "means an agreement entered into before the shares are brought before the public, that in the event of the public not taking up the whole of them or the number mentioned in the agreement, the underwriter will take an allotment of such part of the shares as the public has not applied for." The underwriter is liable on the stock. *Re* Licensed, etc. Assoc., L. R. 42 Ch. D. 1 (1889). See 158 Fed. Rep. 969.

During the past five years underwriting agreements have become quite common in the United States.

Where an "underwriter" agrees to subscribe for whatever the public do not take, and authorizes another to make the subscription for him, he is bound by the subscription. Shaw *v.* Bentley, etc. Co., 68 L. T. Rep. 812 (1893); also *Re* Bentley, etc. Co., 69 L. T. Rep. 204 (1893).

An underwriter's contract is given in full in *Re* Hannan's, etc. Co., 75 L. T. Rep. 45 (1896), s. c. [1896] 2 Ch. 643. See also § 52, *infra*.

2 Knickerbocker T. Co. *v.* Davis, 143 Fed. Rep. 587 (1906).

3 Gilbert *v.* Bunnell, 92 N. Y. App. Div. 284 (1904).

4 A construction company that contributes stock to go with bonds which are being underwritten, may itself be a subscriber to the underwriting agreement. The insolvency of the company issuing the bonds is no defense in itself to the underwriting agreement. Eastern Tube Co. *v.* Harrison, 140 Fed. Rep. 519 (1905).

Where underwriters have agreed to purchase the bonds of the corporation at a certain price with a bonus of 75% in stock, the corporation may pledge the bonds and assign the underwriting agreement to the pledgee, and the pledgee in order to enforce the underwriting agreement may compel the corporation to furnish the 75% in stock for that purpose. Kirkpatrick *v.* Eastern, etc. Co., 135 Fed. Rep. 146 (1904), aff'd, 137 Fed. Rep. 387.

In the case Hudson, etc. Ry. *v.* O'Connor, 95 N. Y. App. Div. 6 (1904), an underwriting syndicate agreement was construed where bonds were sold at eighty cents on the dollar with a

Founders' shares are shares which take the profits after certain dividends are paid on the other shares. They are a sort of deferred stock.[1] They are issued to the founders or promoters of the enterprise. They are unknown in America. In England they often acquire a great value, and so enormous have been the profits of some of the trust and investment companies that their founders' shares, which divide the surplus after payment of a moderate maximum dividend on the ordinary shares, are worth almost fabulous

stock bonus, and it was held that coupons attached to the bonds belonged to the underwriters, even though the bonds were not delivered for some time after the coupons became due.

The agreement of individuals with a promoter to underwrite shares of stock of a company cannot necessarily be enforced by the company, and may be modified without the consent of the company, but if shares are allotted to the underwriters, and they do not object, they are liable as shareholders by English law, and if the corporation was an English corporation such liability may be enforced in the United States. Electric, etc. Co. *v.* Prince, 81 N. E. Rep. 306 (Mass. 1907).

A pledgee of an underwriter's agreement may have difficulty in tendering performance to the underwriters. Litchfield, etc. Society *v.* Dibble, 67 Atl. Rep. 476 (Conn. 1907).

An underwriter is a guarantor, and if the agreement which he underwrites is modified without his consent he is thereby released. Guardian T. Co. *v.* Peabody, 122 N. Y. App. Div. 648 (1907).

[1] In the case *Re* New Transvaal Co., [1896] 2 Ch. 750, the founders' shares had the following rights:

"The profits of the company in each year shall . . . be applicable first in or towards payment of a dividend of eight per cent. on the amount of the ordinary shares, and the surplus, if any, shall . . . be divided as follows, viz.: one-fifth part thereof among the holders of founders' shares, and the remaining four-fifths thereof among the holders of ordinary shares in proportion to the amounts for the time being paid up thereon."

In *Re* London, etc., Ltd., 77 L. T. Rep. 146 (1897), there were one hundred and twenty founders' shares of £10 each and twelve thousand ordinary shares of £10 each. The founders' shares were entitled to half of any dividend which might remain after paying ten per cent. on the ordinary shares. The directors allotted to themselves eighty of these founders' shares and the court upheld the allotment. The prospectus stated that each person taking fifty ordinary shares would be entitled to take one of the founders' shares. The directors caused the fifty ordinary shares for each of the eighty founders' shares to be taken by others. A scheme by which founders' shares are to be exchanged for ordinary stock at the rate of one hundred shares of the latter for each share of the former is *ultra vires* and illegal, and will not be sanctioned by the court. *Re* Development Co. etc., [1902] 1 Ch. 547. Under the English statute a reduction of the capital stock, when approved by the court, is binding, and the court may approve a reduction which pays off the founders' shares at par, even though the reserve is more than sufficient therefor, it appearing that the founders' shares have no commercial value. Poole *v.* National Bank of China, 96 L. T. Rep. 889 (1907), disapproving *Re* Anglo-French Ex. Co., [1902] 2 Ch. 845.

sums of money.[1] There seems to be but little difference between

[1] For instance, the founders' shares in The Trustees, Executors and Securities Insurance Company have been quoted on the market at something like seven thousand five hundred per cent. of their par value.

The following article in the Financial News of London of June 2, 1890, is interesting if not particularly edifying:

"In a considerable proportion of the new enterprises, which are being brought out, either the prospectus is accompanied by a list of founders, or it invites subscriptions of ordinary capital by offering the inducement of a proportionate allotment of founders' shares. The very name of founder has come to have an opulent ring about it, . . . and in the case of the most recent issue, that of the Empire of India Corporation, the fortunate possessors of the few £10 founders' shares have already seen them worked up in the market to a premium of £500. No wonder, then, that securities of this class are regarded with a covetous eye. To be the lucky holder seems a very good substitute for possessing the philosopher's stone or the magic wand of the eastern genii, by means of which gold could be produced at will. In no other kind of investment regulated by limited-liability principles have such profitable results been obtained. For a comparatively small outlay there is the prospect of a return 'exceeding the dreams of avarice,' and although all founders' shares do not turn out El Dorados, yet their infinite possibilities of 'uncarned increment' give them a special degree of fascination, and tempt persons who would scornfully hold aloof from any ordinary scheme of company promotion to lend their names in return for the allotment of one or two founders' shares. . . . There can be no question that the investing public attach a good deal of importance to the list of founders. They see a number of names of gentlemen of social position, possibly of financial eminence, and they jump to the conclusion that the taking up of the founders' shares by these persons implies a sort of assurance on their part of the respectability and *bona fides* of the promotion. The founders themselves, probably, have never looked at the matter quite in that light. They must, however, confess that the privilege of holding these specially-favored shares is not conferred with an altogether disinterested object. Promoters want to get good names on the prospectus, and this is one of the expedients by which they accomplish their end. . . . It is quite understood in many—perhaps in a majority of—cases that it is their personal influence which is being purchased by the grant of an exclusive privilege. To that extent they do undoubtedly further and encourage the interests of the promoters. Sometimes they undertake for each founders' share to place a certain number of ordinary shares—in other words, to 'guarantee a subscription.'"

Founders' shares resemble preferred stock in that the amount of dividends payable thereon depends in each case upon the terms of the agreement under which the shares are issued. The dividends going to the founders' shares may be great or small, and may be more or less fixed or contingent, just as the original incorporators may determine. The nature of founders' shares and the variable character of the rights conferred thereby are illustrated in the case *Re* London, etc. Corp., 73 L. T. Rep. 280 (1895), the charter containing the following provisions:

"(*b*) There shall first be paid out of the net profits of the company in each year to the holders of the preferred shares a cumulative preferential dividend, at a rate not exceeding £5 per cent. per annum on the amount paid up thereon for the time being. (*c*) There shall, in the next place, be paid out of the net profits of the company to the holders of ordinary shares a dividend at the rate of seven per cent. per annum on the amount paid up thereon for the time being. (*d*) After these payments, and providing for the further remuneration of the directors, one moiety shall belong to the holders of founders' shares, and the residue shall belong to the holders of ordinary shares." . . .

"The founders' shares shall entitle the holders thereof to such dividends and other interest in the profits of the company as is defined by the memorandum and articles of association; but, except in the case of liquidation, they shall not entitle the holders thereof to any share in the capital of the company beyond the actual amount paid up or duly credited as paid up upon them." . . .

"In any winding up of the company the holders of founders' shares shall be en-

founders' shares, as related to common stock, and common stock as related to preferred stock.[1]

Founders' shares are often given as a gift to eminent persons who consent to act as directors and to be held out to the public as such.

The word "securities" means bonds, certificates of stock and other evidences of debt or of property.[2]

§ 15. *The name of a corporation.*—A corporation has an existence distinct from that of the individuals constituting it. Hence, for the purposes of identification and continuity, it is essential that the corporation have a name. "The name is an indispensable part of the constitution of every corporation, the knot of its combination, as it has been called, without which it cannot perform its corporate functions."[3]

The corporate name is usually the choice of the incorporators, and is specified in the creating instrument. By this name it takes and grants property, sues and is sued, and does all corporate acts.[4]

titled (as between themselves and holders of preferred and ordinary shares) to one moiety of any assets of the company remaining after the payment and discharge of the debts and liabilities of the company, and the repayment to the holders of preferred and ordinary shares of the amount paid up or credited as paid up on such shares, together with the costs of winding up; provided always that in the division of any reserve fund under this clause the founders shall be entitled to one moiety of any portion of such reserve fund arising from the issue of any shares in the company at a premium, but as to any other reserve fund shall only be entitled to one moiety of such reserve fund up to twenty per cent. of the subscribed capital, and no more."

See also *Re* Macdonald, etc. Co., [1894] 1 Ch. 89.

1 Fisher *v.* Black, etc. Co., [1901] 1 Ch. 174.

2 Thayer *v.* Wathen, 17 Tex. Civ. App. 382 (1897). A certificate of stock is not a security in the proper signification of that term. Culp *v.* Mulvane, 66 Kan. 143 (1903). *Cf.* § 305.

3 Fort, etc. Assoc. *v.* Model, etc. Assoc., 159 Pa. St. 308 (1893).

4 Viner's Abr., Corporation; Bacon's Abr., Corporation; 1 Bl. Com. 475, 476; Glass *v.* Tipton, etc. Co., 32 Ind. 376 (1869). Where the name signed to a bond begins with the word "The" and ends with the word "Company," the law presumes that it is a corporation. Allen *v.* Hopkins, 62 Kan. 175 (1900). Statutes relative to corporations usually prescribe, expressly or by implication, that the articles of incorporation shall specify the name assumed by the corporation. In Wells *v.* Oregon Ry. etc. Co., 15 Fed. Rep. 561, 567 (1883), it is said that the statute might create a corporation without any special designation, although some description would be necessary, and then it might subsequently acquire a name. Corporations are required both at common law and by the statutes of all the states to have names. Glass *v.* Tipton, etc. Co., 32 Ind. 376 (1869). The corporate name has been variously spoken of as "the very being of the constitution," "the knot of their combination," "as the name of baptism," "the substance and essence of it." The form of the name is sometimes prescribed by statute, as that it shall begin with "The" and end with "company," "corporation," "association," or "society." Colo. Gen. Laws, 1877, pp. 143, 144. See also Conn. Gen.

The right of a corporation to the exclusive use of its chosen name is recognized by statute in many states. Moreover, it is usually protected by the courts, independently of any statute.[1]

Stat. 1888, § 1905. In Hammond *v.* Hastings, 134 U. S. 401 (1890), the name of the corporation was "George H. Hammond & Company." The court held that even if this name on the certificate of stock did not give notice that it was a corporation, yet that a lien on the stock was sufficient. Where the name of an individual is the same as that of a corporation of which he is president, parol evidence may show that the signature to an instrument was the signature of the company and not of the individual. Hall *v.* Ochs, 34 N. Y. App. Div. 103 (1898). A judgment in favor of a corporation named "B. F. Avery & Sons" should be indexed under the letter A, and not under the letter B, inasmuch as individual names are indexed in that way. B. F. Avery & Sons *v.* Texas, etc. Agency, 62 S. W. Rep. 793 (Tex. 1901). School districts erected under a general law, which does not require the designation of a name, may acquire such for the purposes of suits and other corporate acts by usage. South School Dist. *v.* Blakeslee, 13 Conn. 227 (1839). The West Virginia Code, 1891, p. 503, § 11, prescribes that "no joint-stock company shall adopt the same name which is being used at the time by another corporation of this state." N. Y. Laws, 1895, ch. 672, prohibits the selection of a name sufficiently resembling another as to deceive. See also Mo. Rev. St. 1889, §§ 2496, 2768. An author cannot repudiate his contract with a corporation, although the corporation has the same name as a person who has fled from a criminal prosecution. Jewett Pub. Co. *v.* Butler, 159 Mass. 517 (1893). In Alabama the name must indicate the business. State *v.* Colias, 43 S. Rep. 190 (Ala. 1907). Under the Pennsylvania statute a concern cannot use the name "University" unless authorized so to do in a particular way. Commonwealth *v.* Banks, 198 Pa. St. 397 (1901). The Kentucky statute, requiring the corporate name to be painted on signs at the principal places of business in the state, does not sustain an indictment for failure to print the name on the principal place of business in a specified city. Such a statute does not apply to every place of business of the corporation. Standard Oil Co. *v.* Commonwealth, 110 Ky. 821 (1901).

"Inc." does not satisfy the Kentucky statute requiring the word "Incorporated" to follow the corporate name at the principal place of business. Commonwealth *v.* American Snuff Co., 101 S. W. Rep. 364 (Ky. 1907).

A corporation not doing business in the state is not liable for its selling agent advertising its goods without adding the word "Incorporated" after its name. Commonwealth *v.* Cook, etc. Co., 104 S. W. Rep. 255 (Ky. 1907).

Letter-heads and bill-heads of a corporation in Kentucky need not contain the word "incorporated." Commonwealth *v.* National Biscuit Co., 106 S. W. Rep. 799 (Ky. 1908).

A Kentucky corporation need not add the word "incorporated" on the label of goods which it manufactures and sells. Jung, etc. Co. *v.* Commonwealth, 96 S. W. Rep. 476 (Ky. 1906).

It is legal for an unincorporated association to use what apparently is a corporate name. People *v.* Rose, 219 Ill. 46 (1905).

[1] Thus, it is said that a corporate name legally acquired should be protected upon the same principle and to the same extent that individuals are protected in the use of trade-marks. Holmes, etc. *v.* Holmes, etc. Co., 37

The matter of protecting the use of a corporate name is intrinsically of equitable cognizance, as the injured party seldom if ever has an adequate and complete remedy at law. To prevent the continuance of such a wrong equity will interfere, and at the suit of the injured party will grant an injunction.[1]

Conn. 278, 293 (1870). The corporate name is a trade-mark from the necessity of the thing, and upon every consideration of private justice and public policy deserves the same consideration and protection from a court of equity. The case of an encroachment is analogous to if not stronger than that of a piracy upon an established trade-mark. Newby *v.* Oregon Cent. Ry., Deady, 609, 616 (1869); s. c., 18 Fed. Cas. 38. *Cf.* Goodyear's India Rubber, etc. Co. *v.* Goodyear Rubber Co., 128 U. S. 598 (1888). State officials cannot be enjoined from allowing a domestic corporation to take the name that a foreign corporation has, even though a fraud is worked thereby. Lehigh Valley Coal Co. *v.* Hamblen, 23 Fed. Rep. 225 (1885). In Massachusetts, by statute, a foreign corporation doing a banking, loan, trust or investment business in the state cannot use the same name as or a similar name to a domestic corporation. International T. Co. *v.* International L. & T. Co., 153 Mass. 271 (1891). A corporation may take a name which an old corporation is about to take by change of name. Illinois Watch Case Co. *v.* Pearson, 140 Ill. 423 (1892). A foreign corporation cannot prevent a domestic corporation from using the same name, where the latter was incorporated first, even though the public may be misled. In this case a party sold out to individuals, but did not sell any trade-marks. He then incorporated a company under the name of the trade-mark. Hazelton Boiler Co. *v.* Hazelton, etc. Co., 142 Ill. 494 (1892). A person who owns all the stock of a corporation which has the same name that he has, and sells such stock, cannot prevent the continuation of the use of that name. Geo. T. Stagg Co. *v.* E. H. Taylor, etc., 113 Ky. 709 (1902).

[1] Ottoman Cahvey Co. *v.* Dane, 95 Ill. 203 (1880). A corporation the "Landlords' Protective Bureau" may enjoin another corporation from using the name "Landlord's Protective Department," inasmuch as the public will be misled and confused. Koebel *v.* Chicago, etc. Bureau, 210 Ill. 176 (1904). Where a corporation selects its name with a view to misleading the public and getting the trade of another institution, it may be enjoined from using that name. International, etc. Co. *v.* William H. Rogers Corp., 67 N. J. Eq. 646 (1905). See also Eureka, etc. Co. *v.* Eureka, etc. Co., 69 N. J. Eq. 159 (1905). The "Knights of Maccabees of the World" may enjoin another corporation from using the word "Maccabees" in its name. Knights, etc. *v.* Searle, 106 N. W. Rep. 448 (Neb. 1905). A corporation named "Glucose Sugar Refining Company" may enjoin another corporation doing business under the name "American Glucose Sugar Refining Company." Glucose, etc. Co. *v.* American, etc. Co., 56 Atl. Rep. 861 (N. J. 1904). The Electromobile Company cannot enjoin another company carrying on business under the name of British Electromobile Company, if there is no proof that the public would be misled. Electromobile Co. Ltd. *v.* British, etc. Co. Ltd., 97 L. T. Rep. 196 (1907). See also British Vacuum, etc. Co. *v.* New, etc. Co., 97 L. T. Rep. 201 (1907). A Pennsylvania corporation having the name Philadelphia Trust, Safe Deposit and Security Company of the City of Philadelphia, but com-

The New York court of appeals stated the law on this subject as follows:

"In respect to corporate names the same rule applies as to the names of firms or individuals, and an injunction lies to restrain the simulation and use by one corporation of the name of a prior corporation which tends to create confusion and to enable the latter corporation to obtain, by reason of the similarity of names, the

monly known as the Philadelphia Trust Company, may enjoin a Delaware corporation from using the name Philadelphia Trust Company. Philadelphia, etc. Co. *v.* Philadelphia, etc. Co., 123 Fed. Rep. 534 (1903). The name "Walsh Boiler and Iron Works" may be used by a corporation, joint stock company, partnership or individual, in the transaction of business. Anderson *v.* Walsh, 189 N. Y. 159 (1907). A Pennsylvania corporation having the name American Clay Manufacturing Company may enjoin a New Jersey corporation having the same name from doing business in Pennsylvania, even though the latter company has registered its certificate with the secretary of state, as provided by statute, and even though no fraud is involved. American, etc. Co. *v.* American, etc. Co., 198 Pa. St. 189 (1901). Injunction lies at the instance of a corporation against another corporation using its name, inasmuch as the name may stand as a trade-mark. St. Patrick's, etc. *v.* Byrne, 59 N. J. Eq. 26 (1899). A company having a trade-mark on the use of the words "Hygeia Water" may enjoin another company from using those words, but cannot enjoin them from using the word "Hygeia" in connection with the word "ice." Hygeia, etc. Co. *v.* Hygeia Ice Co., 72 Conn. 646 (1900). In the case of Lamb, etc. Co. *v.* Lamb, etc. Co., 120 Mich. 159 (1899), the court enjoined a domestic corporation using the name "Lamb Glove & Mitten Company," where it interfered with the business of another corporation having the name "Lamb Knit-Goods Company." See also Penberthy, etc. Co. *v.* Lee, 120 Mich. 174 (1899). In the case of Red, etc. Club *v.* Red, etc. Club, 108 Iowa, 105 (1899), the court enjoined an Iowa corporation from taking as its corporate name a name already used by an Illinois corporation, the latter having issued a book under that name. A corporation having the name "The Young Women's Christian Association" may enjoin a new corporation from using the name "International Committee of the Young Women's Christian Association." International, etc. *v.* Young Women's, etc. Ass'n, 194 Ill. 194 (1901). The "Industrial Mutual Deposit Company" cannot prevent a corporation using the name "Central Mutual Deposit Company." Industrial, etc. Co. *v.* Central, etc. Co., 112 Ky. 937 (1902). Even an unincorporated association may enjoin a corporation from taking its name where injury is shown. Aiello *v.* Montecalfo, 21 R. I. 496 (1899). A company having the name "The Manchester Brewery Company" may enjoin another company from using the name "The North Cheshire and Manchester Brewery Company." North Cheshire, etc. Co. *v.* Manchester, etc. Co., [1899] A. C. 83. Equity will always interfere where the same name has been wrongfully appropriated. Where only a similar name is used, it is usually held that some actual damage, past, present or imminent, must be shown. A corporation will be protected in its name as a trade-mark. Often so by statute. State *v.* McGrath, 92 Mo. 355 (1887). A corporation may enjoin another

business of the prior one. The courts interfere in these cases, not on the ground that the state may not affix such corporate names as it may elect to the entities it creates, but to prevent fraud, act-

corporation from taking and using its name. Farmers' L. & T. Co. *v.* Farmers' L. & T. Co., 1 N. Y. Supp. 44 (1888). The use of any particular name by a corporation will not be enjoined unless it be clearly proven that the complainant will suffer injury. Drummond Tobacco Co. *v.* Randle, 114 Ill. 412 (1885); London, etc., Ass. Soc. *v.* London, etc. Ins. Co., 11 Jur. 938 (1847); Newby *v.* Oregon Cent. Ry., Deady, 609, 616 (1869); s. c., 18 Fed. Cas. 38; Holmes, etc. *v.* Holmes, etc. Co., 37 Conn. 278, 295 (1870), where the language of the court is as follows: "The ground on which courts of equity afford relief in this class of cases is the injury to the party aggrieved, and the imposition upon the public by causing them to believe that the goods of one man or firm are the production of another. The existence of these consequences does not necessarily depend upon the question whether fraud or an evil intent does or does not exist. The *quo animo*, therefore, would seem to be an immaterial inquiry." A New York corporation, "Goodyear Rubber Co.," cannot enjoin a Connecticut corporation from using substantially the same name. Goodyear's India Rubber, etc. Co. *v.* Goodyear Rubber Co., 128 U. S. 598 (1888), reversing 21 Fed. Rep. 276 (1884). *Cf.* Boston Rubber Shoe Co. *v.* Boston Rubber Co., 149 Mass. 436 (1889). The corporate name is not a franchise, even though it is a trade-mark. Hazelton Boiler Co. *v.* Hazelton, etc. Co., 137 Ill. 231 (1891); s. c., 142 Ill. 494. A benevolent corporation cannot object to a subsequent corporation's assuming a somewhat similar name. American, etc. Clans *v.* Merrill, 151 Mass. 558 (1890). The words "employers' liability," used in the name of an insurance company, may be used in the name of another insurance company, both companies being foreign corporations. Employers', etc. Corp. *v.* Employers', etc. Co., 10 N. Y. Supp. 845 (1890). A corporation of Nebraska, "The Nebraska Loan & Trust Company," cannot enjoin another Nebraska corporation, the "Nebraska Loan & Trust Company," from using that name. The name is too general for a trade-mark, and the location of the companies in different cities prevents confusion of business. Nebraska Loan, etc. Co. *v.* Nine, 27 Neb. 567 (1889). Technically this decision may be correct, but when such a fraud is sustained by the courts it is time for the legislature to enact the usual law against one corporation assuming the name of a prior corporation. The corporate name "Richardson & Boynton Company" does not prevent another company using the name "Richardson & Morgan Company." Richardson, etc. Co. *v.* Richardson, etc. Co., 8 N. Y. Supp. 52 (1889). If a corporation wrongfully refuses to accept watch movements with its name thereon, the manufacturer may sell them with that name on. McCulloh *v.* Smith, 44 Fed. Rep. 12 (1890). The "International Banking Company" cannot prevent another concern using the name the "International Bank." Koehler *v.* Sanders, 122 N. Y. 65 (1890). Where a company has a well established and known business, and a person having the same name attempts to incorporate under his name and carry on the same business, although he was never in the business before, he will be restrained. Tussaud *v.* Tussaud, L. R. 44 Ch. D. 678 (1890). While there may be "nothing in the adoption of a name which is borne by another which infracts any known law" (*Re* Baptist Church, 3 Haz. Pa.

ual or constructive."[1] An ordinary family surname, such as Remington, cannot be an exclusive trademark, and any other person having the same name may reasonably and honestly use it either personally or in a firm or corporation in transacting business, but there must be no false representations or dishonesty in the use, and hence one corporation cannot restrain another firm using such a name in the corporate title, unless there is fraud. Mere confusion by reason of the similarity of names is not such fraud. Unfair competition is palming off one's goods as the goods of another.[2]

Reg. 225 (1828); s. c., 1 Haz. Pa. Reg. 75), yet approval of the proposed articles of incorporation will generally be withheld if the name conflicts with that of an existing corporation. *Re* First Presbyterian Church of Harrisburg, 2 Grant Cas. (Pa.) 240 (1858); *Re* Sons of Progress, 14 W. N. Cas. 31 (1883).

[1] Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462 (1895).

Where a corporation selects its name in order to get another company's business, it is no defense that the name of the former is the name of its chief stockholder. William Rogers Mfg. Co. *v.* R. W. Rogers Co., 66 Fed. Rep. 56 (1895).

The court will not authorize a corporation to change its name, where injury will result to another corporation, or an imposition or deceit will result by reason of the confusion of the names. *Re* U. S. Mortgage Co., 83 Hun, 572 (1895).

A name is protected like a trademark, but five years' delay in complaining is fatal. Moreover a seceding part of an unincorporated association cannot by incorporation obtain the exclusive right to the old name. United Workmen *v.* Graham, 96 Iowa, 592 (1896).

The "Sun Life Assurance Society" of England cannot restrain the "Sun Life Assurance Company of Canada" from doing business in England, there being no actual fraud practiced or attempted; but the latter company must not abbreviate its name so as to mislead the public. Saunders *v.* Sun, etc. Co., [1894] 1 Ch. 537.

The Elgin Butter Company cannot object to another company using the name the Elgin Creamery Company. Elgin Butter Co. *v.* Elgin Creamery Co., 155 Ill. 127 (1895).

The Home Life Insurance Company, a new York corporation, cannot prevent a Michigan corporation from organizing under the name The Home Life Assurance Company. People *v.* Home, etc. Co., 111 Mich. 405 (1897).

A committee appointed by a voluntary association to obtain a charter may incorporate in the name of the voluntary association, and the association cannot enjoin the use of such name. Paulino *v.* Portuguese Ben. Assoc., 18 R. I. 165 (1893).

Although the name of a domestic corporation is very similar to that of an existing domestic corporation, yet where there is no evidence that the latter company knew of the former, and no sufficient proof that any one is deceived, the court may, in the exercise of a sound discretion, refuse to enjoin the latter corporation from using the name—the name of the first company being the Hygeia Water Ice Company, and of the latter the New York Hygeia Ice Company, Limited. Hygeia, etc. Co. *v.* New York, etc. Co., 140 N. Y. 94 (1893).

[2] Howe Scale Co. *v.* Wyckoff, etc. Co., 198 U. S. 118 (1905); rev'g Wyckoff, etc. *v.* Howe, etc. Co., 122 Fed. Rep. 341. It is unfair competition for a corporation to assume the

Certiorari lies to review the action of the secretary of state for rejecting a certificate of incorporation because the name resembles a name already in use, but after he has accepted the certificate and the corporation has commenced business, the remedy is a bill in equity.[1]

A foreign corporation cannot prevent a state granting a charter to a corporation having the same name and for the same purposes.[2]

A corporation has neither the right nor the power to change the corporate name originally selected unless it is allowed so to do by

name of an individual in its employ where the purpose was to obtain a part of a business which had been built up by another corporation having a somewhat similar name. J. & P. Coats *v.* John Coates, etc. Co., 135 Fed. Rep. 177 (1905). A stockholder in a corporation which has the same name as his name may do business in his own name, so long as he does not resort to artifice to deceive the public, but he cannot organize another corporation to use his name. Dodge Stationery Co. *v.* Dodge, 145 Cal. 380 (1904). An individual cannot enjoin a corporation from embodying his name in its corporate name as a libel or defamation of his business reputation, unless he shows that it will have that effect. Edison *v.* Thomas, etc. Co., 128 Fed. Rep. 957 (1904). Where a copartnership having a trade name is about to incorporate under that name, and other persons do so first, for the purpose of obtaining part of the copartnership business and appropriating the partnership name, they may be enjoined from so doing. Pettes *v.* American, etc. Co., 89 N. Y. App. Div. 345 (1903). A copartnership may enjoin a subsequent corporation from using its name. Nesne *v.* Sundet, 93 Minn. 299 (1904). Where a grain dealing corporation becomes insolvent and a trustee is appointed and thereafter the president continues to do business on his own account, but uses the name of the corporation, moneys received by him are not subject to the debts of the corporation. Boyle *v.* Northwestern, etc. Bank, 125 Wis. 498 (1905). A company has not the same right to use the name of its promoter that he himself would have to use it in business, especially where he does not transfer any business or good will to the company. Fine, etc. Assoc. *v.* Harwood, etc. Co., 97 L. T. Rep. 45 (1907). The secretary of state will not be compelled by mandamus to receive a certificate of incorporation of the "National Liberty League" when there is already a corporation with a name "National Liberty Legion." People *v.* Rose, 80 N. E. Rep. 293 (Ill. 1907).

[1] People *v.* O'Brien, 101 N. Y. App. Div. 296 (1905). The secretary of state will not be ordered by mandamus to file a certificate of incorporation of a company to be known as the "United States Express Company" where there is an unincorporated association which has used that name for many years. People *v.* Rose, 219 Ill. 46 (1905).

[2] National Council, etc. *v.* State Council, 203 U. S. 151 (1906). Even though a foreign corporation is doing business in the state without complying with the statutes in regard thereto, a domestic corporation thereafter organized under the same name cannot enjoin the foreign corporation from doing business in the state. Blackwell's, etc. Co. *v.* American, etc. Co., 59 S. E. Rep. 123 (N. C. 1907).

the laws under which it has been created, or by the consent of the authority from which its charter is derived.[1]

1 In the case of voluntary religious societies constituted under general laws, without a special act of incorporation and without an established name, names are purely arbitrary, and changes therein do not at all affect their identity. Trinity Church *v.* Hall, 22 Conn. 125 (1852); Cahill *v.* Bigger, 8 B. Mon. (Ky.) 211 (1848). So the identity and rights of a municipal corporation are not affected by a change of its name. Girard *v.* Philadelphia, 7 Wall. 1 (1868). A change in the name by statute does not affect the liability of the members to the corporation. South Carolina, etc. Co. *v.* Price, 67 S. C. 207 (1903). Even though a corporate name is changed under a statute, the real estate need not be deeded from the old name to the new one. Palfrey *v.* Association, etc., 110 La. 452 (1903). A deed to a corporation before its charter was taken out may be accepted after the charter is granted, and is valid, even though a slightly different name is adopted from that which appears in the deed. Sumter, etc. Co. *v.* Phœnix Ins. Co., 56 S. E. Rep. 654 (S. C. 1907). A corporation cannot change its name unless allowed by statute so to do. Sykes *v.* People, 132 Ill. 32 (1890); Bellows *v.* Hallowell, etc. Bank, 2 Mason, 31 (1819); s. c., 3 Fed. Cas. 144. The power is sometimes given by the legislature to the courts to change the name of any corporation within their jurisdiction upon proper notice being given to the auditor-general; and this applies to religious corporations. *Re* First Presbyterian Ch., 111 Pa. St. 156 (1885). A reorganization, with change of name, under a statute, does not affect fixed or running obligations. Hyatt *v.* McMahon, 25 Barb. 457 (1857); City National Bank *v.* Phelps, 16 Hun, 158 (1878); reversed on another point, 86 N. Y. 484. As to a change of name under the New York statute, see *Re* U. S. etc. Agency, 115 N. Y. 176 (1889). A judgment in the new name which a corporation has taken by proceedings under a statute is valid, although such proceedings to change the name were not regular. King *v.* Ilwaco, etc. Co., 1 Wash. St. 127 (1890). An irregular and ineffectual attempt to change the name of a corporation does not affect its charter. O'Donnell *v.* C. R. Johns Co., 76 Tex. 362 (1890). In some states it is provided in the general laws that the corporate name may be changed by a resolution of the stockholders or of the directors, properly filed and recorded. Me. Rev. St. 1883, ch. 46, § 6; Tenn. Code, 1896, § 2028; Shackelford, etc. Co. *v.* Dangerfield, L. R. 3 C. P. 407 (1868), under the English Companies Act. Similar provision is sometimes made in special acts. Morris *v.* St. Paul, etc. Ry., 19 Minn. 528 (1873); Attorney-General *v.* Joy, 55 Mich. 94, 106 (1884). Or the change may be directly made by the special act. Wallace *v.* Loomis, 97 U. S. 146, 154 (1877); Alexander *v.* Berney, 28 N. J. Eq. 90, 92 (1877). *Cf.* Pacific Bank *v.* De Ro, 37 Cal. 538 (1869). Or the original special act of incorporation may provide for a change by an order of the directors approved by the stockholders. Wells *v.* Oregon Ry. & Nav. Co., 15 Fed. Rep. 561 (1883). If the legislature changes the name of a corporation without altering its powers or identity, it does not affect a controversy between the company and third parties. Rosenthal *v.* Madison, etc. Co., 10 Ind. 358 (1858). As to the right of the corporation to maintain an action on a note executed to it in the old name, see Northwestern College *v.* Schwagler, 37 Iowa, 577 (1873). A grant to a church in a particular

While a corporation cannot change its corporate name, it may nevertheless become known by another name, through usage; and the courts have frequently treated acts done and contracts entered into by corporations under another name, as having been done or entered into by it under its true name.[1]

Modern law has departed from the strict rules of the common law as to the use of the corporate name. As corporations are now able to contract almost as freely as natural persons, it is held that a departure from the strict name of a corporation will not avoid its contract if its identity substantially appears; and an ambiguity

name is not lost by a subsequent change of name. Cahill *v.* Bigger, 8 B. Mon. (Ky.) 211 (1848). Where a railroad company was authorized by special act to change its name or the names of its branches, and did change the name of one branch and of itself in the management of such branch, *held*, that for the purpose of suits its original name remained unchanged. Morris *v.* St. Paul, etc. Ry., 19 Minn. 528 (1873). The change of a corporation's name does not affect its real estate contracts. Welfley *v.* Shenandoah, etc. Co., 83 Va. 768 (1887). Nor an obligation on a bond. West *v.* Carolina L. Ins. Co., 31 Ark. 476 (1876). A guarantee to pay for goods thereafter delivered by Crane Bros. Manufacturing Company cannot be enforced by the company, where it changed its name to Crane Company before the goods were delivered. Crane Co. *v.* Specht, 39 Neb. 123 (1894).

[1] Society for Propagating Gospel *v.* Young, 2 N. H. 310 (1820). An assignment by a corporation in a name which it has adopted but not recorded as required by statute is good. Woodrough, etc. Co. *v.* Witte, 89 Wis. 537 (1895). See also, in general, Smith *v.* Tallassee, etc. Co., 30 Ala. 650, 664 (1857); South School District *v.* Blakeslee, 13 Conn. 227 (1839); Minot *v.* Curtis, 7 Mass. 441 (1811), where the court, in using the language, "We know not why corporations may not be known by several names as well as individuals," evidently had in mind certain classes of corporations and societies. Identity may be a question of fact for the jury. Dutch West India Co. *v.* Van Moses, 1 Stra. 612 (1725). An assignment of a claim against a corporation need not accurately describe its name. Adler *v.* Kansas City, etc. R. R., 92 Mo. 242 (1887). A corporation is bound by an abbreviated name. People *v.* Sierra, etc. Co., 39 Cal. 511, 514 (1870). There is a distinction in some of the old cases to the effect that corporations by prescription may have several names, while with charter corporations it is otherwise. Anonymous (2), 3 Salk. 102 (1703); Mercers, etc. of Shrewsbury *v.* Hart, 1 Car. & P. 113 (1823); Hammond *v.* Shepard, 29 How. Pr. 188, 191 (1865); Thomas *v.* Dakin, 22 Wend. 9, 72 (1839); Melledge *v.* Boston Iron Co., 59 Mass. 158, 175 (1849); Medway Cotton Manuf'y *v.* Adams, 10 Mass. 360 (1813). Where the company signs a contract under an assumed name the contract may be enforced against it. Marmet Co. *v.* Archibald, 37 W. Va. 778 (1893). In Cincinnati Cooperage Co. *v.* Bate, 96 Ky. 356 (1894), the remarkable conclusion was reached that where a corporation changed its name and used the new name without complying with the statute the stockholders were liable as partners.

may, under proper averments, be explained by parol.[1] A deed to a corporation is valid although the corporate name as set forth in the deed is not correct.[2] Where a corporation has been enjoined

1 A bequest to "Georgetown University" will go to "Georgetown College," a corporation, if there is no corporation of the former name. Speer *v.* Colbert, 200 U. S. 130 (1906). An error in the name of a charitable corporation to which a bequest is given does not prevent the vesting of the bequest in such corporation. Matter of Pearson, 52 N. Y. Misc. Rep. 273 (1906). An abbreviated corporate signature is sufficient and a seal is not necessary if it would not be required in a similar individual contract. Seiberling *v.* Miller, 207 Ill. 443 (1904). Even though a contract is made with the "Halls Safe and Lock Works," which is a local name for a shop of the Herring-Hall-Marvin Company, yet the latter may sue upon and enforce the contract. Herring, etc. Co. *v.* Smith, 43 Ore. 315 (1903). A creditor of a corporation, before a change in the name of the latter, may after such change sue it by its new name. Wright, etc. Co. *v.* Hoen & Co., 105 Va. 327 (1906). Although a notice of a corporate meeting, and proxies given for a corporate meeting, add to the name of the corporation the place where it is located, this is immaterial. Langan *v.* Francklyn, 20 N. Y. Supp. 404 (1892). A corporation may be liable on a contract which it enters into in a name other than its corporate name. Neff *v.* Covington, etc. Co., 108 Ky. 457 (1900), the court, however, sending the case back on account of error in the form of judgment. Haag *v.* County Com'rs, 34 Fed. Rep. 778 (1888); Berks, etc. Road *v.* Myers, 6 Serg. & R. (Pa.) 12, 17 (1820); Boisgerard *v.* New York Banking Co., 2 Sandf. Ch. 23 (1844); Hammond *v.* Shepard, 29 How. Pr. 188 (1865); Gifford *v.* Rockett, 121 Mass. 431 (1877); Melledge *v.* Boston Iron Co., 59 Mass. 158, 175 (1849); Medway Cotton Manuf'y *v.* Adams, 10 Mass. 360 (1813); Commercial Bank *v.* French, 38 Mass. 486 (1839); Hascall *v.* Life Assoc., 5 Hun, 151 (1875); aff'd, 66 N. Y. 616; Conro *v.* Port Henry Iron Co., 12 Barb. 27, 55 (1851); Northwestern Dist. Co. *v.* Brant, 69 Ill. 658 (1873). *Cf.* New York African Soc. *v.* Varick, 13 Johns. 38 (1816); Mott *v.* Hicks, 1 Cow. 513 (1823); Brockway *v.* Allen, 17 Wend. 40 (1837). Although the name used in a contract is different from the corporate name, yet if the identity is clear the contract is enforceable. Hasselman *v.* Japanese, etc. Co., 2 Ind. App. 180 (1891). There is a line of cases where corporations draw or accept bills or make deeds in another name merely as a convenient mode of doing the special act of business, and they are held liable although the corporate name is not mentioned. In such cases they are to be sued in their true name. Culpeper Agric. etc. Soc. *v.* Digges, 6 Rand. (Va.) 165 (1828); Milford, etc. Co. *v.* Brush, 10 Ohio, 111 (1840); Ryan *v.* Martin, 91 N. C. 464 (1884); Asheville Division *v.* Aston, 92 N. C. 578 (1885); Clement *v.* Lathrop, 18 Fed. Rep. 885 (1884); Bridgeford *v.* Hall, 18 La. Ann. 211, 218 (1866); Brock Dist. Council *v.* Bowen, 7 U. C. Q. B. 471 (1850). A slight variation in documentary evidence of a national bank's corporate existence which does not go to raise a doubt of the identity is to be disregarded. Thatcher *v.* West River Nat. Bank, 19 Mich. 196 (1869).

2 Precious, etc. Soc. *v.* Elsythe, 102 Tenn. 40 (1899). A deed to a religious corporation is good although the name is not correctly stated in the deed. Church of Christ *v.* Christian Church, 193 Ill. 144 (1901). Although by error land is deeded to a corporation not by its right name

from using its name this is cause for a dissolution, at the instance of the stockholders.[1] Upon dissolution a company may sell its trade name.[2] There have been a great many decisions as to the effect of an error in setting forth the name of a corporation in suits by or against it. The decided tendency of the courts is to ignore such errors, unless attention is called to them at once or unless a criminal liability is involved.[3]

but by a name which another corporation has, yet the latter company does not take title. Clarke *v.* Milligan, 58 Minn. 413 (1894). The omission of part of the corporate name in the assignment of a mortgage by a corporation is immaterial. Chilton *v.* Brooks, 71 Md. 445 (1889). A mistake in writing the name of the corporation in a mortgage is immaterial. Woronieki *v.* Pairskiego, 74 Conn. 224 (1901). But a mortgage indexed as "Scandinavian Congregational Church, Trustees of," is not notice of the actual mortgage given by the "Scandinavian Free Church." Congregational, etc. Soc. *v.* Scandinavian Free Church, 24 Wash. 433 (1901). Even though the name of a corporation is abbreviated as signed to its mortgage and bonds, yet they are legal. William Firth Co. *v.* South Carolina, etc. Co., 122 Fed. Rep. 569 (1903). Even though the signature of a mortgagor corporation to the mortgage and to the bonds leaves off a part of the name, yet this does not invalidate the mortgage and bonds. *In re* Goldville, etc. Co., 118 Fed. Rep. 892 (1902); aff'd, 122 Fed. Rep. 569. A variation will not in general invalidate a deed, grant, or lease by or to a corporation when the true name can be collected from the instrument or is shown by proper averments. 2 Kent, Com. 292; Bacon, Abr., Corporation; Kentucky Seminary *v.* Wallace, 15 B. Mon. (Ky.) 35, 45 (1854); Clarke *v.* Potter County, 1 Pa. St. 159 (1845); Douglass *v.* Mobile Branch Bank, 19 Ala. 659 (1851); Culpeper Agric. etc. Soc. *v.* Digges, 6 Rand. (Va.) 165 (1828); 1 Kyd, Corp. 286, 288; Com. Dig., Pleader, 2 B. 2; Case of Linne Regis, 10 Co. 122*b*, 125*b* (1613); Ayray's Case, 11 Co. 18*b* (1612).

[1] *Re* Thomas, etc. & Sons, Ltd., [1897] 1 Ch. 406.

[2] Townsend *v.* Jarman, [1900] 2 Ch. 698. A publishing corporation in selling its business may sell the use of its name. Lothrop, etc. Co. *v.* Lothrop, etc. Co., 191 Mass. 353 (1906).

[3] Where a corporation is sued by the wrong name it may appear specially and object, but must disclose the facts as to its name. Montello, etc. Co. *v.* Pullman's, etc. Co., 4 Pen. (Del.) 90 (1902). If the defendant is incorrectly named in the process its remedy is a plea in abatement, showing the true name. A changed name under a statute is no defense against an old liability. Wilhite *v.* Convent, etc. 117 Ky. 251 (1904). The omission of the word "The" from the corporate name is immaterial in litigation. Carlson *v.* White Star, etc. Co., 39 Wash. 394 (1905). A published notice giving a corporate name without the word "The" is sufficient, even though that was a part of the name. Clifford *v.* Thun, 104 N. W. Rep. 1052 (Neb. 1905). Adding the word "The" to the corporate name in a pleading is immaterial. Western Bank, etc. Co. *v.* Ogden, 93 S. W. Rep. 1102 (Tex. 1906). Where a foreign and a domestic corporation have nearly the same name and are connected in business, and by mistake the foreign corporation was named when the domestic one was intended to be, and the latter appeared and defended and

The sale of a business of a corporation which does not specific-

did not make known the mistake until the trial, the pleadings may be amended so as to contain the name of the domestic corporation. McCord, etc. Co. *v.* Prichard, 84 S. W. Rep. 388 (Tex. 1904). Where a suit is brought against the "Banking Department of the Citizen's Bank," and the corporate name is "Citizen's Bank of Louisiana," the defendant may deny that it has been served and thus defeat the suit. State *v.* Banking Department, etc., 113 La. 150 (1904). Where a corporation defendant appears and defends without objecting to a misnomer, the same may be corrected by amendment. Sentell *v.* Southern Ry., 67 S. C. 229 (1903). Even though the name of a company is "Home Brewing Company of Grafton," yet a mechanic's lien against "Home Brewing Company" is good. Grafton, etc. Co. *v.* Home Brewing Co., 54 S. E. Rep. 349 (W. Va. 1906). In a pleading the adding to the name of a corporation its supposed location is an immaterial misnomer. Kannow *v.* Farmers', etc. Assoc., 107 N. W. Rep. 563 (Neb. 1906). Where a corporation is incorporated in two states by the same name and with the same officers and incorporators, each state giving the corporation certain riparian rights on a river, a mortgage given by one of the corporations, without stating which one, when foreclosed, must be foreclosed as against both corporations in order to convey complete title. Alabama, etc. Co. *v.* Riverdale, etc. Mills, 127 Fed. Rep. 497 (1904); aff'd, 198 U. S. 188. If the defendant is named with a "The" as a part of its name, when in fact such is not a part of its name, a plea in abatement may be interposed. Lapham *v.* Philadelphia, etc. R. R., 4 Pen. (Del.) 421 (1903). Where several lines of railroad use for convenience the name "Kanawha Dispatch" in handling freight, such Kanawha Dispatch cannot maintain a suit. Kanawha Dispatch *v.* Fish, 219 Ill. 236 (1905). "It is immaterial what name it does its business under. A corporate name is that which is adopted in the articles of incorporation. If the name is changed it must be done by changing the articles of incorporation." Where a corporation sued on an agreement, and alleged a due and legal change of name between the time of the execution and the suit, it was held such change must be proved by the articles and not by testimony of the secretary. Chicago, etc. R. R. *v.* Keisel, 43 Iowa, 39 (1876). "A corporation may sue or be sued only by its corporate name." Iowa Rev., § 1151; Iowa Code, § 1059. Where the name in a *fi. fa.* was different from that by which the corporation was sued and judgment had. Bradford *v.* Water Lot Co., 58 Ga. 280 (1877). *Cf.* Ga. Code, § 3636. Where two insurance corporations in issuing a policy use a name to designate both of them they may be sued under that name. Ferry *v.* Cincinnati Underwriters, 111 Mich. 261 (1896). Alexander *v.* Berney, 28 N. J. Eq. 90 (1877), holding that a corporation, through its retaining the use of its original name after the passage of an amendatory act changing it, regained, so to speak, its original name, and could be sued and be proceeded against in bankruptcy by it. At common law a substantial variance between the name of the party injured as laid in the indictment and as given in evidence was fatal; and it was so held in New York, in a case involving a misnomer of the corporate owner of the property. McGary *v.* People, 45 N. Y. 153 (1871), three judges dissenting; Sykes *v.* People, 132 Ill. 32 (1890). But this rule is modified in some jurisdictions, as by the Penal Code of California, section

ally transfer the trade name and good will does not enable a

956. See People *v.* Potter, 35 Cal. 110 (1868). *Cf.* N. Y. Code Crim. Proc., § 281. *Cf.*, also, People *v.* Runkel, 9 Johns. 147, 156 (1812). A misnomer has been held material where a corporation is required by statute to act for its own benefit, as in collecting assessments for benefit to land from its proposed road. Glass *v.* Tipton, etc. Co., 32 Ind. 376 (1869). A suit brought against the Bell Telephone Company is sustainable though the corporate name is the American Bell Telephone Company. State *v.* Bell Telephone Co., 36 Ohio St. 296 (1880). When the corporate name has once correctly appeared it is generally not necessary that it should be completely stated at every recurrence in a pleading. Antipæda Bapt. Ch. *v.* Mulford, 8 N. J. L. 182 (1825); London *v.* Lynn, 1 H. Bl. 206 (1789); Stafford *v.* Bolton, 1 Bos. & P. 40 (1797); Case of Lynne Regis, 10 Rep. 120 (1613). In an action or special proceeding brought by or against a corporation the defendant is deemed to have waived any mistake in the statement of the corporate name unless the misnomer is pleaded in the answer or other pleading in the defendant's behalf. N. Y. Code Civ. Pro., § 1777. So generally a misnomer is not ground for a nonsuit and must be pleaded in abatement. Whittlesey *v.* Frantz, 74 N. Y. 456 (1878); Bank of Utica *v.* Smalley, 2 Cow. 770 (1824); Methodist Ep. Church *v.* Tryon, 1 Denio, 451 (1845); Lake Superior Bldg. Assoc. *v.* Thompson, 32 Mich. 293 (1875); Northumberland Co. Bank *v.* Eyer, 60 Pa. St. 436 (1869); Wilson *v.* Baker, 52 Iowa, 423 (1879); Medway Cotton Manuf'y *v.* Adams, 10 Mass. 360 (1813); Gilbert *v.* Nantucket Bank, 5 Mass. 97 (1809); State *v.* Bell Telephone Co., 36 Ohio St. 296 (1880); Sunapee *v.* Rastman, 32 N. H. 470 (1855); Burnham *v.* Strafford Co. Sav. Bank, 5 N. H. 446 (1831); School District *v.* Griner, 8 Kan. 224 (1871). Misnomer is pleadable in abatement, but not in bar. Baltimore, etc. R. R. *v.* Fifth Bapt. Church, 137 U. S. 568 (1891). Proceedings for perpetuating testimony are not admissible when only the letters "C., B. & Q. R. R. Co." are used to designate defendant. Accola *v.* Chicago, etc. Ry., 70 Iowa, 185 (1886). *Cf.* Martin *v.* Central Iowa Ry., 59 Iowa, 411 (1882); Stone *v.* East Berkshire Cong. Soc., 14 Vt. 86 (1842); Souhegan, etc. Factory *v.* McConihe, 7 N. H. 309 (1834); Bank of Metropolis *v.* Orme, 3 Gill (Md.) 443 (1845); Gray *v.* Monongahela Nav. Co., 2 Watts & S. (Pa.) 156 (1841); Stafford *v.* Bolton, 1 Bos. & P. 40 (1797); Beene *v.* Cahawba, etc. R. R., 3 Ala. (N. S.) 660 (1842); Lafayette Ins. Co. *v.* French, 18 How. 405 (1855). *Cf.* Brittain *v.* Newland, 2 Dev. & B. (N. C.) L. 363 (1837); Traver *v.* Eighth Ave. R. R., 4 Abb. Dec. 422 (1867); Mauney *v.* High Shoals Mfg. Co., 4 Ired. Eq. (N. C.) 195 (1845). A mistake in setting out the name of a corporation party in a pleading may be corrected by amendment. Smith *v.* Central Plank-road Co., 30 Ala. 659, 662 (1857); Bullard *v.* Nantucket Bank, 5 Mass. 99 (1809); Sherman *v.* Connecticut River Bridge, 11 Mass. 338 (1814); Brittain *v.* Newland, 2 Dev. & B. (N. C.) L. 363 (1837). Or if manifestly immaterial no objection will be allowed. Baltimore Marine Bank *v.* Biays, 4 Har. & J. (Md.) 338 (1818). And judgment will not be arrested. Coulter *v.* Western Theol. Seminary, 29 Md. 69 (1868). Where a corporate name is established it is usually held that suits must be brought and defended in such name. Romeo *v.* Chapman, 2 Mich. 179 (1851). In the case of a misnomer in a devise the courts are very liberal in permitting the identity of

purchaser of the business from the corporation to claim such trade name.[1]

the corporation to be otherwise shown. Deaf and Dumb. Inst. *v.* Norwood, Busb. (N. C.) Eq. 65 (1852); First Parish in Sutton *v.* Cole, 20 Mass. 232 (1825); Minot *v.* Boston Asylum, 48 Mass. 416 (1844); St. Louis Hospital Assoc. *v.* Williams, 19 Mo. 609 (1854); Preachers' Aid Soc. *v.* Rich, 45 Me. 552 (1858); Vansant *v.* Roberts, 3 Md. 119 (1852); New York Inst. for Blind *v.* How, 10 N. Y. 84 (1854); Domestic, etc. Soc.'s Appeal, 30 Pa. St. 425 (1858); Cresson's Appeal, 30 Pa. St. 437 (1858); Newell's Appeal, 24 Pa. St. 197 (1855); Chapin *v.* Winchester School Dist., 35 N. H. 445 (1857); Button *v.* American Tract Soc., 23 Vt. 336 (1851); Hornbeck *v.* American Bible Soc., 2 Sandf. Ch. 133 (1844); Attorney-General *v.* Rye, 7 Taunt. 546 (1817); General Lying-in Hospital *v.* Knight, 21 L. J. Ch. 537 (1851); *Re* Kilvert's Trusts, L. R. 7 Ch. App. 170 (1871); Jarman, Wills, 326. Where a corporation voluntarily appears under a wrong name it becomes a party in such name and may not object to a decree for want of process against it. Virginia, etc. Nav. Co. *v.* United States, Taney, 418 (1840): s. c., 28 Fed. Cas. 1229; State *v.* Bell Teleph. Co., 36 Ohio St. 296 (1880); School District *v.* Griner, 8 Kan. 224 (1871). So, in general, whenever, for any purpose, a corporation is described, a slight variance will not be held material. Burdine *v.* Grand Lodge, 37 Ala. 478 (1861); Souhegan, etc. Factory *v.* McConihe, 7 N. H. 309 (1834). In the case of a misnomer in a notice required by statute to be given as a condition precedent to an action where there was no possibility of anybody being misled, Pollock, C. B., said: "For the credit of Westminster Hall we ought to refuse this rule." Eastham *v.* Blackburn Ry., 23 L. J. Exch. 199 (1854). See also Bruce County *v.* Cromar, 22 L. J. Exch. 321, 327 (1863); Trent, etc. Co. *v.* Marshall, 10 U. C. C. P. 329, 336 (1861); Hawkins *v.* Municipal Council, etc., 2 U. C. C. P. 72, 121 (1852); Whitby *v.* Harrison, 18 U. C. Q. B. 603 (1859); Croydon Hospital *v.* Farley, 6 Taunt. 467 (1816); Doe *v.* Miller, 1 B. & Ald. 699 (1818); Hagerstown Turnp. Co. *v.* Creeger, 5 Har. & J. (Md.) 122 (1820); Hoboken Bldg. Assoc. *v.* Martin, 13 N. J. Eq. 427 (1861); Upper Alloways Creek *v.* String, 10 N. J. L. 323 (1829); Woolwick *v.* Forest, 2 N. J. L. 115 (1806); Middleton *v.* McCormick, 3 N. J. L. (3d ed.) 92 (1809); Granville Charitable Assoc. *v.* Baldwin, 42 Mass. 359 (1840); Lowell *v.* Morse, 42 Mass. 473 (1840); Shawmut Sugar Co. *v.* Hampden Mut. Ins. Co., 78 Mass. 540 (1859); Levant Trustees *v.* Parks, 10 Me. 441 (1833); Newport Mechanics' Mfg. Co. *v.* Starbird, 10 N. H. 123 (1839); Society for Propagating Gospel *v.* Young, 2 N. H. 310 (1820); Delaware, etc. R. R. *v.* Irick, 23 N. J. L. 321 (1852). A misnomer of a corporation defendant can be raised by a plea in abatement only. Gillespie *v.* Planters', etc. Co., 76 Miss. 406 (1899).

[1] Cutter *v.* Gudebrod, etc. Co., 44 N. Y. App. Div. 605 (1899); aff'd, 168 N. Y. 512. Where a company is in difficulties and an agreement is made by which creditors are given the right to sell all the assets in case the business does not succeed within a certain time, and they do so, the purchaser has no right to organize a corporation having the same name as the old corporation, unless that was a part of the original agreement, and not even a majority of the stockholders have a right to vote to allow such use of the name, unless there is a new consideration therefor. Armington *v.* Palmer, 21 R. I. 109 (1898).

A corporation may take the name of a partnership which it buys out.[1] Where, on a judicial sale, the name and good will is included in the sale, the reorganized company may protect such name by injunction.[2]

§ 15a. *Statutes which apply to "persons" are generally construed to apply to corporations.*—The word "person" includes a corporation, when it is clear that such was the legislative intent.[3] Thus, a statute authorizing persons to obtain a discharge from their debts upon going through certain insolvency proceedings applies to a corporation, and it may obtain such a discharge.[4] A statute prohibiting "persons" from engaging in banking applies not only to natural persons but also to corporations.[5] A corporation is subject to a statute which prescribes that a "person" shall be subject to a penalty;[6] or that the United States shall be a preferred creditor;[7] or that all "inhabitants" or "residents" shall pay taxes;[8] or that testimony shall be admitted as against certain "persons;"[9] or that "persons" may do certain acts in regard to promissory notes;[10] or shall be guilty of a misdemeanor;[11] or that a local court

Even though a company having the name of "Sabiston Lithographic and Publishing Company" sells out its business and good will to another company, yet the latter cannot prevent a brother of the managing director of the former doing business under the name "Sabiston Lithographing and Publishing Company," it not appearing that he held himself out as the successor of the old company. Montreal, etc. Co. *v.* Sabiston, [1899] A. C. 610. *Cf.* 208 U. S. 267.

1 Bristol, etc. Trust Co. *v.* Jonesboro, etc. Trust Co., 101 Tenn. 545 (1898).

2 Peck Brothers, etc. Co. *v.* Peck Bros. Co., 113 Fed. Rep. 291 (1902).

3 State *v.* Portage City, etc. Co., 107 Wis. 441 (1900).

4 Barth *v.* Backus, 140 N. Y. 230 (1893).

5 People *v.* Utica Ins. Co., 15 Johns. 358 (1818). A corporation may be a "person" within the meaning of the words of a statute. Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42 (1891). A statute authorizing tax commissioners to reduce an assessment, and to extend the time for applying therefor in case of illness, etc., applies to corporations, and, if the officers are absent or ill, the corporation is entitled to further time. People *v.* Barker, 140 N. Y. 437 (1893).

6 U. S. *v.* Amedy, 11 Wheat. 392 (1826). *Contra*, Androscoggin, etc. Co. *v.* Bethel, etc. Co., 64 Me. 441 (1874); Cumberland, etc. Corp. *v.* Portland, 56 Me. 77 (1868).

7 Beaston *v.* Farmers' Bank, 12 Pet. 102 (1838). *Contra*, Commonwealth *v.* Phœnix Bank, 52 Mass. 129 (1846).

8 Bank of U. S. *v.* Deveaux, 5 Cranch, 61 (1809); Rex *v.* Gardner, Cowp. 79 (1774); Otis Co. *v.* Ware, 74 Mass. 509 (1857); International, etc. Soc. *v.* Com'rs, 28 Barb. 318 (1858); Baldwin *v.* Ministerial Fund, 37 Me. 369 (1854); Cortis *v.* Kent Water Works, 7 B. & C. 314 (1827). *Contra*, Hartford F. Ins. Co. *v.* Hartford, 3 Conn. 15 (1819).

9 La Farge *v.* Exchange F. Ins. Co., 22 N. Y. 352 (1860).

10 State *v.* Woram, 6 Hill, 33 (1843).

11 White *v.* State, 69 Ind. 273 (1879). A statute that any "person" employing a child under fourteen

shall have jurisdiction;[1] or that property may be attached;[2] or that "persons" shall be liable for damages for injuries which result in death;[3] or in case of injury by a dam;[4] or a statute which allows "owners" of vessels to obtain a registry;[5] or gives a mechanic's lien to "persons;"[6] or that renders persons liable for misrepresenting the responsibility of another party.[7] A trust company is not a bank within the meaning of a criminal statute.[8] Stockholders are liable for taxes levied on a distillery, where the statute levies the tax on "persons interested in the use of the distillery."[9] A corporation may take out an original copyright.[10] In New York, by statute, "the term person includes a corporation and a joint-stock association."[11] A foreign corporation is a "person" outside of the state as regards the statute of limitations.[12] But a foreign corporation is not a "resident" within the chattel mortgage act;[13] nor is a domestic corporation a "resident taxpayer," so as to be counted in voting

years of age shall be guilty of a misdemeanor applies to a corporation. Overland, etc. Co. *v.* People, 32 Colo. 263 (1904).

1 Brown *v.* Mayor, etc., 66 N. Y. 385 (1876); Bristol *v.* Chicago, etc. R. R., 15 Ill. 436 (1854); Bank of North America *v.* Chicago, etc. R. R., 82 Ill. 493 (1876); Eslava *v.* Ames Plow Co., 47 Ala. 384 (1872).

2 Knox *v.* Protection Ins. Co., 9 Conn. 430 (1833); Mineral Point R. R. *v.* Keep, 22 Ill. 9 (1859); Trenton Bkg. Co. *v.* Haverstick, 11 N. J. L. 171 (1829); Bushel *v.* Commonwealth Ins. Co., 15 Serg. & R. (Pa.) 173 (1827); Planters', etc. Bank *v.* Andrews, 17 Ala. (O. S.) 404 (1838). Or garnished. Brauser *v.* New England, etc. Ins. Co., 21 Wis. 506 (1867).

3 Southwestern R. R. *v.* Paulk, 24 Ga. 356 (1858).

4 Lehigh Bridge *v.* Lehigh Coal & Nav. Co., 4 Rawle (Pa.), 8 (1833).

5 Regina *v.* Arnaud, 9 Q. B. 806 (1846).

6 Chapman *v.* Brewer, 43 Neb. 890 (1895). A statutory lien given to any "person" for work done may be availed of by a corporation doing work for another corporation. Wetzel, etc. Ry. *v.* Tennis Bros. Co., 145 Fed. Rep. 458 (1906).

7 Hirst *v.* West, etc. Co., [1901] 2 K. B. 560.

8 State *v.* Reid, 125 Mo. 43 (1894).

9 U. S. *v.* Wolters, 46 Fed. Rep. 509 (1891); U. S. *v.* Distillery, 43 Fed. Rep. 846 (1890). Where the law permits punishment or confiscation of property, but not both, the conviction of a stockholder for violation of the internal revenue law prevents a confiscation of the corporation property. U. S. *v.* Distillery, 43 Fed. Rep. 846 (1890).

10 Schumacher *v.* Schwencke, 25 Fed. Rep. 466 (1885); Mutual Advertising Co. *v.* Refo, 76 Fed. Rep. 961 (1896); R. S. of U. S., § 4952.

11 New York Stat. Construction Law, § 5.

12 Olcott *v.* Tioga R. R., 20 N. Y. 210 (1859); Blossburg, etc. R. R. *v.* Tioga R. R., 5 Blatchf. 387 (1867); s. c., 3 Fed. Cas. 735; s. c., 20 Wall. 137. *Contra*, Connecticut, etc. Ins. Co. *v.* Duerson, 28 Gratt. (Va.) 630 (1877), where it had an agent in the state to accept service.

13 Cook *v.* Hager, 3 Colo. 386 (1877).

municipal aid to railroads;[1] nor is a state a person, and as such entitled to take by devise.[2] A preference to laborers does not include a corporation, especially where the latter's claim is for printing and binding books.[3] A corporation is not a "citizen" within the meaning of the federal constitution;[4] but is a "person" within the meaning of the fourteenth amendment.[5] Although a state cannot give a preference to its own citizens as against citizens of another state in the distribution of the assets of an insolvent corporation, yet as against corporations of other states such preference may be given.[6]

§ 15*b*. *Torts committed by corporations—Exemplary damages—Indictment.*—After much discussion the general rule is now firmly established that corporations cannot make defense to actions in tort by claiming that the acts by which the wrongs have been committed are not within the corporate powers conferred upon them.[7] A corporation is liable at common law for torts committed

1 People *v.* Schoonmaker, 63 Barb. 44 (1871). *Cf.* Crafford *v.* Warwick County, 87 Va. 110.

2 *Re* Fox, 52 N. Y. 530 (1873); U. S. *v.* Fox, 94 U. S. 315 (1876).

3 *In re* Barr-Dinwiddie, etc. Co., 42 Atl. Rep. 575 (N. J. 1899).

4 See § 697, *infra*. *Cf.* McKinley *v.* Wheeler, 130 U. S. 630 (1889); Thomas *v.* Chisholm, 13 Colo. 105 (1889). A corporation is not a citizen within the meaning of the fourteenth amendment to the Constitution of the United States prohibiting any law which abridges the privileges or immunities of citizens, and hence a statute in regard to insurance corporations is not affected by that amendment. Ætna Ins. Co. *v.* Brigham, 120 Ga. 925 (1904).

5 San Mateo County *v.* Southern Pacific R. R., 13 Fed. Rep. 722 (1882).

6 Blake *v.* McClung, 172 U. S. 239 (1898).

7 National Bank *v.* Graham, 100 U. S. 699, 702 (1879), where a bank was held in damages for the loss, occasioned by the gross negligence of its agents, of a special deposit which it had received with the knowledge and acquiescence of its officers and directors; Baltimore, etc. R. R. *v.* Fifth Baptist Church, 108 U. S. 317 (1882), for maintaining a nuisance; Philadelphia, etc. R. R. *v.* Quigley, 21 How. 202, 210 (1858), for libel published by the board of directors, Campbell, J., saying: "For acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances." This rule was directly affirmed and applied to a municipal corporation in Salt Lake City *v.* Hollister, 118 U. S. 256 (1886). See New York, etc. R. R. *v.* Schuyler, 34 N. Y. 30 (1865); State *v.* Morris, etc. R. R. 23 N. J. L. 360, 367 (1852), and cases cited; Brokaw *v.* New Jersey R. R. & T. Co., 32 N. J. L. 328 (1867), an action for assault and battery (ejecting a passenger); Ramsden *v.* Boston, etc. R. R., 104 Mass. 117 (1870), assault and battery (seizing property for fare); Peebles *v.* Patapsco Guano Co., 77 N. C. 233 (1877); a case of deceit and fraudulent representations made by agents; Chicago, etc. R. R. *v.* Davis, 86 Ill. 20 (1877), trespass, see *infra;* Vinas *v.* Merchants' Mut. Ins. Co., 27 La. Ann. 367 (1875), slander and libel sanc-

by its servants or agents precisely as a natural person would be,[1] excepting in some instances a charitable corporation.[2] Thus where

tioned by a corporation; Goodspeed *v.* East Haddam Bank, 22 Conn. 530 (1853), vexatious suit; South, etc. R. R. *v.* Chappell, 61 Ala. 527 (1878), injury to person; Hays *v.* Houston, etc. R. R., 46 Tex. 272 (1876), expulsion from train; Fishkill Sav. Inst. *v.* Fishkill Nat. Bank, 80 N. Y. 162 (1880), conversion of bonds by cashier; Ranger *v.* Great Western Ry. Co., 5 H. L. Cas. 72, 86 (1854); Lewis *v.* Meier, 14 Fed. Rep. 311 (1882); Philadelphia, etc. R. R. *v.* Derby, 14 How. 468 (1852), injury to person in a collision caused by the negligence of employees; Hussey *v.* Norfolk, etc. R. R., 98 N. C. 34 (1887), malicious prosecution and false imprisonment, the court saying: "These artificial persons have become so numerous and entered so largely into the every-day transactions of life, that it has become the policy of the law to subject them, as far as practicable, to the same civil liability for wrongful acts as attach to natural persons;" Denver, etc. Ry. *v.* Harris, 122 U. S. 597 (1887), assault and battery; New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637 (1887), undue violence by employee; New Orleans, etc. R. R. *v.* Bailey, 40 Miss. 395 (1866). A railroad which has engaged in transporting passengers by a steamboat cannot defeat an action for negligence by asserting that the use of the steamboat by it was *ultra vires*. Gruber *v.* Washington, etc. R. R., 92 N. C. 1 (1885); South Wales Ry. *v.* Redmond, 10 C. B. (N. S.) 675 (1861). *Contra*, Gunn *v.* Central R. R., 74 Ga. 509 (1885), where a railroad was held *not* responsible for a tort (an injury to the person) committed by a firm in which it had become, although illegally, a *partner*. A bank which as pledgee causes by its statements a party to purchase the stock held in pledge may be held liable in damages if such statements were false. Hindman *v.* First Nat. Bank, etc., 98 Fed. Rep. 562 (1899). Where a national bank and two of the directors of a corporation are secretly interested in the profit made by selling property to a corporation for stock, the corporation may hold them liable for such profit. The defense of *ultra vires* on the part of the bank is not good. Zinc, etc. Co. *v.* First, etc. Bank, 103 Wis. 125 (1899). A corporation may be held liable for false representations in a prospectus issued by it to sell stock of another corporation. Such a cause of action is assignable. Benedict *v.* Guardian T. Co., 58 N. Y. App. Div. 302 (1901). A bank is not chargeable with the acts of its cashier who is the agent of another party and as such agent transfers the funds of that party into his own name. School District, etc. *v.* De Weese, 100 Fed. Rep. 705 (1900). An incorporated society which gives a ball is not liable for the act of its floor manager in ejecting a person from the room. Maisenbacker *v.* Society, etc., 71 Conn. 369 (1899).

1 Southern, etc. Co. *v.* Platten, 93 Fed. Rep. 936 (1899). A street railway may be liable for the death of a person who was killed by a shot fired by one of its conductors, even though he was shooting at another person. Savannah, etc. Co. *v.* Wheeler, 58 S. E. Rep. 38 (Ga. 1907).

2 A charitable corporation is not liable for the negligence of its servants unless it was negligent in selecting them. Gittzhoffen *v.* Sisters, etc. Assoc., 88 Pac. Rep. 691 (Utah 1907). Even though a corporation created by Congress for a home for disabled soldiers may be sued on a contract, yet this does not authorize a suit against it for a tort. Overholser *v.* National Home, etc., 68 Ohio St. 236 (1903). A hospital run by a stock corporation

the president of a bank is acting as the agent of a person and sells to the latter securities of the bank by means of false representations, the bank is liable, even though the purchaser did not know that the sale was in behalf of the bank.[1]

Even where it is necessary to prove a fraudulent or malicious intent, it is held, by the great weight of modern authority, that the fraud or malice of the authorized agents of a corporation may be imputed to the corporation itself.[2]

Although a corporation may not strictly be guilty of deceit, yet it is held liable for damages resulting from the false and fraudulent representations of its agents.[3]

is liable for negligence in the treatment of its patients. Hogan *v.* Clarksburg, etc., 59 S. E. Rep. 943 (W. Va. 1907).

1 Carr *v.* National Bank & L. Co., 167 N. Y. 375 (1901).

2 National Exch. Co. *v.* Drew, 2 Macq. H. L. Cas. 103 (1855); New Brunswick, etc. Ry. *v.* Conybeare, 9 H. L. Cas. 711, 740 (1862); Barwick *v.* English Joint Stock Bank, L. R. 2 Exch. 259 (1867); Philadelphia, etc. R. R. *v.* Quigley, 21 How. 202 (1858); Whitfield *v.* Southeastern Ry. El. B. & E. 115 (1858); Vance *v.* Erie Ry., 32 N. J. L. 334 (1867); Copley *v.* Grover, etc. Co., 2 Woods, 494 (1875); s. c., 6 Fed. Cas. 517; Goodspeed *v.* East Haddam Bank, 22 Conn. 530 (1853); Carter *v.* Howe Machine Co., 51 Md. 290 (1878); Wheless *v.* Second Nat. Bank, 1 Baxt. (Tenn.) 469 (1872); Williams *v.* Planters' Ins. Co., 57 Miss. 759 (1880); Iron Mountain Bank *v.* Mercantile Bank, 4 Mo. App. 505 (1877); Edwards *v.* Midland Ry., L. R. 6 Q. B. D. 287 (1880); Jeffersonville R. R. *v.* Rogers, 28 Ind. 1, 7 (1867); s. c., 38 Ind. 116. *Cf.* Walker *v.* Southeastern Ry., L. R. 5 C. P. 640 (1870); Smith *v.* Southeastern Ry., L. R. 5 C. P. 640 (1870).

3 Mackay *v.* Commercial Bank, L. R. 5 P. C. 394 (1874), in which a bank was held liable in damages for the act of its cashier in sending a telegram purporting to be from an individual by means of which other parties were induced to accept bills of exchange in which the bank was interested; Ranger *v.* Great Western Ry., 5 H. L. Cas. 72, 86 (1854), Lord Chancellor Cranworth saying: "If the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation;" Barwick *v.* English Joint Stock Bank, L. R. 2 Exch. 259 (1867), where a bank was held liable for false representations of its manager as to the credit of an individual; Erie City Iron Works *v.* Barber, 106 Pa. St. 125 (1884), where a manufacturing company was held in damages for the deceit of its agent in knowingly selling a defective boiler and representing it as sound and safe; Peebles *v.* Patapsco Guano Co., 77 N. C. 233 (1877), involving representations of an agent that a spurious article was genuine; Cragie *v.* Hadley, 99 N. Y. 131 (1885), where, an officer of a bank receiving a deposit after he knew the bank was insolvent and its paper protested, it was held to be a deceit which justified a rescission of the contract and a recovery of the deposit; New York, etc. R. R. *v.* Schuyler, 34 N. Y. 30 (1865), involving an issue of false certificates of stock; Butler *v.* Watkins, 13 Wall.

A corporation may be held liable in damages for a libel;[1] or

456 (1871), where an agent of a corporation, by pretending to negotiate for the purchase of a patent, succeeded in keeping the patented article out of the market. The corporation was held liable in damages; Candy *v.* Globe Rubber Co., 37 N. J. Eq. 175 (1883), where a sale to a corporation made upon false representations of its officers as to its solvency and prosperity was rescinded; Fogg *v.* Griffin, 84 Mass. 1 (1861), where, in an action upon premium notes, a defense that they had been procured through false and fraudulent representations by an agent of the company as to the amount of capital stock paid in was held good. See also Etting *v.* Bank of U. S., 11 Wheat. 59 (1826); Lamm *v.* Port Deposit Homestead Assoc., 49 Md. 233 (1878); Carter *v.* Howe Machine Co., 51 Md. 290 (1878); Western Bank *v.* Addie, L. R. 1 Sc. (H. L.) 145 (1867), and §§ 139, 140, 157, *infra*.

[1] Philadelphia, etc. R. R. *v.* Quigley, 21 How. 202 (1858), where the court held that the publication of a libelous letter received in evidence by a committee of investigation in a bound volume of its transactions, by authority of the board of directors of a railroad company, constituted a sufficient ground for an action for libel against the corporation; Van Aernam *v.* Bleistein, 102 N. Y. 355 (1886); Howe Machine Co. *v.* Souder, 58 Ga. 64 (1877), where the publication of libelous matter was caused by an agent within the scope of his authority; Maynard *v.* Fireman's, etc. Co., 34 Cal. 49 (1867); s. c., 47 Cal. 207 (1873); Johnson *v.* St. Louis Dispatch Co., 2 Mo. App. 565 (1876); Fogg *v.* Boston, etc. R. R., 148 Mass. 513 (1889); Van Aernam *v.* Bleistein, 102 N. Y. 355 (1886), holding that a joint-stock association under the New York statute is liable to an action for libel; Payne *v.* Western, etc. R. R., 13 Lea (Tenn.), 507 (1884); Evening Journal Assoc. *v.* McDermott, 44 N. J. L. 430 (1882); Detroit Daily Post Co. *v.* McArthur, 16 Mich. 447 (1868); Aldrich *v.* Press Printing Co., 9 Minn. 133 (1864); Hewett *v.* Pioneer-Press Co., 23 Minn. 178 (1876); Vinas *v.* Merchants' Mut. Ins. Co., 27 La. Ann. 367 (1875); Whitfield *v.* Southeastern Ry., El., B. & E. 115 (1858); Tench *v.* Great Western Ry., 32 U. C. Q. B. 452 (1872). A corporation may be held liable in a suit for libel. Sun, etc. Co. *v.* Bailey, 101 Va. 443 (1903). An insurance company may be liable for a libel published by one of its officers, acting within the scope and in the course of his employment. Citizens', etc. Co. Ltd. *v.* Brown, [1904] A. C. 423. The president of a newspaper corporation is not personally liable in damages for a libel published in the newspaper, even though he was editor in chief and the principal stockholder, it appearing that he had no personal knowledge of the publication before it was made. Folwell *v.* Miller, 145 Fed. Rep. 495 (1906). A corporation is not liable for the malice of its agent for publishing a libel unless the corporation authorized the libel or ratified it or did something from which such authority or ratification may be implied. Warner *v.* Missouri, etc. Ry., 112 Fed. Rep. 114 (1901). An allegel libel is not proved by showing that the manager of a corporation dictated to a stenographer the alleged libelous matter, even though the stenographer wrote it out and mailed it. This is not sufficient to prove publication. Owen *v.* Ogilvie, etc. Co., 32 N. Y. App. Div. 465 (1898). A newspaper corporation may be liable for exemplary damages in an action of libel by its agents acting within the scope of their duty and authority. Times, etc. Co. *v.*

for slander[1] (and may maintain a suit for damages for libel or slander);[2] for assault and battery committed by its officers, agents or servants in executing the rules and regulations or orders of the corporation;[3] for damages for arrest and false imprison-

Carlisle, 94 Fed. Rep. 762 (1899). A railroad may be held liable for a libel by its division agent in reporting causes of discharge of employees to other agents. Bacon *v.* Michigan Cent. R. R., 66 Mich. 166 (1887). A corporation was held liable for a libel in Missouri Pac. Ry. *v.* Richmond, 73 Tex. 568 (1889).

1 Sawyer *v.* Norfolk, etc. R. R., 142 N. C. 1 (1906). A corporation may be sued for slander. Empire, etc. Co. *v.* De Laval, etc. Co., 67 Atl. Rep. 711 (N. J. 1907). A railroad company is liable for a slander by one of its employees in regard to another employee made in the performance of duties, even though the corporation knew nothing about it. Rivers *v.* Yazoo, etc. R. R., 43 S. Rep. 471 (Miss. 1907). A corporation is not liable for slander on the part of its agent in settling with a sub-agent. Redditt *v.* Singer, etc. Co., 124 N. C. 100 (1899). A corporation formed to furnish private watchmen cannot maintain an action for slander against a person who states that one of its employees has been guilty of a crime, inasmuch as this is not in direct relation to the business of the corporation. Brayton *v.* Cleveland, etc. Co., 63 Ohio St. 83 (1900). A corporation is not liable for a slander by its president as to the right of a person to sell goods. Perkins *v.* Maysville, etc. Assoc., 10 S. W. Rep. 659 (Ky. 1889).

2 A corporation may sue for libel. Pennsylvania, etc. Co. *v.* Voght, etc. Co., 96 S. W. Rep. 551 (Ky. 1906). A corporation may sue for libel injuring its business or property. Reporters' Assoc. *v.* Sun, etc. Assoc., 186 N. Y. 437 (1906). A corporation may maintain a suit for slander or libel. Gross Coal Co. *v.* Rose, 126 Wis. 24 (1905). A corporation cannot maintain a libel suit based on charges that its promotors had issued watered stock and intended to unload on to the public, there being no allegation of special damages and the language referred only to the promotors. Memphis, etc. Co. *v.* Cumberland, etc. Co., 145 Fed. Rep. 904 (1906). A corporation may bring suit for libel. South Hetton Coal Co. *v.* Northeastern News Assoc., [1894] 1 Q. B. 133.

3 Brokaw *v.* New Jersey R. R. & T. Co., 32 N. J. L. 328 (1867), for ejecting a passenger from a train, and in such action an individual may be joined as a defendant with the corporation; Hewett *v.* Swift, 85 Mass. 420 (1862), for using undue force in removing a minor from a freight depot under an order of the president directing employees to keep boys out of the depot; Denver, etc. Ry. *v.* Harris, 122 U. S. 597 (1887), where forcible possession was taken of a railroad; Ramsden *v.* Boston, etc. R. R., 104 Mass. 117 (1870), involving an assault by a conductor in seizing property to secure payment of fare. And see Frost *v.* Domestic S. M. Co., 133 Mass. 563 (1882); Jackson *v.* Second Ave. R. R., 47 N. Y. 274 (1872), holding that if an illegal fare be demanded by a conductor *any* force used in ejecting a passenger renders the railway company liable for an assault and battery; Pennsylvania R. R. *v.* Vandiver, 42 Pa. St. 365 (1862), for ejecting a passenger and thereby causing his death; Moore *v.* Fitchburg R. R., 70 Mass. 465 (1855), where, in an action for assault in ejecting from a train, there being a verdict against the corporation but in favor of the conductor, the joinder of the defendants was held not to be a ground of exception by the cor-

ment;[1] knowingly keeping a dangerous animal;[2] a vexatious civil suit;[3] for trespass *quare clausum fregit*;[4] for malicious prosecution;[5]

poration; Chicago, etc. R. R. *v.* Williams, 55 Ill. 185 (1870), for preventing a colored woman from entering a car set apart for ladies; Jeffersonville R. R. *v.* Rogers, 28 Ind. 1 (1867); s. c., 38 Ind. 116; St. Louis, etc. R. R. *v.* Dalby, 19 Ill. 353 (1857), holding that in Illinois the proper remedy is trespass.

1 Owsley *v.* Montgomery, etc. R. R., 37 Ala. 560 (1861); Wheeler, etc. Co. *v.* Boyce, 36 Kan. 350 (1887); American Exp. Co. *v.* Patterson, 73 Ind. 430 (1881); Lynch *v.* Metropolitan El. Ry., 90 N. Y. 77 (1882); Carter *v.* Howe Machine Co., 51 Md. 290 (1878). Where a street railway conductor assaults and arrests a passenger, the company may be liable for false imprisonment. Conklin *v.* Consolidated Ry., 82 N. E. Rep. 23 (Mass. 1907). A corporation carrying on a department store may be liable for punitive damages for the acts of its chief executive officers in illegally arresting an employee. Bingham *v.* Lipman, etc. Co., 40 Oreg. 363 (1901). Where the president and manager and attorney of the company illegally cause the arrest of an employee for embezzling corporate funds, the corporation may be held liable for malicious prosecution. Schwarting *v.* Van Wie, etc. Co., 69 N. Y. App. Div. 282 (1902). See also Hussey *v.* Norfolk Southern R. R., 98 N. C. 34 (1887), in which the question of agency was left to the jury. A corporation is not liable for an arrest by a special policeman appointed by the governor at its request and for its protection, even though the arrest was made at the request of an officer of the company, the policeman acting merely in the exercise of his common-law powers as an officer, and not as a duly authorized agent of the company. Tolchester, etc. Co. *v.* Steinmeier, 72 Md. 313 (1890). A corporation is not necessarily liable for a false imprisonment instigated by its state agent, where the plaintiff fails to show the agency, and the agent testifies that he acted individually. Travis *v.* Standard, etc. Ins. Co., 86 Mich. 288 (1891). See also Gillett *v.* Missouri Valley R. R., 55 Mo. 315 (1874), overruled in Boogher *v.* Life Assoc., 75 Mo. 319 (1882). Although the gate-keeper of a turnpike company causes a person to be arrested for defrauding the company of tolls, yet the company cannot be held liable for false imprisonment. Baltimore, etc. T. Road *v.* Green, 86 Md. 161 (1897). A bank may be held liable in damages for malicious intent in arresting an alderman who had introduced a privileged resolution which the bank claimed was libelous. Wachsmuth *v.* Merchants' Nat. Bank, 96 Mich. 426 (1893).

2 Stiles *v.* Cardiff Steam Nav. Co., 33 L. J. Q. B. 310 (1864); but in this case the action failed for want of proof that the dangerous character of the animal was known to any one whose knowledge could, in point of law, be that of the corporation.

3 Goodspeed *v.* East Haddam Bank, 22 Conn. 530 (1853); Wheless *v.* Second Nat. Bank, 1 Baxt. (Tenn.) 469 (1872). See 8 Ry. & Corp. L. J. 478.

4 Maund *v.* Monmouthshire Canal Co., 4 Man. & G. 452 (1842), where the trespass consisted in breaking and entering canal locks and carrying away barges by an agent acting within the scope of his authority. Chicago, etc. R. R. *v.* Davis, 86 Ill. 20 (1870); Dater *v.* Troy, etc. R. R., 2 Hill, 629 (1842).

5 Willard *v.* Holmes, etc., 142 N. Y. 492 (1894); Vance *v.* Erie Ry., 32 N. J. L. 334 (1867); Reed *v.* Home Sav. Bank, 130 Mass. 443 (1881); Ricord *v.* Central Pacific R. R., 15 Nev. 167 (1880), holding that prose-

for a nuisance;[1] for conversion;[2] and for a conspiracy.[3] A corpora-

cution of criminal offenders is one of the privileges of railroad corporations, and therefore they are liable for malicious prosecutions; Morton *v.* Metropolitan L. Ins. Co., 34 Hun, 366 (1884); Jordan *v.* Alabama, etc. R. R., 74 Ala. 85 (1883), overruling Owsley *v.* Montgomery, etc. R. R., 37 Ala. 560 (1861); Boogher *v.* Life Assoc. of America, 75 Mo. 319 (1882), overruling Gillett *v.* Missouri V. R. R., 55 Mo. 315 (1874); Copley *v.* Grover, etc. Co., 2 Woods, 494 (1875); s. c., 6 Fed. Cas. 517; Carter *v.* Howe Machine Co., 51 Md. 290 (1878); Williams *v.* Planters' Ins. Co., 57 Miss. 759 (1880); Iron Mountain Bank *v.* Mercantile Bank, 4 Mo. App. 505 (1877). See also Brennan *v.* Tracy, 2 Mo. App. 540 (1876); Wheless *v.* Second Nat. Bank, 1 Baxt. (Tenn.) 469 (1872); Philadelphia, etc. R. R. *v.* Quigley, 21 How. 202 (1858). A corporation may be sued for malicious prosecution in that it caused a person to be indicted. Feighner *v.* Delaney, 21 Ind. App. 36 (1898). A foreign corporation may be held liable for malicious prosecution for larceny. Cascarella *v.* National Grocer Co., 114 N. W. Rep. 857 (Mich. 1908). A corporation may be liable for a malicious prosecution instituted by its superintendent, and the fact that the attorney for the corporation conducted the proceedings, and that the superintendent had no personal interest therein, and that the costs were not paid by him, is evidence that the corporation instituted the proceedings. Reed *v.* Loosemore, 197 Pa. St. 261 (1900). An action lies against a corporation for malicious prosecution. Cornford *v.* Carlton Bank, [1900] 1 Q. B. 22, aff'g [1899] 1 Q. B. 392. In the English case of Stevens *v.* Midland Counties Ry., 10 Exch. 352 (1854), where the power to sue a corporation for malicious prosecution was questioned, Lord Alderson was of opinion that there was no such power. See Walker *v.* Southeastern Ry., L. R. 5 C. P. 640 (1870), where it was held that the action would not lie because the act out of which the case originated was not within the scope of the authority of the servant who committed it. And in Henderson *v.* Midland Ry., 20 W. R. 23 (1871), and Abrath *v.* Northeastern Ry., L. R. 11 App. Cas. 247 (1886), Lord Bramwell, in dissenting opinions, insisted that corporations aggregate cannot be liable for malicious prosecution, because they are incapable of malice or motive. In Hussey *v.* Norfolk, etc. R. R., 98 N. C. 34 (1887), it was held that a corporation is liable for a malicious prosecution jointly with the officer who instituted the prosecution. No allegation of his authority to act is necessary. A corporation is not liable for malicious prosecution in instituting criminal proceedings where it acted on the advice of counsel. Atchison, etc. R. R. *v.* Brown, 57 Kan. 785 (1897).

1 Baltimore, etc. R. R. *v.* Fifth Baptist Ch., 108 U. S. 317 (1883); Pennsylvania R. R. *v.* Angel, 41 N. J. Eq. 316 (1886). "The directors and officers are the persons primarily responsible, and therefore the proper ones to be prosecuted" for a nuisance carried on by the corporation. The corporation itself can also be prosecuted and fined. People *v.* Detroit, etc. Works, 82 Mich. 471 (1890).

2 Beach *v.* Fulton Bank, 7 Cow. 485 (1827); Mayor, etc. *v.* Bailey, 2 Denio, 433 (1845), holding that an action of trespass or trover or an action on the case for malfeasance lies against a corporation; Chestnut Hill, etc. Co. *v.* Rutter, 4 Serg. & R. (Pa.) 6 (1818), holding that trespass on the case lies against a corporation for stopping a water-course. See also ch. XXXV.

3 Buffalo Lubricating Oil Co. *v.* Standard Oil Co., 106 N. Y. 669

tion may be guilty of a criminal libel and may be punished therefor by a fine.[1] A corporation may be guilty of the crime of violating the eight-hour law, and may be fined therefor.[2] Since corporations are not in themselves capable of an evil intent, they can be indicted only for such offenses as arise from misfeasance—such as a nuisance;[3] or obstructing a road.[4] Or for non-feasance—such as an omission to perform a legal duty or obligation.[5] A statute may ren-

(1887), aff'g 42 Hun, 153. If a corporation takes part in a conspiracy to compel a builder to hire only union workmen, it may be enjoined and held liable in damages the same as an individual. Aberthaw, etc. Co. *v.* Cameron, 80 N. E. Rep. 478 (Mass. 1907). A corporation may be guilty of a conspiracy. United States *v.* MacAndrews, etc. Co., 149 Fed. Rep. 823 (1906). For a common-law indictment against coal corporations for a conspiracy to fix the price of coal, see Chicago, etc. Co. *v.* People, 214 Ill. 421 (1905). Where a bank agrees with a partnership that the partnership shall buy goods and give a chattel mortgage to the bank, and then that the bank foreclose and resell the goods and give two-thirds of the profits to the copartnership, a creditor of the partnership who is thus defrauded may hold the bank liable. Johnston, etc. Co. *v.* National Bank, 4 Okl. 17 (1896). A corporation may be held liable for conspiracy. West Virginia, etc. Co. *v.* Standard Oil Co., 50 W. Va. 611 (1902).

[1] Telegram, etc. Co. *v.* Commonwealth, 172 Mass. 294 (1899), a case where a newspaper corporation was fined for publishing such a report of a case as to prevent a fair trial. In Brennan *v.* Tracy, 2 Mo. App. 540 (1876), it was said that a corporation may be guilty of a criminal libel.

[2] United States *v.* J. Kelso Co., 86 Fed. Rep. 304 (1898).

[3] Commonwealth *v.* New Bedford Bridge, 68 Mass. 339 (1854), erecting a bridge over a navigable stream: Commonwealth *v.* Vermont, etc. R. R., 70 Mass. 22 (1855), obstructing a highway by embankment; State *v.* Morris, etc. R. R., 23 N. J. L. 360 (1852), obstructing a highway by a building and trains; Louisville, etc. R. R. *v.* State, 3 Head (Tenn.), 523 (1859), obstruction by a cut across a street; Susquehanna, etc. Co. *v.* People, 15 Wend. 267 (1836), suffering a turnpike to be and remain out of repair; People *v.* Albany, 11 Wend. 539 (1834), neglecting to excavate and cleanse a basin, whereby the water became corrupted and a nuisance; Regina *v.* Great North. etc. Ry., 9 Q. B. 315 (1846), obstruction by a cut across a highway; Queen *v.* Bradford Nav. Co., 6 Best & S. 631 (1865), permitting water in the canal to become foul. *Contra*, State *v.* Great Works Milling Co., 20 Me. 41 (1841). A corporation may be indicted for keeping a disorderly house. State *v.* Passaic, etc. Soc., 54 N. J. L. 260 (1892). A corporation may be indicted for an offense which is punishable by fine. Commonwealth *v.* Pulaski County, etc. Assoc., 92 Ky. 197 (1891). A corporation may be indicted. State *v.* Security Bank, 2 S. D. 538 (1892). A corporation may be indicted for maintaining a nuisance, and judgment may be given on default. Commonwealth *v.* Lehigh Valley R. R., 165 Pa. St. 162 (1895). As to the indictment of a corporation in Indiana for maintaining a nuisance, see Paragon Paper Co. *v.* State, 19 Ind. App. 314 (1898).

[4] State *v.* White, 96 Mo. App. 34 (1902).

[5] A national bank may be indicted for violating the state usury laws. State *v.* First Nat. Bank, 2 S. D. 563

der a railroad corporation subject to indictment and fine for failing to supply pure drinking water to its patrons.[1] A corporation may be subject to criminal prosecution for furnishing liquor to a minor in violation of the statute.[2] "The corporation as such, the technical legal entity, cannot suffer imprisonment for a crime, but those who represent it and act for it as its officers and agents can."[3] The personal liability of the officers and stockholders in such cases is discussed elsewhere.[4] An officer in executing a bail process against

(1892). An indictment of the directors of the New York & New Haven R. R. Co. for an accident due to not using steam heat in cars as required by statute failed in People *v.* Clark, N. Y. L. J., May 28, 1891; Commonwealth *v.* Central Bridge Corp., 66 Mass. 242 (1853), for not keeping a bridge properly lighted at night, its charter requiring it to be kept in "good, safe and passable repair;" Louisville, etc. R. R. *v.* Commonwealth, 13 Bush (Ky.), 388 (1877), involving a failure to give warning signals at highway crossings; Regina *v.* Manchester, 7 El. & B. 453 (1857), where there was a failure of a city to repair streets; State *v.* Murfreesboro, 11 Humph. (Tenn.) 217 (1850), to same effect; People *v.* New York, etc. R. R., 74 N. Y. 302 (1878), sustaining an indictment for failure to repair a highway; Susquehanna, etc. Co. *v.* People, 15 Wend. 267 (1836), for failure to repair a plank-road. An indictment lies against a turnpike company for failure to repair its road. State *v.* Godwinsville, etc. Co., 49 N. J. L. 266 (1887); Mower *v.* Leicester, 9 Mass. 247 (1812), holding that an indictment may lie when there is no action at common law for damages sustained through defects in a highway. In Brennan *v.* Tracy, 2 Mo. App. 540 (1876), it was said that a corporation may be the subject of a criminal libel. It has been held that a statute subjecting railroads to indictment and fine for loss of life on account of the negligence or carelessness of the proprietors or their servants is constitutional. Boston, etc. R. R. *v.* State, 32 N. H. 215 (1855). A corporation may be indicted for failing to use revenue stamps. U. S. *v.* Baltimore, etc. R. R., 7 Am. L. Reg. (N. S.) 757 (1868); s. c., 24 Fed. Cas. 972. A corporation cannot be indicted for a crime, but its particular members may be. Anonymous, 12 Mod. 559 (1701). A corporation may be indicted. See 4 Am. & Eng. Encyc. of Law, pp. 267, etc. A corporation may be enjoined from doing criminal acts, such as promoting prize-fighting, and a receiver may be put in. Columbian Ath. Club *v.* State, 143 Ind. 98 (1895).

1 Southern Ry. *v.* State, 125 Ga. 287 (1906).

2 Southern Express Co. *v.* State, 58 S. E. Rep. 67 (Ga. 1907).

3 People *v.* Sherman, 133 N. Y. 349, 354 (1892). Where the law permits punishment or confiscation of property, but not both, the conviction of a stockholder for violation of the internal revenue law prevents a confiscation of the corporate property. U. S. *v.* Distillery, 43 Fed. Rep. 846 (1890). See 158 Fed. Rep. 456.

4 See § 682, *infra*. The president of a newspaper corporation is not personally liable in damages for a libel published in the newspaper, even though he was editor in chief and the principal stockholder, it appearing that he had no personal knowledge of the publication before it was made. Folwell *v.* Miller, 145 Fed. Rep. 495 (1906). In a suit against a corporation and its agent for malicious prosecution, the agent may be held liable and the corporation not liable. Farmers', etc. Assoc. *v.* Stewart, 167 Ind.

a corporation cannot arrest the corporation and is not authorized to arrest the officers.[1]

Upon the question whether or not corporations are liable in exemplary or punitive damages for wrongs maliciously committed by their agents when acting in the line of their duty, the authorities are far from uniform. In one line of cases the courts adhere to the ordinary rule that a principal cannot be held for more than the actual damage resulting from the acts of his agent or for those immediately and necessarily growing out of them, and therefore refuse to allow exemplary damages.[2] In other cases it is held that if it appears that injury has resulted through the wilful misconduct of employees, or through such a reckless indifference to the rights of others as amounts to an intentional violation of them, punitive or exemplary damages may be awarded.[3] In still another class of

544 (1906). Where money is converted by a corporation, not only is the corporation liable, but the officers and agents participating in the act are personally liable. Sweet *v.* Montpelier, etc. Co., 69 Kan. 641 (1904). The president is not guilty of larceny merely because a clerk embezzled funds paid in by a customer. State *v.* Carmean, 126 Iowa, 291 (1905). Stockholders and officers are not liable for a libel published by the corporation unless they aided or advised its publication or their duties were such that the law would charge them as agents in the publication or circulation. Belo *v.* Fuller, 84 Tex. 450 (1892). Persons who are large stockholders and executive officers and in full management of an infringing corporation and who have incited the company to wilfully infringe, are liable personally for the damage. Saxlehner *v.* Eisner, 140 Fed. Rep. 938 (1905). In a suit for damages for infringing a patent a corporation and its chief stockholder may be joined as defendants, where it is charged that he directs its affairs and that they conspired together. Whiting, etc. Co. *v.* Western etc. Co., 148 Fed. Rep. 396 (1905). The president should not be joined as a party defendant in a suit for infringing on a patent where it is not alleged that the corporation is insolvent, even though he directs the corporate business. Glucose, etc. Co. *v.* St. Louis, etc. Co., 135 Fed. Rep. 540 (1905).

[1] Hall, etc. Co. *v.* Barnes, 115 Ga. 945 (1902).

[2] Detroit Daily Post Co. *v.* McArthur, 16 Mich. 447 (1868); Great Western Ry. *v.* Miller, 19 Mich. 305 (1869); Wardrobe *v.* California Stage Co., 7 Cal. 118 (1857); Mendelsohn *v.* Anaheim Lighter Co., 40 Cal. 657 (1871); Turner *v.* North Beach, etc. R. R., 34 Cal. 594 (1868); Hill *v.* New Orleans, etc. R. R., 11 La. Ann. 292 (1856); Hays *v.* Houston, etc. R. R., 46 Tex. 272 (1876); Ackerson *v.* Erie Ry., 32 N. J. L. 254 (1867); Doss *v.* Missouri, etc. R. R., 59 Mo. 27 (1875), holding that no exemplary damages may be awarded unless the act complained of be wanton or malicious. In a suit against a corporation for libel its wealth cannot be shown, and the malice of a stockholder is not admissible. Randall *v.* Evening News Assoc., 97 Mich. 136 (1893). A newspaper corporation may be liable for exemplary damages in an action of libel by its agents acting within the scope of their duty and authority. Times, etc. Co. *v.* Carlisle, 94 Fed. Rep. 762 (1899).

[3] Denver, etc. Ry. *v.* Harris, 122 U. S. 597, 610 (1887); Milwaukee, etc. Ry. *v.* Arms, 91 U. S. 489, 493

cases the liability for exemplary damages is made to depend upon the authority of the servant or agent who commits the wrong; the corporation being liable if the agent acted under the express direction of the corporation or of the officer representing it, or if the wrongful act was afterwards ratified either expressly or impliedly.[1]

(1875); Philadelphia, etc. R. R. *v.* Larkin, 47 Md. 155 (1877); Baltimore, etc. Turnp. Rd. *v.* Boone, 45 Md. 344 (1876); Philadelphia, etc. R. R. *v.* Quigley, 21 How. 202, 214 (1858); New Orleans, etc. R. R. *v.* Hurst, 36 Miss. 660 (1859); Beale *v.* Railway, 1 Dill. 568 (1871); s. c., 2 Fed. Cas. 1110; Samuels *v.* Evening Mail Assoc., 75 N. Y. 604 (1878), reversing s. c., 9 Hun, 288 (1876), where a libel had been published; New Orleans, etc. R. R. *v.* Burke, 53 Miss. 200 (1876), where the conduct of the conductor of a train in not properly protecting a passenger from the assault of employees of the road and the failure of the road to discharge or punish the assailants was held to justify a verdict for exemplary damages; Jeffersonville R. R. *v.* Rogers, 38 Ind. 116 (1871), it being held that exemplary damages may be awarded for a wrongful expulsion from a train without harsh or unnecessary force, on account of the time, place and circumstances of the act. Goddard *v.* Grand Trunk Ry., 57 Me. 202 (1869), where exemplary damages were awarded because a railroad company had retained in service a brakeman after knowledge of his gross assault upon a passenger; Taylor *v.* Grand Trunk Ry., 48 N. H. 304 (1869); Belknap *v.* Boston, etc. R. R., 49 N. H. 358 (1870), holding that in estimating exemplary damages the condition and circumstances of the *defendant* may be material and are to be considered; Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282 (1872); Cleghorn *v.* New York, etc. R. R., 56 N. Y. 44 (1874). Exemplary damages cannot be recovered from a railroad construction company on account of the construction train carrying an employee beyond his stopping place. Arkansas Const. Co. *v.* Eugene, 20 Tex. Civ. App. 601 (1899).

1 Hagan *v.* Providence, etc. R. R., 3 R. I. 88 (1854); Nashville, etc. R. R. *v.* Starnes, 9 Heisk. (Tenn.) 52 (1871), where exemplary damages were refused because it did not appear that the company, after knowing the reckless character of its agent, retained him in its employment; Bass *v.* Chicago, etc. Ry., 42 Wis. 654 (1877); Cleghorn *v.* New York, etc. R. R., 56 N. Y. 44 (1874); Mendelsohn *v.* Anaheim Lighter Co., 40 Cal. 657 (1871); Turner *v.* North Beach, etc. R. R., 34 Cal. 594 (1868); Perkins *v.* Missouri, etc. R. R., 55 Mo. 201 (1874); Malecek *v.* Tower Grove, etc. Ry., 57 Mo. 17 (1874), where the language of the superintendent of a street railway admitting and justifying an assault by a driver was held to bind the company; Travers *v.* Kansas Pac. Ry., 63 Mo. 421 (1876), holding that authority of the agent sufficient to warrant exemplary damages may be inferred from the general scope of his duty; Galveston, etc. Ry. *v.* Donahue, 56 Tex. 162 (1882); Western Cottage, etc. Co. *v.* Anderson, 97 Tex. 432 (1904); Goddard *v.* Grand Trunk Ry., 57 Me. 202 (1869). See also Ackerson *v.* Erie Ry., 32 N. J. L. 254 (1867). In some states the distinction between corporations and natural persons as to liability for exemplary damages is entirely obliterated, and corporations are held to be equally liable with individuals and to the same extent. New Orleans, etc. R. R. *v.* Bailey, 40 Miss. 395 (1866); Atlantic, etc. Ry. *v.* Dunn, 19 Ohio St. 162 (1869); *Cf.* Western Union Tel. Co. *v.* Eyser, 91 U. S. 495 (1875), rev'g 2 Colo. 141 (1873).

CHAPTER II.

STOCK MAY BE ISSUED LEGALLY FOR MONEY OR PROPERTY, OR BY A STOCK DIVIDEND.

§ 16. Different methods of issuing stock.
17. First method: Issue by money subscription.
18. Second method: Issue for property, labor or construction work.
19. When such subscriptions are not legal.
20. What property may be received.
21. Payment in property as a favor, not as a contract right.
22. Sale of stock for property.
23. English statutes governing issue of stock for property.
24. Performance of contract to pay in property—Obligation of the corporation to issue the stock.
25. Third method: Issue by stock dividend.
26. Pledge of stock by corporation.
27. Issue of stock for partnership property, or the property of another corporation.

§ 16. *Methods of issuing stock.*—There are in general three methods of issuing stock. It may be issued, first, by means of subscriptions, payable in cash, the subscription being made in writing, or by acts equivalent thereto.[1] Second, the issue may be by means of subscriptions, payable in labor, property, or both. Third, the issue may be by a stock dividend.

§ 17. *First method: Issue by money subscription.*—An issue of stock by means of a subscription, payable in cash, is the most simple and safe method of issuing stock. In the absence of any agreement to the contrary, an ordinary subscription for stock is deemed a cash subscription, and payment in money may be enforced. The subscription contract is generally made by a writing duly signed by the subscriber. The writing itself is contained in books opened by the corporation or by commissioners appointed in conformity with a statute, or it is made without formality on subscription lists or separate sheets of paper.

A subscription, payable in cash, may arise also from the mere acts or declarations of a party. A person having assumed the position of a subscriber or stockholder is frequently held to be bound as such. Any act or declaration, sufficient to indicate an intent on the part of the person to be a subscriber, and an acceptance by the corporation of the person as such, is equivalent to a written subscription, and the person is bound as a subscriber.[2]

§ 18. *Second method: Issue for property, labor or construction work.*—The issue of stock for labor, property, contract work, or any valuable consideration other than money, has given rise to much

1 See § 52, *infra*.

2 See § 52, *infra*.

controversy and litigation. In England a long line of decisions, under the Companies Act, has established the principle that stock need not necessarily be paid for in cash, but that it may be paid for in money's worth.[1] Such, also, was the rule at common law.[2] The well-established rule now is that a subscription for stock,

1 See many cases in § 46, *infra;* Steacy *v.* Little Rock, etc. R. R., 5 Dill. 348, 376 (1876); s. c., 22 Fed. Cas. 1142, 1153.

2 Stock may be issued in payment for property or labor, or both. Farwell *v.* Great West. Tel. Co., 161 Ill. 522 (1896); Woolfolk *v.* January, 131 Mo. 620 (1895); Foster *v.* Belcher's etc. Co., 118 Mo. 238 (1893); Woodfall's Case, 3 De G. & Sm. 63 (1849). Stock may be issued for property. Bristol, etc. Trust Co. *v.* Jonesboro, etc. Trust Co., 101 Tenn. 545 (1898); Burkinshaw *v.* Nicholls, L. R. 3 App. Cas. 1004, 1012 (1878), where, payment having been made in property, the court said: "If there had been no statutory enactment forbidding a transaction of that kind, it is a transaction which might be perfectly valid." *Cf. dictum* in Sanger *v.* Upton, 91 U. S. 56, 60 (1875). In the absence of a statutory prohibition the directors may receive property in payment for stock. Macbeth *v.* Banfield, 45 Ore. 553 (1904). A statutory provision that stock may be issued for property only where the stockholders have authorized the issue at a meeting called for that purpose, is satisfied by the incorporators accepting the subscription payable in property. Southern, etc. Co. *v.* Yeatman, 134 Fed. Rep. 810 (1905). A corporation having charter power to purchase the stock of other corporations may give its certificates of indebtedness in payment therefor, and may also issue with such certificates its preferred stock, the dividends to be used to pay the principal and interest of such certificates, the preferred stock then to belong to the vendors. Ingraham *v.* National Salt Co., 130 Fed. Rep. 676 (1904), overruling 122 Fed. Rep. 40. Stock may be issued for property. Palliser *v.* Home Tel. Co., 44 S. Rep. 575 (Ala. 1907). A corporation may issue its stock in payment for property and agree to buy the stock back within four months at its par value. United States, etc. Co. *v.* Camden, etc., 56 S. E. Rep. 561 (Va. 1907). "It is not now questioned that a corporation may issue its stock by way of payment in the purchase of property. This is on the principle that there is no need for the roundabout process of first issuing the stock for money, and then paying the money for the property. But it is necessary that the property so taken be considered reasonably worth the par value of the stock paid for it." Chouteau *v.* Dean, 7 Mo. App. 210 (1879); Wyman *v.* American Powder Co., 62 Mass. 168 (1851); Reichwald *v.* Commercial Hotel Co., 106 Ill. 439 (1883); Hayden *v.* Atlanta Cotton Factory, 61 Ga. 233 (1878). "Whatever may have been formerly held, it is now established that subscriptions to corporate stock need not, in the absence of statutory provisions requiring it, be paid for in cash. The principle is now generally accepted, both in England and America, that any property which the corporation is authorized to purchase, or which is necessary for the purposes of its legitimate business, may be received in payment for its stock. Any payment, whether it be in money or money's worth, so that it be made in good faith, will give the shares so paid for the *status* of paid-up stock. In the language of Lord Justice Giffard, in Drummond's Case, L. R. 4 Ch. App. 772 (1869): 'If a man

payable by its terms in property or labor, or both, is a good and legal subscription. If the property is taken at a valuation made without fraud, the payment is as effectual and valid as though made in cash to the same amount. An issue of stock for property is one which finds support, not only in the decisions, but in the daily practice of corporations,[1] and the law does not compel the corporation and the subscriber to go through the useless form of a payment by the corporation to the subscriber of the value of the property, and an immediate repayment of the same money by the subscriber to the corporation on his subscription.[2] It is to be borne

contracts to take shares he must pay for them, to use a homely phrase, in meal or in malt; he must either pay in money or in money's worth. If he pays in one or the other that will be a satisfaction.' . . . The contract to receive in payment the letters-patent, plows, material, and other assets of its predecessor, Unthank & Coffin, was therefore not *ultra vires*." Coffin *v.* Ransdell, 110 Ind. 417 (1887), holding, also, that payment for stock by transferring to the corporation the property and assets of a partnership was legal, provided that a fair valuation was placed upon the property so conveyed. If such property is overvalued, the dangers incurred thereby are various. Garrett *v.* Kansas City Coal. Min. Co., 113 Mo. 330 (1892), approving the above statement of law. See also ch. III.

1 Foreman *v.* Bigelow, 4 Cliff. 508, 544 (1878); s. c., 9 Fed. Cas. 427, 441.

2 American Tube, etc. Co. *v.* Hays, 165 Pa. St. 489 (1895); Searight *v.* Payne, 6 Lea (Tenn.), 283 (1880); aff'd, 2 Tenn. Ch. 175; Brant *v.* Ehlen, 59 Md. 1 (1882); Spargo's Case, L. R. 8 Ch. App. 407, 412 (1873); Ashuelot Boot, etc., Co. *v.* Hoit, 56 N. H. 548 (1876). In the case of South Dakota *v.* North Carolina, 192 U. S. 286 (1904), where state bonds were by statute to be sold at not less than par, and the profits invested in stock at par, the court held that the bonds might be issued for the stock and said (p. 309): "It is true that no money was paid into the treasury and thence out of the treasury to the railroad company, yet looking at the substance of the transaction (and equity has regard to substance rather than form), the transaction was the same as though the company had been the only bidder, had placed a thousand dollars in the treasury in payment of each bond and received that thousand dollars back from the treasury in payment of the subscription for ten shares of stock." Payment in property by subscribers was held not allowable in Neuse River Nav. Co. *v.* Com'rs of Newbern, 7 Jones, L. (N. C.) 275 (1859); also Henry *v.* Vermillion, etc. R. R., 17 Ohio 187 (1843), although the latter case seems to involve an oral agreement to allow such payment, and to have been decided on that ground. There is a long line of cases sustaining the validity of an issue of stock for money's worth instead of money itself. They are given in this and the following chapter. So well established has this principle of law become, that the few cases holding to the contrary can no longer be considered good law. "That in the absence of fraud an agreement may ordinarily be made by which stockholders can be allowed to pay for their shares in patents, mines or other property, to which it is not easy to assign a determinate value, appears to be well settled." New

in mind, however, that a corporation has no power to issue stock unless expressly authorized so to do.[1]

There is some doubt as to whether an oral agreement of the corporate agents that a subscription may be paid in property is binding upon the corporation. Under the well-established rule that parol evidence will not be allowed to add to or vary a written agreement, it has been held that such an oral agreement with the agent cannot be admitted in evidence.[2] When, however, the parol agreement is made subsequently to the act of subscribing, and is supported by a sufficient consideration, it is valid and enforceable.[3]

Under a statute requiring stock to be paid for in cash or in property it has been held that stock cannot be issued for services rendered prior to the incorporation.[4] A statute that the commissioner of corporations must pass upon the value of property, which is turned in for stock, cannot be evaded by the parties paying cash to the corporation for the stock and then using that cash to buy the property from themselves. Yet if they do so under advice of counsel, they are not liable for the penalty for doing so.[5]

A statutory provision that a certain percentage of the capital stock

Haven, etc. Co. *v.* Linden Spring Co., 142 Mass. 349 (1886).

1 Cooke *v.* Marshall, 191 Pa. St. 315 (1889), involving a cemetery corporation, s. c., 196 Pa. St. 200.

2 See § 137, *infra*.

3 See § 137, *infra*.

4 Herbert *v.* Duryea, 34 N. Y. App. Div. 478 (1898), aff'd 164 N. Y. 595 and 596. While a corporation may issue stock for labor and services, yet it must be at a fair and bona fide valuation, and the proof that the issue was made for labor must be clear. Clevenger *v.* Moore, 71 N. J. Law. 148 (1904).

A financier who brings about a settlement between a corporation and its creditors, may be paid for his services in stock, even though he was a director part of the time and even though there was no previous agreement to pay him. Rosehill Cemetery Co. *v.* Dempster, 79 N. E. Rep. 276 (Ill. 1906).

Stock may be issued for legal services, already performed or to be performed in the future, and a stockholder cannot cause to be set aside an issue of $50,000 par value of stock in a Michigan corporation for legal services, unless actual fraud is proven. Vogeler *v.* Punch, 103 S. W. Rep. 1001 (Mo. 1907).

5 Harvey-Watts Co. *v.* Worcester, etc. Co., 193 Mass. 138 (1906).

Even though the form is gone through with, of all subscribers for stock paying therefor in cash and then using the cash to purchase their property, this is not paying for the stock in cash. International Paper Co. *v.* Gazette Co., 182 Mass. 578 (1903).

Payment for a subscription, by cancellation of a debt due from the corporation to the subscriber, is a payment in cash. Breck *v.* Barney, 183 Mass. 133 (1903).

Where a statute requires that a minimum subscription must be paid in cash before an allotment of shares is made, this means cash and does not mean checks which have not yet been cashed. Mears *v.* Western, etc. Co. Ltd., [1905] 2 Ch. 353.

must be paid in before business is commenced is satisfied by turning in property.[1]

§ 19. *When such subscriptions are not legal.*—A subscription payable by its terms in labor or property is in the nature of a conditional subscription. Accordingly, in certain states, where a percentage or fixed amount of the capital stock must be subscribed for before a charter can be obtained, and where, by the decisions of the courts, such preliminary subscriptions must be absolute and unconditional, a subscription payable by its terms in labor or property, being conditional to that extent, cannot form a part of the subscriptions preliminary to incorporation.[2] In such states, however, subscriptions to the remainder of the capital stock, the part subscribed after the charter has been obtained, may be conditional, and may, by their terms, be payable in property or labor.[3] On the ground that subscriptions payable in property or labor are conditional, it has been held also that a subscription payable in labor or property is not to be counted in ascertaining whether the full capital stock has been subscribed,[4] in order to enforce other subscriptions for stock. An *ultra vires* purchase of property may be insufficient as a consideration for the issue of stock.[5]

§ 20. *What property may be received.*—A corporation may receive in payment of its shares of stock any property which it may lawfully purchase,[6] and, in general, may receive any consideration which is suitable and applicable to the purposes for which the corporation was organized.[7] A railroad corporation may receive pay-

1 Fargason *v.* Oxford, etc. Co., 78 Miss. 65 (1900).

A statute requiring twenty per cent. of the capital stock to be paid in is satisfied by payment in property or labor. La Crosse, etc. Co. *v.* Goddard, 114 Wis. 610 (1902).

Where ten per cent. of the capital stock must be paid in before business is commenced, payment may be in property. McCandless *v.* Inland, etc. Co 115 Ga 968 (1902).

2 See §§ 79, 180, *infra.*

3 See § 82, *infra.*

4 See § 180, *infra.*

5 In Powell *v.* Murray, 3 N. Y. App. Div. 273 (1896), aff'd, 157 N. Y. 717, where a company, formed to manufacture electric appliances and plant, issued stock in payment for a license to sell the product of a foreign corporation, it was held that the parties so receiving the stock were liable thereon under the New York statute as not being paid-up stock, such contract being *ultra vires.*

6 Brant *v.* Ehlen, 59 Md. 1 (1882); American Silk Works *v.* Salomon, 4 Hun, 135 (1875).

In Louisiana the general act for incorporation prescribes that the articles of incorporation shall state the time when and the manner in which the stock shall be paid for. See New Orleans, etc. R. R. *v.* Frank, 39 La. Ann. 707 (1887).

7 "Payment of stock subscriptions need not be in cash, but may be in whatever, considering the situation of the corporation, represents to that corporation a fair, just, lawful, and needed equivalent for the money sub-

ment in contract work, in right of way, or in any kind of material or labor applicable to its construction.[1] A manufacturing corpo-

scribed." Liebke *v.* Knapp, 79 Mo. 22 (1883). Under a charter power to receive, in payment for stock, property "for the advancement of the purposes for which" the corporation was organized, a trust company may receive stock in a savings association, and even though by statute the payment of stock by property must first be authorized by the stockholders, yet if the corporation receives the stock and pledges it and receives a dividend thereon and retains it two years until it depreciates in value, it cannot then repudiate the transaction. Southern Trust, etc. Co. *v.* Yeatman, 130 Fed. Rep. 798 (1904). Payment in newspaper advertising of the enterprise upheld in this case. The subscription may, by its terms, be payable in plank for a plank-road company, and the subscriber is a stockholder before payment is completed. Haywood, etc. Co. *v.* Bryan, 6 Jones, L. (N. C.) 82 (1858). Payment in Confederate bonds redeemable in cotton upheld. Schroder's Case, L. R. 11 Eq. Cas. 131 (1870). So, also, payment in stock in a coal corporation carrying on a supplementary business. East New York, etc. R. R. *v.* Lighthall, 6 Rob. (N. Y.) 407 (1868). Payment by a patent-right is legal. Edwards *v.* Bringier Sugar Extracting Co., 27 La. Am. 118 (1875). It is no objection to the validity of the issue of stock for patents that the corporation selling the patents was not legally incorporated. Way *v.* American, etc. Co., 60 N. J. Eq. 263 (1900). Payment may be by canceling a debt of the company past due. Carr *v.* Le Fevre, 27 Pa. St. 413 (1856). Or not yet due. Appleyard's Case, 49 L. J. (Ch.) 290 (1880). A company may issue stock in exchange for bonds of another corporation where the former corporation owns the equity of the property, subject to the mortgage securing the bonds. Beebe *v.* Richmond, etc. Co., 3 N. Y. App. Div. 334 (1896). A company organized to manufacture, bleach and dye cottons has power to issue its stock in exchange for and payment of stock in a dyeing corporation which had been organized by the consulting chemist of the former company for the purpose of exchanging the stock as above set forth. Joseph Bancroft, etc. Co. *v.* Bloede, 106 Fed. Rep. 396 (1901). Payment, however, to a bank in its own currency was not upheld, it being statutory that only specie could be received. King *v.* Elliott, 13 Miss. 428 (1845). Payment by check cannot be objected to by another subscriber. Thorp *v.* Woodhull, 1 Sandf. Ch. 411 (1844). Stock may be issued to the president in payment of past salary and debts. Reed *v.* Hayt, 51 N. Y. Super. Ct. 121 (1884); aff'd, 109 N. Y. 659. Where stock is issued to a city by a street railway company in payment for its street rights, a provision in the grant of the street rights that in case the company became indebted the city should have a lien on the company's franchise and property does not give the city a lien in preference to creditors of the company, but only in preference to other stockholders. Guaranty, etc. Co. *v.* Galveston, etc. R. R., 107 Fed. Rep. 311 (1901).

[1] "We can see no objection whatever to a railroad company issuing stock and taking in payment materials or labor or land necessary for its road." Clark *v.* Farrington, 11 Wis. 306 (1860). As to payment in stock for construction work, see also Wood, Railways, § 282. "The corporation had a right to accept payment of stock in labor or materials, in damages which the company were

ration may receive payment in the good-will of a business or the stock in trade.[1] Land may be taken in payment when the corporation would be allowed to purchase the same.[2] Promissory notes may also be taken, under the corporate power to give credit and extend the time of payment of debts.[3] But a bank may have no

liable to pay, or in any other liability of the company, provided these transactions were entered into and carried out in good faith." Philadelphia, etc. R. R. *v.* Hickman, 28 Pa. St. 318 (1857); Bedford County *v.* Nashville, etc. Ry., 14 Lea (Tenn.), 525 (1884), holding, also, that thirty years' delay in demanding the stock is no bar to the right. To the same effect, payment being in services, Kobogum *v.* Jackson Iron Co., 76 Mich. 498 (1889). Payment may be in cross-ties. Ohio, etc. R. R. *v.* Cramer, 23 Ind. 490 (1864). Or in real estate and services. Cincinnati, etc. R. R. *v.* Clarkson, 7 Ind. 595 (1856). Or in services and materials. Phillips *v.* Covington Bridge Co., 2 Metc. (Ky.) 219 (1859). Or by construction of the road. See § 18. One railroad having power to consolidate with another may, in payment therefor, issue stock to the contractors who are constructing the latter. Branch *v.* Jesup, 106 U. S. 468 (1882). A corporation may agree to give $5,000 of stock to one who will borrow $15,000 for it. Arapahoe, etc. Co. *v.* Stevens, 13 Colo. 534 (1889). A contract that subscriptions shall be payable in land is illegal by statute in Alabama, but after subscription payment in land may be allowed. Knox *v.* Childersburg Land Co., 86 Ala. 180 (1888).

1 Pell's Case, L. R. 5 Ch. App. 11 (1869). Stock may be issued for the good-will of a business, and a person who has taken part in the transaction cannot afterwards complain. Washburn *v.* National, etc. Co., 81 Fed. Rep. 17 (1897). Stock may be issued for good-will. White Corbin & Co. *v.* Jones, 79 N. Y. App. Div. 373 (1903).

2 Goodin *v.* Evans, 18 Ohio St. 150 (1868); Cincinnati, etc. R. R. *v.* Clarkson, 7 Ind. 595 (1856); Peck *v.* Coalfield Co., 11 Bradw. (Ill.) 88 (1882); Brant *v.* Ehlen, 59 Md. 1 (1882); Jones's Case, L. R. 6 Ch. App. 48 (1870); Maynard's Case, L. R. 9 Ch. App. 60 (1873); Dayton, etc. R. R. *v.* Hatch, 1 Disney (Ohio), 84 (1855); Carr *v.* Le Fevre, 27 Pa. St. 413 (1856); Lohman *v.* N. Y. & Erie R. R., 2 Sandf. Super. Ct. 39 (1848). In Foreman *v.* Bigelow, 4 Cliff. 508, 544 (1878), s. c., 9 Fed. Cas. 427, 441, the court said: "Argument to show that the transaction of issuing the stock in payment for the mineral land would have been valid . . . is scarcely necessary." In Indiana formal acceptance by the directors is necessary. State *v.* Bailey, 16 Ind. 46 (1861); Junction R. R. *v.* Reeve, 15 Ind. 236 (1860). A corporation receiving a deed of land in payment of a stock subscription is protected in its title to the land the same as any other *bona fide* purchaser of it would be against a former vendor's lien for the purchase-money. Frenkel *v.* Hudson, 82 Ala. 158 (1887). A subscriber for stock may show that payment therefor was by the conveyance of land or an interest in land. Libby *v.* Mt. Monadnock, etc. Co., 68 N. H. 444 (1896). A corporation owing a party for a tract of land may issue stock in cancellation of the debt. Richardson *v.* Graham, 45 W. Va. 134 (1898). Stock may be paid for, under the New Jersey statute, partly in cash and partly by furnishing a site for buildings. *In re* Remington, etc. Co., 153 Fed. Rep. 345 (1907).

3 Stoddard *v.* Shetucket Foundry

power to accept the subscriber's notes in payment of a subscription to its stock, and the directors are personally liable for so doing, unless the notes were good or the directors had reasonable cause to believe they were good.[1] A note given in payment for the subscrip-

Co., 34 Conn. 542 (1868); Ogdensburgh, etc. R. R. *v.* Wooley, 3 Abb. Ct. of App. Dec. 398 (1864); Magee *v.* Badger, 30 Barb. 246 (1859), aff'd 34 N. Y. 247; Goodrich *v.* Reynolds, 31 Ill. 490 (1863); Vermont Central R. R. *v.* Clayes, 21 Vt. 30 (1848); Hardy *v.* Merriweather, 14 Ind. 203 (1860); Pacific Trust Co. *v.* Dorsey, 72 Cal. 55 (1887). Wyman *v.* Bowman, 127 Fed. Rep. 257 (1904). Stock may be paid for by a note fully secured by collateral. Clarke *v.* Lexington Stove Works, 72 S. W. Rep. 286 (Ky. 1903). A stock dividend need not be delivered forthwith to a stockholder who paid for his original stock by a note to the corporation secured by the original certificate of stock. Alford *v.* Laurel Imp. Co., 86 Miss. 375 (1905). Under the New York statute which requires that stock or bonds shall be issued only for money paid or property, the purchaser of bonds from the corporation cannot make payment in the note of a third person, where the note is never collected. *In re* Waterloo, etc. Co., 134 Fed. Rep. 341 (1904), rev'g, 128 Fed. Rep. 517 (1904). A New York corporation cannot under the New York statute receive a note in payment for its bonds, especially where it was a note of the president, unless such note is actually collected. *In re* Waterloo, etc. Co., 134 Fed. Rep. 341 (1904). A statute relative to the incurring of debts before the capital stock is fully paid in is not satisfied by a subscriber giving his note. Williams *v.* Brewster, 117 Wis. 370 (1903). A receiver's suit on notes given in payment for stock cannot be defeated on the ground that all the creditors have been paid. Pope *v.* Merchants' T. Co., 103 S. W. Rep. 792 (Tenn. 1907). In Wisconsin a corporation may accept in payment of stock a note secured by a mortgage on real estate. Clark *v.* Farrington, 11 Wis. 306 (1860); Blunt *v.* Walker, 11 Wis. 334 (1860); Cornell *v.* Hichens, 11 Wis. 353 (1860); Lyon *v.* Ewings, 17 Wis. 61 (1863); Andrews *v.* Hart, 17 Wis. 297 (1863); Western Bank of Scotland *v.* Tallman, 17 Wis. 530 (1863). In Tennessee payment in notes is not upheld, but the subscriber is to be credited with the amount collected on such notes. Moses *v.* Ocoee Bank, 1 Lea (Tenn.), 398 (1878). In New York the payment of a subscription by one's own note is prohibited by statute. Payment by bond and mortgage was upheld in Valk *v.* Crandall, 1 Sandf. Ch. 179 (1843), and in Leavitt *v.* Pell, 27 Barb. 322 (1858), aff'd, 25 N. Y. 474. As to payment by note, see §§ 172–175, *infra*. But a worthless note is not payment so far as corporate creditors are concerned. Bouton *v.* Dement, 123 Ill. 142 (1887). A company authorized by statute to sell stock for cash may sell it for the bonds of the vendee, and may enforce the bonds. Southern Life Ins. Co. *v.* Lanier, 5 Fla. 110 (1853). Subscriptions may be paid by notes, especially where the corporation sells the notes. Rouse, etc. Co. *v.* Detroit, etc. Co., 111 Mich. 251 (1896). A note given in payment for a subscription does not bear interest unless the note itself so provides, especially where no call on the subscription has been made. Seattle T. Co. *v.* Pitner, 18 Wash. 401 (1898). In Massachusetts by statute a note cannot be received in payment for stock. Harvey-Watts Co. *v.* Worcester, etc. Co., 193 Mass. 138 (1906).

1 Coddington *v.* Canaday, 157 Ind. 243 (1901). A note given in payment of the subscription price of

tion price of stock is illegal under the New York statute which requires ten per cent. to be paid in cash, where the subscription is a cash subscription, and hence in such a case the entire subscription is void, even though it provided for the employment of the subscriber and for giving him a bonus of stock.[1] Fully paid-up stock may be issued by an irrigation company in payment for pipe lines, wells and ditches.[2] It is legal for a corporation to issue stock as fully paid to a person in consideration of his leaving an employment in which he is engaged and of assuming the presidency of the corporation.[3] Services rendered by a director after he had subscribed for stock are a good consideration in payment therefor in accordance with an agreement to that effect.[4] A person to whom a corporation issues full-paid stock in settlement of a claim is not bound by any prior contracts of the corporation in regard to that stock where he

stock in a national bank may be enforced by the receiver, and it is no defense that the president had agreed that the stock might be returned and the note canceled. Atwater *v.* Stromberg, 75 Minn. 277 (1899). Where the directors upon an increase of the capital stock issue a part of the stock for worthless notes, the directors upon the bank becoming insolvent are liable to the receiver for the par value of such stock, unless they can show the stock could not have been otherwise issued or sold. Cockrell *v.* Abeles, 86 Fed. Rep. 505 (1898). In the case of State *v.* New Orleans, etc. Co., 51 La. Ann. 1827 (1899), the subscribers to the stock of a debenture company paid ninety-five per cent. of their subscription by borrowing that amount from the company on their notes, and thereupon full-paid stock was issued to them, although the statute prohibited the issue of stock until paid for. The state brought suit to set aside the charter and liquidate the company. The court held that under the constitution of Louisiana the incorporation was illegal. The court held also that the charter was illegal, in that the debentures issued were forfeited if deferred payments were not made, and that they provided for cancellation at fifty per cent. on the amount paid, and that they were redeemable in numerical order in six years, and that it would be impossible for the company to pay them. The same conclusion was reached in State *v.* Louisiana, etc. Co., 51 La. Ann. 1795 (1899).

[1] Hapgoods *v.* Lusch, 123 N. Y. App. Div. 23 (1907).

[2] Loud *v.* Pomona, etc. Co., 153 U. S. 564, 582 (1894).

[3] Shannon *v.* Stevenson, 173 Pa. St. 419 (1896). A corporation in order to retain the services of employees to be rendered thereafter may issue stock at eighty-five cents in cash, the remaining fifteen cents to be paid for by such services. Potter *v.* Necedah, etc. Co., 105 Wis. 25 (1899).

[4] Doak *v.* Stahlman, 58 S. W. Rep. 741 (Tenn. 1899). A corporation may agree to issue stock to a person in payment for services in procuring a loan for the corporation and guaranteeing payment of the same. If the corporation refuses to perform, the person may obtain damages to the amount of the actual value of the stock. Saunders *v.* United States, etc. Co., 25 Wash. 475 (1901).

took the stock without notice of the contracts.[1] A corporation may maintain a suit to cancel stock which the directors and president voted to themselves as commissions for selling the stock of the company.[2] Where stock is issued for property and the transaction is set aside, a suit lies by the receiver of the company to have the stock cancelled.[3]

§ 21. *Payment in property as a favor, not as a contract right.*— There is an important distinction to be made between payments in property, where the subscription itself, by its terms, allows such payment, and a payment in property, which is allowed, as a matter of favor, by the corporation, the subscription itself being silent as to the mode of payment.[4] The later class of transactions has been uniformly upheld, except when positively prohibited by statute, and payment has even been held to be valid, although the statute required it to be in money or in cash.[5] A subscription is payable in cash unless there is a contract by which it is to be paid in labor

1 Angle *v.* Chicago, etc. Ry., 94 Fed. Rep. 717 (1899). See also § 766c, *infra.*

2 Central, etc. Co. *v.* Madden, 68 Atl. Rep. 777 (N. J. 1908).

3 McMaster *v.* Drew, 68 Atl. Rep. 771 (N. J. 1908).

4 Many of the cases which apparently are cases of subscriptions, wherein the subscriber has expressly stipulated that he may pay in property or labor, will be found, on close examination, to be absolute subscriptions payable in cash. Afterwards the corporation, although not obliged so to do, accepts property or labor instead of the cash. This kind of transaction is almost universally upheld by the courts when entered into and carried out in good faith. Such payment is upheld even in opposition to the express terms of a statute requiring payment in cash. See § 23. Many of the American cases, also, are plainly cases in which payment in property was allowed by the corporation, not as a right but as a matter of favor. The courts uphold such agreements because they are similar to offsets of accounts, and the delays, uncertainties, special privileges, and other objections to subscriptions payable in terms in property and labor are obviated. See Ashuelot Boot, etc. Co. *v.* Hoit, 56 N. H. 548 (1876); Stoddard *v.* Shetucket Foundry Co., 34 Conn. 542 (1868), where the court said, "that the defendants could have insisted upon the plaintiff's payment for his stock in cash is unquestionable." See also Vermont Central R. R. *v.* Clayes, 21 Vt. 30 (1848); Boston, etc. R. R. *v.* Wellington, 113 Mass. 79 (1873). A subscription may be made and then by another contract be paid by a lease of a railroad. Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892). Even where, by statute, railroad corporations must require payment in cash of a certain percentage of the subscription at the time of subscribing, the courts hold that the percentage may be paid by property actually received. Beach *v.* Smith, 30 N. Y. 116 (1864), where payment was by services rendered. The court said: "Was it necessary, for any purpose, that the ceremony of paying money by the company to the defendant, and by the defendant of the same money back again, should be gone through with? It seems to me not."

5 See p. 114, note 4.

or property.[1] Where a person subscribes for stock and afterwards payment is made in property at a gross overvaluation, the court may hold him liable for the difference between the actual value of the property and the par value of the stock, even though the company went through the form of canceling the subscription and issuing the stock as an original issue for property.[2] Where stock is subscribed for, although thereafter it is agreed that the subscription shall be paid by the transfer of property, yet if no actual transfer is made, a subscriber may be liable, even though he understood that the property had been actually transferred.[3]

§ 22. *Sale of stock for property.*—The issue of stock for property, labor or contract work need not necessarily be accompanied with the formality of a subscription.[4] Frequently the issue is spoken of as a sale of the stock for the property received in payment. Sometimes the issue is by means of a contract, whereby, upon the completion of certain work, the party is to be entitled to the stock. The New York court of appeals stated the law clearly when it said, in respect to such issues, that "the right of the officers of a railroad corporation to enter into an agreement to build its road and pay for the construction of the same in stock or bonds cannot be seriously questioned, and contracts of this description are frequently made for such a purpose."[5] A railroad construction

1 Farwell *v.* Great West. Tel. Co., 161 Ill. 522 (1896). A subscriber for one share of stock is liable thereon although afterwards a contractor to whom stock is issued for property transfers to the former one full-paid share of stock to fulfill the subscription. Dalton, etc. Co. *v.* Dalton, 66 L. T. Rep. 704 (1892).

2 Hebberd *v.* Southwestern, etc. Co., 55 N. J. Eq. 18 (1896). Even after subscriptions to stock have been made, payable in cash, the company may receive land from a third party in payment of the balance due on such subscriptions, and such payment will be sufficient, even though the land turns out to have been overvalued. Carr *v.* Le Fevre, 27 Pa. St. 413 (1856). *Cf.* §§ 169, etc., *infra.*

3 Crowley *v.* Walton, 23 R. I. 331 (1901).

4 A charter provision authorizing the opening of stock subscription books does not amount to a prohibition against any other mode of becoming a stockholder. "If a railroad company could sell its stock for the right of way, for lands for depot purposes, for iron, or anything essential to the accomplishment of its purpose, it might do so." It is a legal issue of stock without subscription. Western Bank of Scotland *v.* Tallman, 17 Wis. 530 (1863). See also Clark *v.* Farrington, 11 Wis. 306 (1860); Reed *v.* Hayt, 51 N. Y. Super. Ct. 121 (1884); aff'd, 109 N. Y. 659. In Jackson *v.* Traer, 64 Iowa, 469 (1884), stock having been issued in payment of contract work, the court said: "We have seen no case which recognizes a difference between those stockholders who become such in pursuance of a written agreement and those who become such by the mere acceptance of stock issued to them."

5 Van Cott *v.* Van Brunt, 82 N. Y. 535 (1880). See also Eppes *v.* Mississippi, etc. R. R., 35 Ala. 33 (1859);

contract by which the work is paid for by stock and bonds is not a stock subscription nor a sale of the stock, but is merely a contract, and the receiver of the railroad cannot hold a contractor liable for the alleged value of the stock and bonds, he being estopped the same as a corporation itself, and there being no promise to pay the par value of the stock.[1]

It is doubtful, however, whether any clearness of ideas is obtained, under any circumstances, by calling an original issue of stock a sale of stock. Such a transaction is not a sale of stock. A sale of stock means a transfer of stock after the stock has been issued, or an agreement to transfer the same. Original issues of stock which are occasionally spoken of as being sales of stock might better be considered as informal subscriptions arising by the acts or declarations of the parties, and payable in property.[2]

§ 23. *English statutes on issues of stock for property.*—In England the payment for stock in property, labor or contract work is regulated largely by act of parliament. The statute requires that payment shall be in cash, unless the contract allowing payment in property is registered at a specified public registry.[3] Nevertheless, even where no registry is made, the courts have held that a payment in property at its real value is equivalent to payment in cash, where the property has been actually delivered.[4] Such a pay-

Boody *v.* Rutland, etc. R. R., 3 Blatchf. 25 (1853); s. c., 3 Fed. Cas. 857; s. c., 24 Vt. 660; Troy, etc. R. R. *v.* Newton, 74 Mass. 596 (1857); McMahon *v.* New York, etc. R. R., 20 N. Y. 463 (1859), construing such a contract. An agreement to buy stock was held to be a subscription to stock in Lincoln, etc. Co. *v.* Sheldon, 44 Neb. 279 (1895).

1 Bostwick *v.* Young, 118 N. Y. App. Div. 490 (1907).

2 See Weiss *v.* Mauch Chunk Iron Co., 58 Pa. St. 295 (1868); St. Paul, etc. R. R. *v.* Robbins, 23 Minn. 439 (1877); Clark *v.* Continental Improvement Co., 57 Ind. 135 (1877). In the case of Seymour *v.* Jefferson, 74 N. W. Rep. 149 (Minn. 1898), the court held that a contract to take stock from the corporation was a subscription and not a sale of stock. There is no difference between a subscription of stock and a sale of stock. Richardson *v.* Merritt, 74 Minn. 354 (1899). A so-called sale of stock, being the original issue thereof, is equivalent to an original subscription therefor. New Haven T. Co. *v.* Gaffney, 73 Conn. 480 (1901). In the case of Kohlmetz *v.* Calkins, 16 N. Y. App. Div. 518 (1897), the court held that a sale of stock was an executory contract to take the stock, and that a tender of the certificate might be necessary before suit. In the case McDowell *v.* Lindsay, 213 Pa. St. 591 (1906), the court said that there is a difference between an original subscription of stock and a contract by the corporation for the sale of stock and that the latter may apply to an issue of increased capital stock.

3 Companies Act, Amendment 1867, 30 and 31 Vict., ch. 131, § 25.

4 Under this statute three classes of cases of unregistered contracts arise: First, where payment is actually made in property, if fairly

ment in property, however, is as a matter of favor, and not as a matter of right.[1] It is to be distinguished from the payment in property which the subscriber may not yet have made, but has a right to make in the future.

§ 24. *Performance of contract of payment in property—Obligation of the corporation to issue the stock.*—Subscriptions payable in property are not subject to calls, and a demand for the property must be made by the corporation.[2] Upon failure of the subscriber to furnish the property, or upon insolvency of the corporation, such subscriptions become payable in cash.[3] A corporation may compel

made, it is upheld, under the principles laid down in section 16. See Jones's Case, L. R. 6 Ch. App. 48 (1870); Maynard's Case, L. R. 9 Ch. App. 60 (1873); payment by colliery, *Re* Bagglan Hall Colliery Co., L. R. 5 Ch. App. 346 (1870); Drummond's Case, L. R. 4 Ch. App. 772 (1869); Schroder's Case, L. R. 11 Eq. Cas. 131 (1870); Pell's Case, L. R. 5 Ch. 11 (1869); by services, *Ex parte* Clark, L. R. 7 Eq. 550 (1869). The amounts on each side must be payable presently and in cash. Fothergill's Case, L. R. 8 Ch. App. 270 (1873); so that the transaction is in the nature of a set-off. Forbes's Case, L. R. 5 Ch. App. 270 (1870); *Re* Johannesberg Hotel Co., [1891] 1 Ch. 119. Conveyance of a lease held to be a good payment. Spargo's Case, L. R. 8 Ch. App. 407 (1873). Where the parties fail to register their contract as required by law, they are liable on the stock to the full par value thereof in cash, but may set off a debt due to them from the company. *Re* Johannesberg Hotel Co., [1891] 1 Ch. 119, following Spargo's Case. A second class of unregistered agreements to take pay in property turn upon the question whether the agreement that payment shall be in property is a condition precedent or subsequent to the subscription. If the condition is precedent, and must be performed before the subscription can be enforced, none of the parties are bound, even though the corporation becomes insolvent. Pellatt's Case, L. R. 2 Ch. App. 527 (1867); Stace's Case, L. R. 4 Ch. App. 682 (1869); Simpson's Case, L. R. 4 Ch. App. 184 (1869). The third class is where the contract to pay in property is construed to be a condition subsequent. The condition being subsequent the party must pay; and if the corporation becomes insolvent, he must pay in cash. Elkington's Case, L. R. 2 Ch. App. 511 (1867); Bridger's Case, L. R. 5 Ch. App. 305 (1870); Thomson's Case, 34 L. J. (Ch.) 525 (1865); *Re* Southport, etc. Banking Co., L. R. 31 Ch. D. 121 (1885). See also §§ 78, 80, *infra*.

[1] See § 21, *supra*.

[2] See § 89, *infra*. A subscription which by its terms is payable partly in cash and partly in stock of another corporation, does not sustain an action for cash altogether. Southern, etc. Co. *v.* Yeatman, 134 Fed. Rep. 810 (1905).

[3] See § 89, *infra*. Although property which is deeded to a corporation in payment for stock is really subject to a mortgage which is not mentioned in the deed, the grantor is not liable on covenant of title where another piece of property was also deeded as compensation for the amount of the mortgage. Johnston *v.* Markle Paper Co., 153 Pa. St. 189 (1893). Where a person subscribes for stock payable by its terms in wages, and the directors pay such subscription in full and take the wages, but before the

specific performance of a contract for a deed of land in consideration of the issue of stock, such contract having been made by the promoters and accepted by the corporation.[1] Where a corporation has issued stock for services which have never been performed it may maintain a bill in equity to cancel such stock.[2] A payment of part of the subscription in cash does not waive the right of the subscriber to pay the balance in property.[3]

The stock may be issued to a contractor before his work in payment therefor has been completed.[4] If the corporation prevents the completion of the contract or refuses to fulfill, the contractor may hold it liable for damages or may have specific performance.[5] A contract by which a party turns in land in exchange for stock may be such as to give him a vendor's lien on such land in case the scheme is not carried out.[6]

§ 25. *Third method of issue: By stock dividend.*—The third method of issuing stock is by a stock dividend. It is allowable

stock is fully paid for by him the corporation becomes insolvent, he cannot recover back the part already paid out of his wages. Lincott *v.* Northwood, etc. Co., 68 N. H. 260 (1895). Where a subscriber for stock has the option of paying cash or property, and he sells the property to another, he is liable for the par value of the stock. Enslen *v.* Nathan, 136 Ala. 412 (1903).

1 Scadden, etc. Co. *v.* Scadden, 121 Cal. 33 (1898).

An agreement of several parties to sell their property to a corporation in exchange for stock of the latter, the amount of stock going to each to be determined by arbitrators, will not be specifically enforced where the arbitrators have fixed the value in an illegal way. Any party may withdraw from such a contract prior to the time when it has been signed by all. Consolidated, etc. Co. *v.* Nash, 109 Wis. 490 (1901).

2 Hillside, etc. Ass'n *v.* Holmes, 97 Minn. 261 (1906).

3 See § 89, *infra.*

4 See § 766c, *infra.*

5 See § 766c, *infra.* Where various properties are transferred to a coal company for stock, on the further understanding that all moneys already expended on such properties should be repaid in bonds of a railway to be guaranteed by the coal company, but such distribution of bonds is never made on account of the impossibility of such a guarantee being legally made, one of the parties who turned in his property may hold the coal company liable in damages for the amount of money expended by him on the property before turning it in for stock. Crown, etc. Co. *v.* Thomas, 177 Ill. 534 (1898). Even though a promoter by agreement made with a foreign corporation, before the incorporation of a mining company, was to have one share of stock for his services for every ten shares which he obtained subscriptions for, and the company accepted the subscriptions, yet he cannot hold it liable for the value of the stock to be received by him as commissions where he merely demanded it by letter and the company offered to deliver it after suit was brought. Teeple *v.* Hawkeye, etc. Co., 114 N. W. Rep. 906 (Iowa 1908).

6 Slide, etc. Mines *v.* Seymour, 153 U. S. 509, 520 (1894). A vendor's lien may apply to a sale of property

when an amount of cash or property equal to the amount of the par value of the stock so divided is added to the capital stock of the corporation. A stock dividend can be made only when the whole of the capital stock has not been issued, or when it has been increased. An issue of stock by a stock dividend is prohibited by constitutional or legislative enactment in some states. In England it has been a question of doubt whether stockholders can be compelled to accept a dividend of stock. These questions, however, are discussed elsewhere.[1]

§ 26. *Pledge of stock by a corporation.*—It is now settled that a corporation may pledge its unissued stock to secure the debts of the corporation.[2] It is also clear that, for non-payment of the debts so secured, the pledgee may sell the stock;[3] and such sale is legal even though the stock does not sell for its full par value.[4]

§ 27. *Issue of stock for partnership property or the property of another corporation.*—A copartnership may, of course, sell its stock to a corporation and take shares of stock in payment. But if the partnership is in a failing condition at the time of the transfer, the creditors of the firm may in some cases disregard the sale and levy an execution on the property itself.[5] The same rules apply to a sale by one company to another.[6]

for stock. Harter *v.* Capital City, etc. Co., 64 N. J. Eq. 155 (1902).

1 See § 51, and ch. XXXII, *infra.*

2 See § 465, *infra.*

3 See § 476, *infra.*

4 See § 465, note.

5 This subject and the numerous complicated questions connected with it are considered in ch. XL, *infra.*

6 See ch. XL.

CHAPTER III.

"WATERED" STOCK.—STOCK ISSUED ILLEGALLY FOR MONEY, PROPERTY, OR BY A STOCK DIVIDEND. IT IS THEN CALLED "WATERED" OR FICTITIOUSLY PAID-UP STOCK.

A. NATURE OF WATERED STOCK.

§ 28. Definition and nature of "watered" or fictitiously paid-up stock.
29. Methods of issuing "watered" stock.
30. *Dicta* in regard to such issues.
31. Fictitious stock may be voidable.

B. WATERED STOCK ISSUED FOR CASH.

32. First method of issue: By discount in cash.
33, 34. Dangers attending this method.

C. WATERED STOCK ISSUED FOR PROPERTY OR CONSTRUCTION WORK WHICH IS OVERVALUED.

35. Second method: Issue of stock for property taken at an overvaluation.

D. WHO MAY COMPLAIN AND AGAINST WHOM COMPLAINT MAY BE MADE.

36. Liability on "watered" stock, and who may enforce it.
37. Who may complain of an issue of stock as "paid up" when it has not been fully paid?—The state.
38. Right of the corporation itself to complain.
39. Stockholders participating in the act cannot complain.
40. Transferees of participating stockholders may complain, when?
41. Stockholders dissenting at the time of the issue may complain.
§ 42. Corporate creditors as complainants where the issue is for money—Bonus of stock with bonds—Issue of stock by embarrassed corporation—What creditors may complain.
43. Corporate creditors as complainants where the issue is for property or construction work.
44. Who is liable, and the character of the liability—Liability of the corporation.
45. Liability of persons to whom stock is issued for cash at less than par.
46, 47. Liability of persons to whom stock is issued for property taken by the corporation at an overvaluation — Liability of such persons under various constitutional provisions in Pennsylvania, Illinois, California, Nebraska, Alabama, Arkansas, Missouri, Texas, Louisiana, Colorado, South Dakota, and other states, and under statutory provisions in New York, Maine, Ohio, Wisconsin, Minnesota, Tennessee, Indiana, New Jersey, Washington, Iowa, Massachusetts, Oregon and Utah—Treasury stock.
48. Liability of the officers of the corporation.
49. Liability of the persons purchasing the stock with notice.
50. Liability of *bona fide* transferees without notice.

E. ISSUE OF WATERED STOCK BY A STOCK DIVIDEND.

51. Third method: Issue by stock dividends.

F. ISSUE OF WATERED STOCK ON A CONSOLIDATION.

51*a*. Fourth method: Issue by a consolidation of companies.

A. NATURE OF WATERED STOCK.

§ 28. *Definition and nature of "watered" or fictitiously paid-up stock.*—Watered stock or fictitiously paid-up stock is stock which

is issued as fully paid-up stock, when in fact the whole amount of the par value thereof has not been paid in. All stock which has been issued as paid-up stock, but the full par value of which has not been paid into the corporation in money or money's worth, is watered to the extent that the par value exceeds the value actually paid in. Watered stock is, accordingly, stock which purports to represent, but does not represent, in good faith, money paid into the treasury of the company, or money's worth actually contributed to the capital of the concern.

The issue of shares of stock as "paid up," when in fact they are not paid up, gives rise to some of the most complicated questions connected with the law of corporations. A share of stock is supposed, in theory, to represent its par value in money or money's worth paid in or to be paid in to the corporation. Accordingly when it is issued as paid up, it is bought and sold in the open market on the supposition that it is full-paid stock.[1] Upon this basis, transactions in paid-up stock, involving millions of dollars, are of daily occurrence in the commercial centers of the country. The fact is, however, that where stock is issued in payment for property, the actual value of the property is rarely equal to the par value of the stock issued for it. Especially is this the case with the great industrial corporations. Hence it becomes important to know what liability is attached to such stock; who is liable; to whom the liability arises, and when the liability may be enforced.

§ 29. *Methods of issuing "watered" stock.*—There are four different ways in which watered stock is issued: First, by the issue of certificates of stock for an amount of *money* less than the par value of the stock, although the certificates assert on their face that the full value has been paid in; second, for *property* or *construction work* taken at an overvaluation; third, by a *stock dividend,* the equivalent par value of which has not been added to the capital stock; and fourth, by consolidation under a statute. Each of these

1 The reasons why the par value of stock is required by the law to be turned in to the corporation are stated by the supreme court of the United States in Handley *v.* Stutz, 139 U. S. 417, 428 (1891), as follows:

"The stock of a corporation is supposed to stand in the place of actual property of substantial value, and as being a convenient method of representing the interest of each stockholder in such property, and to the extent to which it fails to represent such value it is either a deception and fraud upon the public, or an evidence that the original value of the corporate property has become depreciated. . . . If it be once admitted that a corporation may issue stock without receiving a consideration therefor, and where it does not represent actual or substituted value in corporate assets, there is apparently no limit to the extent to which the original stock may be 'watered,' except the caprice of the stockholders."

four methods may be the means of issuing stock which has been paid up in good faith. Each, also, is available for the issue of "watered" stock. The second method particularly—that of taking property at an overvaluation—is well calculated to conceal the fictitious character of the issue, and to accomplish the purposes of the participants.

Where a corporation has acquired shares of its own paid-up capital stock, either by purchase or by forfeiture for non-payment of calls, it may legally re-issue and sell the same at less than the par value thereof.[1]

§ 30. *Dicta in regard to such issues.*—There have been various opinions, generally *dicta,* as to the character of stock issued as paid up, when in fact it has not been paid for. The customary expression is that such an issue is a fraud upon the law and upon the public and upon the stockholders; or that it is against public policy; or is a fraud on subsequent purchasers of the stock so issued.[2] The law now is, however, that an issue of stock as full paid-up stock, under an agreement that the full par value shall not be paid, is not necessarily a fraudulent transaction, but that as between the parties thereto it is a legal and valid agreement, and violates no principle of public policy.[3]

1 See § 46, *infra.*

2 In Barnes *v.* Brown, 80 N. Y. 527, 534 (1880), the court said in a *dictum:* "It is not claimed, and could not be claimed, that the corporation or its directors could create any valid stock by issuing the same without any consideration. The directors assuming to issue stock in that way would perpetrate a wrong upon the corporation and its stockholders, and a fraud upon every person who took such stock as full-paid stock, relying upon the appearances, and deceived thereby." In the case of Sturges *v.* Stetson, 1 Biss. 246, 253 (1858); s. c., 23 Fed. Cas. 311, 314, the court said: "The subscription of stock by plaintiff, for less than the price of the shares fixed by the charter, was void, as against law and the power of the directors." See also *Ex parte* Daniell, 1 De G. & J. 372 (1857); Oliphant *v.* Woodburn, etc. Co., 63 Iowa, 332 (1884); Tobey *v.* Robinson, 99 Ill. 222, 228 (1881); Osgood *v.* King, 42 Iowa, 478 (1876). In Coleman *v.* Howe, 154 Ill. 458 (1895), the court said: "The issue of paid-up shares at less than their par value is a fraud upon the creditors."

3 In Scovill *v.* Thayer, 105 U. S. 143, 153 (1881), the court said: "It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it [the tock]. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company this was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy." In *Re* Ambrose, etc. Co., L. R. 14 Ch. D. 390, 394, 395 (1880), where paid-up stock was issued for property taken at a gross overvaluation, the court said: "It seems to me impossible to say that, however wrong the transaction was in respect to other persons, there was anything wrong as between the

The explanation of this is, as will be shown hereafter, that such issues are open to attack in some cases and in other cases not. It depends altogether on who complains of the issue and against whom complaint is made. The issue may be fraudulent as to one party while it is free from fraud as to another party.

The general statement of law that watered stock is illegal throws

company and the vendors." In Flinn *v.* Bagley, 7 Fed. Rep. 785 (1881), the court held that it was only as a fraud upon future creditors that exception could be taken to an issue of stock at a discount. In Lorillard *v.* Clyde, 86 N. Y. 384 (1881), the court held it legal for the parties, as between themselves, to issue paid-up stock for property taken at a valuation agreed upon between themselves. The court said: "If it had appeared that the organization of the corporation in this way was a device to defraud the public, by putting valueless stock on the market, having an apparent basis only, a different question would be presented." See also Otter *v.* Brevoort, etc. Co., 50 Barb. 247, 256 (1867), *dictum;* Spring Co. *v.* Knowlton, 103 U. S. 49, 58 (1880), *dictum.* In an article in the "Statist" of April 6th, 1907, the following statements are made: "The assent of both Houses of Parliament in England has more than once been given to operations by which the Ordinary stock of English railroads has been converted from £100 of Ordinary stock into £100 of Preferred Converted Ordinary, bearing a low rate of dividend, and £100 Deferred Converted Ordinary, thereby doubling the amount of the original stock. . . . It seems to me that in condemning watered capital the American public are led by theorists. If a law prohibiting the issue of stock unless for par in cash had existed in that country in the past, many of what are now big systems would never have been built; and if in the future the capital of railroads is to represent no more than the money spent, it follows that no new railroads will be built, unless by existing dividend-paying systems. . . . To-day the law of Massachusetts prevents a sale of stock under par. It is a good law for a developed and rich State like Massachusetts, and would be a good law for the United States, but its provisions must not be so inelastic as to throttle the country's development."

There have been various *dicta* in the cases and text-books that the issue of "watered" stock by mining companies is a customary, and hence legal, issue. There is no reason, however, why stock issued for a mine should be issued more recklessly than stock issued for a patent right.

The case generally cited as holding that mining companies may legally issue watered stock is *Re* South Mountain Consol. Min. Co., 7 Sawy. 30 (1881); s. c., 5 Fed. Rep. 403. In this case, however, it is stated that corporate creditors were protected "by the personal liability of each stockholder for his *pro rata* share of the indebtedness of the corporation." Aff'd, 14 Fed. Rep. 347 (1882).

Under the Minnesota statute authorizing mining corporations to sell their unissued stock as the corporation might see fit, and providing that if issued thus, as paid up, no further liability should exist, the sale of shares of a par value of $2 for six cents exempts the purchaser from further liability to any one, including corporate creditors. Ross *v.* Kelly, 36 Minn. 38 (1887). See, in general, Kimberly *v.* Arms, 129 U. S. 512, 530 (1889). A distribution of increased capital stock for no consideration whatsoever seems to have been

little light upon the important questions of the rights, risks and liabilities growing out of such issues of stock. The stockholder and the practitioner wish to know whether such stock is void or is voidable, or is valid. They wish to know, also, what are the rights and remedies of the various parties involved. If the stock is valid, then the question arises whether any one is liable for that part of the par value which has not been paid, and also who may bring suit to enforce that liability.

It is well settled that watered stock is not illegal and void, *per se*, unless it is declared to be void by constitutional or statutory provisions. Nearly all the cases assume this to be the rule, and do not discuss it. Even when a constitution or statute declares such stock to be void, it is rarely possible to apply the statutory law. A few cases speak of such stock as being void, but, inasmuch as the remedies given in those cases were remedies for the rescission of contracts for fraud, they do not establish the proposition that the issue was void absolutely.[1] Thus, a *bona fide* purchaser of stock issued without consideration in violation of the constitution and statutes of Louisiana may nevertheless have a *status* to enjoin illegal acts of the directors.[2]

§ 31. *Fictitious stock may be voidable.*—Is stock voidable when fraudulently issued as paid up? There are few cases on this question, but the courts hold that such issues of stock may be avoided by a withdrawal of the issue and a cancellation of the certificates. Thus, a court of equity, on the application of a dissenting stockholder, has decreed that stock falsely issued as paid-up stock should be delivered up to the corporation for cancellation.[3] Where, how-

sustained in Knapp *v.* Publishers, 127 Mo. 53 (1895), there being no creditors and all the stockholders assenting.

1 Sturges *v.* Stetson, 1 Biss. 246 (1858); s. c., 23 Fed. Cas. 311; Fosdick *v.* Sturges, 1 Biss. 255 (1858); s. c., 9 Fed. Cas. 501; Gilman, etc. R. R. *v.* Kelly, 77 Ill. 426 (1875); Campbell *v.* Morgan, 4 Bradw. (Ill.) 100 (1879). The stock is voidable rather than void even in Alabama under a constitutional prohibition. Nicrosi *v.* Irvine, 102 Ala. 648 (1893). See also § 47. Even though a citizen of Massachusetts subscribes and receives stock in a New Hampshire corporation at sixty per cent. of its par value, and even though such stock has been declared void by a court in New Hampshire as being contrary to the statute, yet the subscriber cannot recover back the money paid if he has delayed eight years after the issue of stock before bringing suit. Hallett *v.* New England, etc. Co., 105 Fed. Rep. 217 (1900).

2 United Elect. Sec. Co. *v.* Louisiana Elect. L. Co., 68 Fed. Rep. 673 (1895).

3 Gilman, etc. R. R. *v.* Kelly, 77 Ill. 426 (1875). In this case it was admitted that the stock was issued gratuitously and for the purpose of enabling the construction company to own a majority of the stock, thereby controlling the corporation.

ever, the stock has passed into the hands of *bona fide* purchasers for value, such purchasers are entitled to retain the stock. Some cases intimate that the stock fictitiously issued may be canceled, except a part whose par value would equal the amount actually paid in by the persons receiving it.[1] Many cases hold also that the transaction is in the nature of a fraudulent contract, and that it may be rescinded for fraud; in which case the stock would have to be returned to the corporation.

So far as the right of the corporation to issue stock below par is concerned, the courts have frequently held that the issue is an *ultra vires* act.[2] But an *ultra vires* act is not always void absolutely, and it is voidable only at the instance of persons standing in a certain relation towards the act. Who can avoid the act will be explained hereafter.

B. WATERED STOCK ISSUED FOR CASH.

§ 32. *First method of issue: By discount in cash.*—As already stated, paid-up stock may be improperly issued in four different methods: by part cash payment; by taking property at an overvaluation; by an invalid stock dividend; and by consolidation.

As issue of paid-up stock for cash, upon payment of only part of the par value of the stock, is not often made, inasmuch as the real nature of the transaction is readily discovered and easily remedied. Sometimes the corporation makes the issue under a contract with those receiving it that no more than a certain percentage of the par value will be called for. Again, a release is sometimes made

1 Sturges *v.* Stetson, 1 Biss. 246, 254 (1858); s. c., 23 Fed. Cas. 311, 315. The court said, in a *dictum*, that stock taken at less than par, with knowledge, is subject to the right of other stockholders, being such at the time of its issue, "to have it reduced to the charter value of the shares. This would take from him nearly one-third of his shares." In Fosdick *v.* Sturges, 1 Biss. 255 (1858); s. c., 9 Fed. Cas. 501, the court says there can be no question that this remedy is available.

2 Fisk *v.* Chicago, etc. R. R., 53 Barb. 513 (1868), where the court says: "It is not a question of good faith, or of honest intention, or of wise policy, or skilful or discreet management on the part of the directors. It is a question of power." In West Cornwall Ry. *v.* Mowatt, 12 Jur., pt. 1, 407 (1848), the court sustained a demurrer to a bill for specific performance of a contract to take shares from the corporation at a discount, the court holding that the contract was *ultra vires*. In *Ex parte* Daniell, 1 De G. & J. 372 (1857), the court says: "It was very properly admitted . . . that the directors of the company had no power to pass the resolution" issuing the stock for less than its par value. In Bunn's Case, 2 De G., F. & J. 275, 295 (1860), it is held to be "beyond the functions and in excess of the powers" of the directors.

by a resolution of the directors or stockholders, after subscriptions have been made and partly paid, discharging the subscribers from any further liability on such subscriptions. The proceedings are generally spread upon the corporate records; certificates are issued, asserting on their face that they are paid up; and all inquiries at the corporate office are answered by a substantiation of that assertion.

§§ 33, 34. *Dangers attending this method.*—There are various dangers and liabilities growing out of such a transaction. The stock is liable to be canceled.[1] The person to whom it was issued,[2] or his transferee with notice,[3] or the corporate officers participating in the act,[4] may, under certain circumstances, each be held liable personally for the unpaid par value of the stock. They may be liable to the corporation itself,[5] or to the corporate creditors,[6] or to *bona fide* transferees of the stock.[7]

A *bona fide* transferee of such stock, however, is not liable.[8]

C. WATERED STOCK ISSUED FOR PROPERTY OR CONSTRUCTION WORK WHICH IS OVERVALUED.

§ 35. *Second method: Issue of stock for property taken at an overvaluation.*—A second method of issuing stock as paid up, when it is not actually paid up, is by its issue for property taken at an overvaluation. This method is the most frequently employed, the most difficult to prove, and the least easy to remedy. A large amount of litigation and confusion has been experienced in determining the principles of law which should govern such transactions. The questions which have perplexed the courts were, first, what constitutes an overvaluation sufficient to invalidate the contract; second, what remedy should be applied when the contract was invalid.

It is now well settled that in order to invalidate an issue of stock which is issued for property taken at an overvaluation, it must be shown not only that there was an overvaluation, but also that such overvaluation was intentional and fraudulent.[9] Moreover, it does not follow that because the issue was invalid the holders of the stock are liable thereon.[10] The better rule is that in such a case rescission

1 See § 31, *supra*.
2 See §§ 46, 47, 167, *infra*.
3 See § 49, *infra*.
4 See § 48, *infra*.
5 See § 38, *infra*.
6 See § 42, *infra*.
7 See § 40, *infra*.
8 See § 50, *infra*.

9 Quoted and approved in Calivada, etc. Co. *v.* Hays, 119 Fed. Rep. 202 (1902); Speer *v.* Bordeleau, 20 Colo. App. 413 (1905), and Kelley *v.* Fletcher, 94 Tenn. 1 (1894). See also §§ 46, 47, *infra*, and 119 Fed. Rep. 202.
10 See § 46, *infra*.

is the only remedy, the property being returned to the stockholder and the stock returned to the corporation.[1]

The property is not to be considered as overvalued merely because, subsequently, it turns out to be so. The various circumstances under which the valuation was made should be considered in determining the *bona fides* of the transaction.[2]

D. WHO MAY COMPLAIN AND AGAINST WHOM COMPLAINT MAY BE MADE.

§ 36. *Liability on "watered" stock, and who may enforce it.*—When it has been established that the overvaluation of the property taken in payment for stock was intentional and fraudulent, the questions then arise, what liability has been incurred, who is liable, and what is the remedy. The clearest method of investigating and presenting the law in answer to these questions is by considering, first, who may complain of the transaction—who may be the party plaintiff or complainant; second, who is liable in such a transaction—who is to be made the defendant. Incidentally also there arise questions as to the extent of that liability, and the remedy to be applied.

§ 37. *Who may complain of an issue of stock as "paid up," when it has not been fully paid?—The state.*—As already stated, the issue of stock as paid up, when not actually paid up, is an act *ultra vires* of the corporation. The commission of *ultra vires* acts by a corporation, to the detriment of the public, renders its charter liable to forfeiture, at the instance of the state.

The issue of fictitiously paid-up stock, with a view to defrauding the public, may constitute a misuse of the corporate rights and privileges. In such a case it has been held that the state might forfeit the charter of the corporation, and that a palpable case of fraud would justify such forfeiture.[3]

1 See § 46, *infra*.

2 Quoted and approved in McCarter *v.* Pitman, etc. Gas Co., 69 Atl. Rep. 211 (N. J. 1908). See §§ 46, 47, *infra*.

3 Under the statutes of Alabama in reference to watered stock, *quo warranto* lies where one million dollars of stock is issued for the possibility of patents to be thereafter granted. In such *quo warranto* proceedings stockholders need not be made parties. State *v.* Webb, 97 Ala. 111 (1893).

The Pennsylvania statute against railway companies issuing stock except for cash at par applies to street railroads, and the attorney-general by the statute is obliged to enforce the statute whenever any stockholder or two reputable citizens make out a *prima facie* case. Cheetham *v.* McCormick, 178 Pa. St. 186 (1896).

In Holman *v.* State, etc., 105 Ind. 569 (1886), the state caused a charter to be forfeited because the subscribers for stock were insolvent at the time of subscribing, thereby perpetrating a fraud on the public. See also State *v.* Atchison, etc. R. R., 24

Moreover, when a corporation is guilty of an *ultra vires* act, and such act is detrimental to the interests of the public, it is possible that the attorney-general may file an information for the purpose of

Neb. 143 (1888); s. c., 38 Neb. 437; State *v.* Webb, 97 Ala. 111 (1892); s. c., 110 Ala. 214 (1896). The case of Jersey City Gas Co. *v.* Dwight, 29 N. J. Eq. 242 (1878), was overruled by National Docks Ry. *v.* Central R. R., 32 N. J. Eq. 755 (1880), according to Elizabethtown G. L. Co. *v.* Green, 46 N. J. Eq. 118 (1890); aff'd, 49 N. J. Eq. 329 (1892).

The state may bring an action to forfeit a charter where the corporation commences business before the full capital stock is subscribed. People *v.* National Sav. Bank, 11 N. E. Rep. 170 (Ill. 1887); affirmed on rehearing, 129 Ill. 618 (1889).

In State *v.* Janesville Water Co., 92 Wis. 496 (1896), the court refused leave to the attorney-general to bring suit to forfeit the charter of a waterworks company although it was alleged that watered stock and bonds had been issued, it being shown in opposition that there had been eight years' delay. Even though a person who has a contract with a street railway company that the latter will lease its street railway on certain terms, turns over such contract to a new corporation for $900,000 of stock of the latter, and the latter then assumes the lease, and even though such stock is illegal under the constitution and statutes of Pennsylvania, yet where the state delays three years in filing a bill to declare it void, and meanwhile the stock has passed into *bona fide* hands, and not until five years thereafter are the real owners of the stock made parties defendant, the bill will be dismissed. Commonwealth *v.* Reading, etc. Co., 204 Pa. St. 151 (1902).

Quo warranto does not lie against a corporation merely because it issues its stock below par. State *v.* Minnesota, etc. Co., 40 Minn. 213 (1889).

The state cannot enjoin private parties from dealing in "watered" stock. State *v.* American Cotton Oil Trust, 40 La. Ann. 8 (1888); People *v.* National Sav. Bank, 11 N. E. Rep. 170 (Ill. 1887); affirmed on rehearing, 129 Ill. 618 (1889). See also Columbus, etc. R. R. *v.* Burke, 20 Week. L. Bull. 287 (Ohio, 1888), and § 766, *infra*, where the prolonged litigation in New York and Ohio over that transaction is explained.

Quo warranto failed in Commonwealth *v.* Central P. Ry., 52 Pa. St. 506 (1866), where a large amount of "watered stock" had been issued. Where the state by a suit in the state court has forfeited the charter of a waterworks company, no receiver being appointed, and thereafter on a bill filed in the United States court a receiver is appointed by the latter court, and thereafter under a statute the Governor of the state appoints a liquidator of the affairs of such corporation, and thereafter the liquidator is brought in as a party defendant to the suit in the United States court and interposes a plea, and thereafter the stockholders organize a new corporation and receive its stock in exchange for their stock in the old corporation, the state cannot maintain a suit to forfeit the charter of the latter corporation and enjoin a transfer of the assets of the old corporation to the new corporation, on the ground that the stock of the new corporation is issued at a fictitious value, the proof being insufficient to sustain any such claim, and the plant itself not yet having been sold and its value ascertained. State *v.* New Orleans, etc. Co., 111 La. 1049 (1904). In the case of State *v.* New Orleans, etc. Co., 51 La. Ann. 1827 (1899), the subscribers to the stock of a debenture company paid ninety-five per cent. of

stopping such acts.[1] Such a proceeding, however, is difficult to maintain. An injunction does not lie at the instance of the state against a corporation doing business, on the ground that its stock was not properly issued and that there was no intent to do any business within the state or to have an office therein.[2]

§ 38. *Right of the corporation itself to complain.*— The corporation itself, after issuing its stock as paid-up stock, and declaring it so to be, cannot subsequently repudiate that declaration and agreement and proceed to collect, either from the person receiving the stock or his transferee, the unpaid part of the par value. It is estopped from so doing.[3]

Where, however, actual fraud enters into a transaction, whereby

their subscription by borrowing that amount from the company on their notes, and thereupon full-paid stock was issued to them, although the statute prohibited the issue of stock until paid for. The state brought suit to set aside the charter and liquidate the company. The court held that under the constitution of Louisiana the incorporation was illegal. The court held also that the charter was illegal, in that the debentures issued were forfeited if deferred payments were not made, and that they provided for cancellation at fifty per cent. on the amount paid and that they were redeemable in numerical order in six years and that it would be impossible for the company to pay them. The same conclusion was reached in State *v.* Louisiana, etc. Co., 51 La. Ann. 1795 (1899).

1 See § 635, *infra*.

The state will not be allowed to intervene in a foreclosure suit for the purpose of preventing it on the ground that the bonds are illegal and void, and that on a re-organization a greater issue will be made. State *v.* Farmers' L. & T. Co., 81 Tex. 530 (1891).

Concerning the power of the state to object to an *ultra vires* act of a private corporation by any proceeding other than *quo warranto*, see People *v.* Ballard, 134 N. Y. 269 (1892).

2 Stockton *v.* American, etc. Co., 55 N. J. Eq. 352 (1897). A state cannot file and sustain a bill to declare void watered stock and bonds, and enjoin a foreclosure sale, and to have the property sold, and the proceeds applied to the moneys actually expended by the corporation. "The state has no authority to protect such private rights by suit." State *v.* Guaranty, etc. Co., 73 Fed. Rep. 914 (1896). A statute authorizing a corporation to reduce its capital stock waives informalities in its incorporation, and such waiver may extend to an illegal issue of watered stock. State *v.* Webb, 110 Ala. 214 (1896), 69 Atl. Rep. 211.

3 Whatever may be the rights of creditors, it is settled law that the corporation itself cannot repudiate its issue of stock as full paid and "proceed to collect either from the party receiving the stock, or his transferee, the unpaid part of the par value." Dickerman *v.* Northern T. Co., 176 U. S. 181, 202 (1900); First Nat. Bank *v.* Gustin, etc. Co., 42 Minn. 327 (1890). Neither the corporation itself nor a receiver of the corporation can hold a stockholder liable for stock issued to the stockholder at less than par by agreement. Great Western, etc. Co. *v.* Harris, 128 Fed. Rep. 321 (1903) (aff'd, 198 U. S. 561), the court saying (p. 329): "A contract between a corporation and its stockholders that they should not be called on to pay therefor in full is

stock is issued for property at an overvaluation, then the corporation is not estopped from having the agreement set aside. The person receiving the stock may then be compelled to return the stock or its market value, and take back that which he gave to the corpora-

good between the corporation and its stockholders." In that case it was held also that a contract between a corporation and all its stockholders cannot be attacked by the corporation or its receiver, and can be attacked only by creditors who have been actually defrauded thereby.

The corporation itself cannot claim that stock was issued for property at a fraudulent overvaluation. Parmelee *v.* Price, 208 Ill. 544 (1904). See also § 729, *infra.*

In ascertaining the value of capital stock for taxation stock issued for patents may be considered as worth par. People *v.* Kelsey, 101 N. Y. App. Div. 325 (1905); aff'd, 181 N. Y. 512.

A subscriber cannot defeat his subscription on the ground that the agent of the company who obtained it told him that he would never be called upon to pay anything. Marles, etc. Co. *v.* Stulb, 215 Pa. St. 91 (1906).

Where a corporation issues stock for cash at twenty-five cents on the dollar and agrees not to call for more, a trustee in bankruptcy cannot collect, except the amount necessary to pay debts, and his suit must be in equity in order that the contract shall first be set aside for fraud. Felker *v.* Sullivan, 34 Colo. 212 (1905).

A contract between a corporation and a person that stock issued to the latter is full paid, is binding on the company and its stockholders in the absence of fraud affecting any stockholder. Goodnow *v.* American, etc. Co., 66 Atl. Rep. 607 (N. J. 1907).

An assignee of a corporation cannot hold liable a person to whom stock is issued at fifty cents on the dollar with the consent of the stockholders, the creditors not being injured. Ross *v.* Sayler, 104 Ill. App. Rep. 19 (1902).

Where a corporation issued certain stock as paid up to forty per cent. and induced the holder to pay the other sixty per cent. by transferring to him second mortgage bonds of the company, no right of action exists against him either in favor of the corporation or its judgment creditor for the forty per cent. unpaid on the shares, or for the value of the bonds. Christensen *v.* Quintard, 8 N. Y. Supp. 400 (1890), overruling s.c., 36 Hun, 334.

Where a bridge corporation issues all its stock and bonds to a construction company, the stock having been first subscribed for by the promoters, a contract between the construction company and the promoters, by which the latter take the profits and such of the stock as is not used, is legal, so far as the bridge company is concerned. The court will enforce the contract for the division of the stock. Even a settlement made without knowledge and a year's delay are not fatal. Krohn *v.* Williamson, 62 Fed. Rep. 869 (1894); affirmed *sub nom.* Williamson *v.* Krohn, 66 Fed. Rep. 655 (1895).

Where stock is issued for property, neither the corporation nor a discontented stockholder can hold the party receiving the stock liable for any further payments, even though the property was overvalued. A corporate creditor might possibly stand in a different position. The court said: "Whatever may have been in fact the value of the property turned over to the company for its stock, the company agreed to take it for the stock. The persons interested were the stockholders, and there was no dissent on the part of any person concerned from what was then done. Neither any person then holding stock, nor any person who afterwards

tion for it. On this theory the supreme court of Massachusetts held that where a person buys property for the purpose of forming a corporation to take it over, and this plan is carried out by the use of dummies as directors, who issue stock therefor, the par value of

became a stockholder by assignment from one who then held stock, can now make complaint, on behalf of the corporation, as against the fairness of that transaction. This I take to be the settled law on that subject." Northern Trust Co. *v.* Columbia, etc. Co., 75 Fed. Rep. 936 (1896); aff'd, 80 Fed. Rep. 450, and 176 U. S. 181.

The corporation cannot complain that the stock was issued for property taken at an overvaluation. Wells *v.* Green Bay, etc. Co., 90 Wis. 412 (1895).

Land which cost $100,000 and upon which only $33,333 had been paid, the remainder being secured by a purchase-money mortgage, was sold to a corporation organized for that purpose for $500,000 of stock; in other words, the $33,333 equity of redemption of the land was turned in for $500,000 of stock. The holders of the stock then donated $200,000 thereof to the treasury to be sold to pay off the mortgage for $66,666. The company borrowed money to make a partial payment on the mortgage and then brought suit against a stockholder on the theory that the stock was not paid up. The court held that the suit would not lie. John, etc. Land Co. *v.* Cooke, 103 Ky. 96 (1898). Even though a corporation issued stock for cash at about fifty cents on the dollar, nevertheless, if it agreed with the subscriber that he need pay no more, neither the corporation nor its receiver can collect the balance. Thompson *v.* Knight, 74 N. Y. App. Div. 316 (1902).

Even though a corporation accepts a note instead of cash in payment for a subscription, in violation of the statute which provides that only money, labor done or property actually received shall be accepted in payment for stocks and bonds, yet a bank which discounted such note for a corporation may hold the corporation liable thereon. First Nat. Bank *v.* Cornell, 8 N. Y. App. Div. 427 (1896).

In the case of Scoville *v.* Thayer, 105 U. S. 143 (1881), the court said, in a *dictum:* "No call could have been made by the company under its agreement with the stockholders, unless to pay its creditors. . . . The shares were issued as full paid, on a fair understanding, and that bound the company." The issue had been at a discount. See also Union, etc. Co. *v.* Frear, etc. Co., 97 Ill. 537 (1881), *dictum.* In the case of Granite Roofing Co. *v.* Michael, 54 Md. 65 (1880), stock was issued as paid up for cash, although not actually paid. The corporation passed under the control of purchasers of the stock, who caused the corporation to sue the original subscribers for the unpaid par value of the stock. The court said: "While the law may reject, as illegal and fraudulent, that which the parties have agreed upon, . . . it will not arbitrarily incorporate, in lieu thereof, terms in the contract to which the parties have never assented." In the case of *Re* Ambrose Lake, etc. Co., L. R. 14 Ch. D. 390 (1880), where all the stockholders acquiesced and there were no creditors' rights involved, the court held that the corporation could not hold the directors liable for the profits made by them. In Zirkel *v.* Joliet Opera House Co., 79 Ill. 334 (1875), the corporation had released the subscriber after the subscription had been made. The release being without consideration, and not a contract, was held void, and the corporation was allowed to recover. See also San An-

which is many times greater than the actual value of the property, the corporation itself may thereafter rescind the transaction and return the property and demand back the stock, even though all the stockholders, directors and officers approved the transaction when it

tonio St. Ry. *v.* Adams, 87 Tex. 125 (1894), rev'g 25 S. W. Rep. 639. An agreement by promoters that certain stock need not be paid for is not binding on the corporation, and it may collect. York Park Bldg. Assoc. *v.* Barnes, 39 Neb. 834 (1894). The case of Society of Prac. Knowl. *v.* Abbott, 2 Beav. 559 (1840), was distinguished in *Re* British, etc. Box Co., L. R. 17 Ch. D. 467 (1881), the latter case holding that no one is liable on fictitiously paid-up stock where all acquiesced and there was no intent to bring in new stockholders. This was held to be the rule even though new stockholders were subsequently brought in.

In the case of Harrison *v.* Union Pac. Ry., 13 Fed. Rep. 522 (1882), where plaintiff sued to recover on bonds guarantied by the defendant, the court said: "The intention of the Arkansas Valley Railway Company was to sell the stock to Harrison for less than its par value; *i. e.*, to give him $15,000 in stock, twenty bonds of the company, guarantied by the Kansas Pacific Company, and the Clay county bonds, all for $15,000 in cash. There is nothing in the statutes of Colorado, where the corporation was created, to forbid the sale of stock at less than par; nor was Harrison forbidden to purchase the stock by reason of the fact that he was already a stockholder and director in the Kansas Pacific Railway Company. The transaction was therefore valid as between the corporation and Harrison, whatever the right of the creditors of the corporation as against Harrison may be."

In St. Louis, etc. R. R. *v.* Tiernan, 37 Kan. 606 (1887), it was held that an issue of $3,600,000 of stock and the payment of $200,000 to directors for an old road-bed which cost them $15,000 was legal, since all the stockholders and directors, except a few nominal holders of stock, were fully informed of the facts, and no other stockholders came in until several months subsequently. The corporation was held to be estopped from complaining. See also Flinn *v.* Bagley, 7 Fed. Rep. 785 (1881); *Re* Glen Iron Works, 17 Fed. Rep. 324 (1883). *Cf.* People *v.* Sterling Mfg. Co., 82 Ill. 457 (1876). As to receivers, see Mathis *v.* Pridham, 1 Tex. Civ. App. 58 (1892).

A corporation cannot hold the directors liable on stock which the corporation issued to them for services, at five cents on the dollar, in lieu of salary, where all the stockholders assented thereto, such stock so issued to them being treasury stock; that is, stock which was issued for property as full paid and then donated to the corporate treasury. The evidence showed that the stock represented a patent-right and was purely speculative, and had no market value. Divine *v.* Universal, etc. Co., 38 S. W. Rep. 93 (Tenn. 1896).

Where all the stockholders unite in the issue of watered stock to the president for his own use, and assent to a contract between him and the company, the corporation itself cannot subsequently complain. Arkansas, etc. Co. *v.* Farmers' L. & T. Co., 13 Colo. 587 (1889). *Cf.* People *v.* Sterling, etc. Co., 82 Ill. 457 (1876), holding that the corporation may refuse to allow a transfer of watered stock.

Although the incorporators of a New Jersey company have contracted to issue sixty per cent. of its stock to a person for two patents, yet the board of directors, after the company is organized, may refuse to carry

was carried out, it appearing that the property received was worthless and that it was a part of the original plan to sell a large part of the stock to the public, which plan was carried out, and it appearing also that the original stockholders and officers were merely representatives of the vendor, and that there was no independent judgment on the part of the board of directors. The court pointed out that this was a different case from one where it was not contemplated that the public should become interested, except by purchase from the original stockholders.[1] The supreme court of the United States, however, subsequently passed on the same transaction and held very

out the agreement, one patent being worthless and the other not having been perfected. The court said: "To justify a corporation in issuing stock under our act for property purchased, there should be an approximation, at least, in true value of the thing purchased to the amount of the stock which it is supposed it represents." Edgerton *v.* Electric, etc. Co., 50 N. J. Eq. 354, 361 (1892). An agreement of the corporation with a stockholder to pay to him in dividends the amount he pays for the stock cannot be enforced as an obligation of the corporation. Smith *v.* Alabama, etc. Ass'n, 123 Ala. 538 (1899). Where a statute declares that stock issued for money or labor or property estimated at less than its true money value, actually received, equal to the par value of the stock, shall be void, and the secretary issues to himself and the president some stock for no consideration, and then sells such stock, the bondsmen for such secretary are not liable on account of such issue of stock, there being no sufficient allegation that the purchasers relied on the certificates, and were innocent of their general character, and that they exercised ordinary care. First Ave. etc. Co. *v.* Parker, 111 Wis. 1 (1901). A corporation cannot maintain a suit for the cancellation of illegally issued certificates of stock unless it alleges that it had the right to issue certificates of stock and that the certificates complained of will injure the corporation of its *bona fide* stockholders in some way. Reno, etc. Co. *v.* Culver, 60 N. Y. App. Div. 129 (1901).

Where the sole owner of the stock of a corporation executes the note of the corporation for his individual indebtedness, no one but the creditors of the corporation can complain. Millsaps *v.* Merchants', etc. Bank, 71 Miss. 361 (1893). See also § 3, *supra*. In Canada it has been held that even though stock was issued at twenty cents on the dollar, and purports to be paid-up stock, yet the corporation may levy assessments upon it and forfeit the stock for non-payment. North West Electric Co. *v.* Walsh, 29 Canada S. C. Rep. 33 (1898). In Nova Scotia, where a subscriber sues a promoter for damages for fraud in obtaining for himself stock and bonds illegally, the suit must be by the corporation, or by the stockholder for its benefit if the corporation refuses to sue. Weatherbe *v.* Whitney, 30 Nova Scotia Rep. 49 (1897). Such claim cannot be joined with a personal claim for services rendered, etc. Weatherbe *v.* Whitney, 30 Nova Scotia Rep. 104 (1897).

[1] Where a person buys all the stock of a corporation for about $613,000, and some real estate for about $175,000, and sells the former to a corporation formed by him for the purpose, for $2,500,000 par value of stock, having also an actual value of $2,500,000, and sells the real estate for $750,000 par value of stock, having also the same actual value, but it turns out that the real estate was worthless, the corporation so issuing

properly that the corporation could not complain at all.[1] Certainly the corporation cannot hold him liable for the par value of the stock.[2] In Pennsylvania it is held that a corporation will

the stock may maintain a separate suit for rescinding the sale and issue of stock for the real estate, or for damages, if the stock cannot be returned, it appearing that the promoter was a director at the time of the sales, and that the fair market value of the stock at the time of issue was par, and so continued to be for a long time thereafter; it further appearing that he made no disclosure of the facts to the corporation and did not see to it that the corporation had adequate independent advice. The court said "that is an obligation resting upon every fiduciary who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and *cestui que* trust, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself. There is no pretense that in the transaction in question the plaintiff corporation was represented by an independent board." It is no defense that every stockholder and director knew of and acquiesced in the transaction at the time, it appearing that the stock was afterwards sold to the public without any disclosure of the facts. Old Dominion, etc. Co. *v.* Bigelow, 74 N. E. Rep. 653 (Mass. 1905), the court refusing to follow Old Dominion, etc. Co. *v.* Lewisohn, 136 Fed. Rep. 915; aff'd, 148 Fed. Rep. 1020, involving the same issue of stock, holding that even though the owners of mining claims organize a corporation in New Jersey, and they themselves as directors, together with dummy directors, cause the corporation to purchase the claims for $750,000 par value of stock, although the mining claims were worth but $5,000, and even though thereafter additional capital stock is sold by the corporation to the public for cash at par, yet the corporation cannot rescind the transaction, inasmuch as there were no other stockholders at the time of the transaction, and hence no one was deceived. The court pointed out that in cases to the contrary it was not contemplated that other parties should become interested in the stock, except by purchase from the original stockholders. If there are two such promoters it seems that in a suit against one, he is liable for the whole stock so issued.

Where by fraud a corporation has been induced to sell stock and it sues to recover back the same, it may have an injunction against the defendant assigning or transferring the stock, but cannot enjoin him from voting it. Maine, etc. Co. *v.* Alexander, No. 2, 115 N. Y. App. Div. 112 (1906).

Where promoters obtain an option on property for $40,000, but cause the written option to state the price as $60,000, on which $20,000 has been paid, and then by misrepresentations causes their associates to organize a company and take over the property and pay the $40,000 and issue to them $20,000 in stock, they may be compelled to give up the stock for cancellation. Cuba, etc. Co. *v.* Kirby, 112 N. W. Rep. 1133 (Mich. 1907).

Where promoters represent to cap-

1 Old Dominion, etc. Co. *v.* Lewisohn, 210 U. S. 206 (1908), the court holding that a corporation will not be allowed to repudiate its consent to an issue of stock for property and to charge a single stockholder therefor, when thirteen-fifteenths of its stock were parties receiving the benefit of the transaction, especially where any such repudiation would be for the guilty and innocent alike.

2 Quoted and approved in Orton *v.* Edson Reduction, etc. Co., Ohio Circuits (1905), p. 107; aff'd, 75 Ohio St. 580. See §§ 46, 47, *infra*.

not be compelled to transfer stock to a person who took with knowledge that nothing had been paid for it.[1] In the foreclosure of a mortgage the corporation cannot set up that the value of the property received by it for bonds and stock was grossly overvalued.[2] The corporation itself, all of whose stock has been issued in payment for a mine cannot hold a vendor liable for misrepresentations as to the value of the property.[3] A corporation cannot maintain a libel suit based on charges that its promoters had issued watered stock and intended to unload on to the public, there being no allegation of

italists that it will cost $1,900,000 to purchase a company to be reorganized, when in fact it costs them but $1,400,000, and the capitalists advance the former sum, and the promoters organize a company and carry out the reorganization and give to the capitalists a part of the stock with bonds, the latter as stockholders may compel the promoters to pay the extra $500,000 to the company, even though the promoters controlled all the stock at the time the property was taken over, the essence of the transaction being that the capitalists were the stockholders in the new company from the beginning, and it is no defense that for each dollar advanced by the capitalists they were to receive a dollar in bonds and a dollar in stock. Arnold *v.* Searing, 67 Atl. Rep. 831 (N. J. 1907).

Where a person purchases property for the sole purpose of creating a corporation to take it over from him and to pay him therefor an excessive price in cash and stock, netting a large profit to him, the stock being offered to the public, and he causes the incorporation to be made and directors to be named, who are his dummies, he is a promoter and can be held liable by such corporation for the profit he has made, unless he fully disclosed in a prospectus that he had formed the corporation and that he had made such profit. Especially is this the rule where the prospectus gave a false impression. He occupies a fiduciary relation towards the purchasers of the stock. It is immaterial that the directors approved of the transaction with full knowledge. Non-disclosure in such a case is a misfeasance in the nature of a breach of trust. *Re* Leeds, etc. Co., [1902] 2 Ch. 809.

[1] Grafner *v.* Pittsburg, etc. Ry., 207 Pa. St. 217 (1903).

[2] Big Creek, etc. Co. *v.* American, etc. Co., 127 Fed. Rep. 625 (1904).

A corporation may file a bill in equity to enjoin the foreclosure of a mortgage securing bonds which have been issued to the stockholders as a dividend illegally, and to compel the surrender of the bonds for cancellation, it appearing that no other rights have intervened. Gunnison, etc. Co. *v.* Whitaker, 91 Fed. Rep. 191 (1898).

[3] Stratton's, etc. *v.* Dines, 126 Fed. Rep. 968 (1904).

Where a person sells property to a corporation for all of its stock, excepting seven qualification shares, and such property is the only property the corporation owns, it cannot hold him liable in damages for deceit as to the value of the property, even though he afterwards sells the stock to outside parties at a high price. The court said that there was no damage because there was no difference between the value of the stock and the value of the property, the corporation having given back "in substance that which it received and no more." Stratton's Independence *v.* Dines, 135 Fed. Rep. 449 (1905).

special damages and the language referred only to the promoters.[1] The promoters of a company may so act as to put themselves into a fiduciary relationship towards the corporation and, in such cases, may be held liable to the corporation for all profits made by them.[2]

The corporation has also a remedy herein against its directors who issued the stock either fraudulently or in *ultra vires* manner.[3] This liability is similar to their general liability to the corporation for fraudulent, negligent or *ultra vires* acts on their part.[4] The

1 Memphis, etc. Co. *v.* Cumberland, etc. Co., 145 Fed. Rep. 904 (1906).

2 See §§ 46 and 651, *infra*.

Where promoters obtain an option on property for $75,000 and organize a company for $100,000 capital stock, and as directors of the company, with other friendly directors, purchase the option for $100,000 and sell $75,000 of the stock at par and thereby have the remaining $25,000 of stock as profit, and the purchasers of the $75,000 of stock supposed that the actual price paid was $100,000, the corporation may compel such promoters to return and cancel the $25,000 of stock, and it is immaterial that the property was worth $100,000, the actual facts not having been disclosed to the corporation or its stockholders. The court said: "The promoter of a company stands in the relation of a trustee to it and those who become subscribers to its stock so long as he maintains the power of control over it." Yeiser *v.* United States, etc. Co., 107 Fed. Rep. 340 (1901).

Where promoters pay out less than $30,000 to secure options on land and then sell the options to a corporation for $700,000 of stock of the latter, the corporation assuming the purchase price of the land, and then issue a prospectus which is misleading and does not state the facts about the issue of stock, and the corporation becomes insolvent, they are liable to the corporation for the fair market value of the stock at the time the stock was issued, or as soon thereafter as it had a market value. The liability is not for unpaid stock, but for fraud as promoters in making a secret profit in services and not making a full disclosure to the stockholders. The promoters owe a duty to future stockholders. The land need not be tendered back. The promoters are to be credited with their actual disbursements and to be charged with the fair market value of the stock, with interest, and also with dividends. The suit should be brought by the corporation itself and not by its receiver, according to the Massachusetts decisions. Hayward *v.* Leeson, 176 Mass. 310 (1900). Where the promoters paid to a person who is to act as chairman of the directors, and his firm who underwrote 10,000 shares, a commission of 12,000 shares, the court held that 10,000 of the 12,000 was for the use of his name and only 2,000 shares for the commission, and hence he was liable, at the instance of an investor in the stock, to pay to the corporation the difference between the amount paid for the stock and its actual value the day after an allotment, the transaction not being fully disclosed in the prospectus. A clause in the prospectus that there "may" be various trade contracts and business arrangements and underwriters' agreements, followed by the usual waiver as to them, does not apply to such a contract, inasmuch as the word "may" was misleading. Cackett *v.* Keswick, 85 L. T. Rep. 14 (1901); aff'd, 87 L. T. Rep. 11 (1902).

3 See § 48.

4 See Part IV.

measure of their liability herein is not the par value of the stock, less the value actually received therefor by the corporation, but it is the actual or market value of the stock, less the property or cash actually received by the corporation on the stock so issued. It has been held that the corporation cannot, in a court of equity, compel a person, who agreed to take stock at a discount, to carry out the contract, inasmuch as it is *ultra vires*.[1]

Where the corporation contracts to issue stock to a contractor for work to be done in the future, and such work is not completed, various complications arise. This subject, however, is considered elsewhere.[2]

§ 39. *Stockholders participating in the act cannot complain.*— Stockholders in a corporation, who participate or aid in the issue of paid-up stock, upon payment of less than its par value, or who have knowledge of the act and acquiesce therein, cannot afterwards complain of the transaction, either in their own behalf as stockholders or creditors or in behalf of the corporation. They are bound by estoppel or acquiescence.[3]

[1] West, etc. Ry. *v.* Mowatt, 12 Jur., pt. I, 407 (1848).

[2] See § 766c, *infra*. Where a corporation has issued stock for services which have never been performed it may maintain a bill in equity to cancel such stock. Hillside, etc. Association *v.* Holmes, 97 Minn. 261 (1906).

[3] An incorporator who takes part in the issue of full paid stock for property cannot afterwards as a creditor claim that the stock was not fully paid up. Cunningham *v.* Holley, etc. Co., 121 Fed. Rep. 720 (1903). Where two million dollars par value of stock is issued for nothing and the parties receiving the stock subsequently obtain a judgment against the corporation for money advanced, they cannot collect the judgment from other persons to whom they have assigned a portion of the stock. Continental, etc. Co. *v.* Cook, 152 Fed. Rep. 652 (1906). Where an option which has been purchased at $125,000, of which amount $30,000 has been paid, is sold to an Illinois corporation for $8,000,000 par value of stock, persons taking the stock with notice are liable proportionately to *bona fide* corporate creditors for the difference between the actual value of the property and the par value of the stock. One of the promoters, however, cannot enforce such liability to repay money which he has loaned to the company. Meyer *v.* Ruby, etc. Co., 192 Mo. 162 (1905). A contract between a corporation and a person that stock issued to the latter is full paid, is binding on the company and its stockholders in the absence of fraud affecting any stockholder. Goodnow *v.* American, etc. Co., 66 Atl. Rep. 607 (N. J. 1907). Where, by agreement of all the stockholders, stock is issued to them at less than par, one of them cannot as a creditor of the company compel the others to pay for the stock in full. Richardson *v.* Chicago, etc. Co., 63 Pac. Rep. 74 (Cal. 1900). Although $1,500,000 of stock, issued as fully paid, and $1,500,000 in bonds are issued for the construction of a work which costs less than $1,500,000, yet an attorney who took part in the transaction cannot, as a creditor of the corporation, claim that the stock was not fully paid. Ten

So also as to the parties who actually receive the stock at less than its par value. They are not allowed to repudiate the trans-

Eyck *v.* Pontiac, etc. R. R., 114 Mich. 494 (1897).

A promoter who takes part in selling property to the corporation for stock, the par value of which is five times the amount paid by the promoters for the property, and who afterwards becomes a director and then sells his stock and becomes a creditor of the corporation, cannot hold the stockholders liable for the difference between its par value and the value of the property. Nicrosi *v.* Calera L. Co., 115 Ala. 429 (1896).

Where $59,000 of stock and $20,000 of bonds are issued for a gas plant worth $34,000 besides the franchise, a judgment creditor cannot hold the stockholders liable on the stock where he himself is a stockholder and no charge of fraud is made. Woolfolk *v.* January, 131 Mo. 620 (1895).

Stock may be issued for the goodwill of a business, and a person who has taken part in the transaction cannot afterwards complain. Washburn *v.* National, etc. Co., 81 Fed. Rep. 17 (1897).

In *Re* Gold Co., L. R. 11 Ch. D. 701, 712 (1879), the court says: "It could not be a fraud upon, or a wrong to, the existing shareholders, because every one of them was a party to the transaction." See also Scovill *v.* Thayer, 105 U. S. 143 (1881); Lorillard *v.* Clyde, 86 N. Y. 384 (1881); Hall *v.* Brooklyn El. R. R., N. Y. L. J., April 30, 1892; Kolsky *v.* Enslen, 103 Ala. 97 (1894). But in the case of Knowlton *v.* Congress, etc. Co., 14 Blatchf. 364, 368 (1877); s. c., 14 Fed. Cas. 797, the court said in a *dictum:* "Can there be any doubt that, up to the time of the abandonment of the scheme by the defendant, the plaintiff could have resorted to a court of equity and restrained further proceedings and vacated the proceedings already taken? The cases are numerous where courts of equity have interfered to prevent the consummation of a wrong, upon the motion of a party who was instrumental in its inception." Affirmed, Spring Co. *v.* Knowlton, 103 U. S. 49 (1880). The issue of stock in that case was held to be absolutely void by statute.

A participating stockholder cannot complain, even though he or his assignee is a corporate creditor. Callanan *v.* Windsor, 78 Iowa, 193 (1889); Lewis *v.* N. Y. etc. Iron Co., N. Y. L. J., April 30, 1890.

A purchaser of stock that has voted for an issue of "watered" bonds and stock is estopped from complaining, even though the issue was prohibited by the constitution of the state (Pennsylvania). Wood *v.* Corry, etc. Co., 44 Fed. Rep. 146 (1890).

A purchaser of stock who voted in favor of a re-organization scheme cannot object to the scheme as being *ultra vires*, there being nothing illegal *per se* in it. Hollins *v.* St. Paul, etc. R. R., 9 N. Y. Supp. 909 (1889).

In the case of Skinner *v.* Smith, 134 N. Y. 240 (1892), $40,000 of stock was issued for letters patent. Afterwards, with the consent of all the stockholders, the transaction was rescinded, the stock being returned and the patents retransferred. A license to manufacture under the patents was then transferred to the company for $350,000 in stock. The court found that the transaction was in good faith and with no intent to defraud future stockholders, and that the license was an adequate consideration for the stock. The court held that there was nothing illegal in the transaction.

A stockholder cannot have a receiver appointed and mortgages set aside, where all the stock is "water," even though the controlling party has made the mortgages to himself and is

action and recover from the corporation the money they may have

about to sell the assets of the company to another company controlled by himself, and has levied an assessment on the stock of the old company in order to sell out the stock. Robinson *v.* Dolores, etc. Co., 2 Colo. App. 17 (1892).

A person to whom watered stock has been issued as full-paid stock is not such a *bona fide* stockholder as may compel a creditor to return bonds which were illegally issued. The stock is void under the Wisconsin statutes. Hinckley *v.* Pfister, 83 Wis. 64 (1892).

A conditional sale of stock, the condition being that the sale shall be complete for fifty cents on the dollar, when the stock is worth par, is valid. Until the stock is worth par no further sum is recoverable by a creditor who as a stockholder participated. Callanan *v.* Windsor, 78 Iowa, 193 (1889).

A person who buys stock in a company, knowing that the stock was issued without consideration, cannot compel another stockholder to return his stock to the company for cancellation or to account for dividends. Clark *v.* American Coal Co., 86 Iowa, 426 (1892).

A stockholder who, as secretary, signed certificates of stock cannot claim they were watered stock and hence that they cannot be voted at a meeting called to ratify a sale of property to a director. Wisner *v.* Delhi, etc. Co., 46 La. Ann. 1223 (1894).

Where three persons own all the stock of a company, two of them may buy the stock of the third and give the company's notes in partial payment for the same. The transaction is legal inasmuch as no one is injured and all consent. Neither subsequent purchasers of the stock, nor those who become stockholders after the notes are paid, nor stockholders who consent to the arrangement, can complain of it. Schilling, etc. Co. *v.* Schneider, 110 Mo. 83 (1892). See also § 766, *infra*.

Where about one-half of the capital stock is issued as full-paid stock for property, the real value of which is one-quarter of the par value of the stock, and then subsequently the remaining stock is sold for cash at one-quarter of its par value, the remaining seventy-five cents on the dollar cannot be collected from the parties to whom the stock was issued for cash, as between the stockholders and the corporation, it having been agreed at the time of the issue that the stock should be full-paid and non-assessable. Green *v.* Abietine, etc. Co., 96 Cal. 322 (1892).

Even though the statutes of Virginia provide that stock shall not be issued at less than par, yet as between the corporation and its stockholders stock may be issued at less than par, the stockholder remaining liable to corporate creditors for the difference. A stockholder is not debarred from suing another stockholder in regard to the stock merely because the stock was issued in this manner. The court said: "In the absence of a statute inflicting a penalty of some sort for issuing or receiving, as fully paid and non-assessable, shares for which less than their face value had been paid, or prohibiting its being done, we are not aware of any general principle which holds such a transaction to be fraudulent, or of moral turpitude, so as to prevent a party to such an act from having any standing in a court of equity. The penalty is that the stockholders to whom such shares are issued may be called upon, not, indeed, to pay their entire par value, but so much thereof as may be required to pay those creditors who had a right to look to the capital stock as a fund

already paid thereon.[1] A stockholder who has received stock at less than par cannot compel other stockholders, who have received

for the payment of their debts. Agreements not to require payment for stocks issued have been regarded by the courts not as questions affected by public policy, but as questions between debtor and creditor, as to which each is controlled by the ordinary rules of law." Barcus *v.* Gates, 89 Fed. Rep. 783 (1898).

The fact that a bank is a stockholder in a corporation which issued stock for property at an overvaluation does not compel such bank as a creditor of the corporation to resort to its collateral before sharing in the general assets. World, etc. Co. *v.* Hamilton-Kenwood, etc. Co., 123 Mich. 620 (1900).

Even though directors sell property to the corporation in exchange for treasury stock which is issued to them at twelve and a half cents on a dollar, yet if they offer to allow all the stockholders to purchase their proportion of the stock at that price, and they all take the stock excepting one director, the latter cannot object to the transaction where he had himself moved that the stock be so issued. Mackey *v.* Burns, 16 Colo. App. 6 (1901). Under the New Jersey statute where stockholders are held liable to corporate creditors on stock issued for property taken at a fraudulent overvaluation, a creditor is entitled to participate, even though he is also one of the stockholders and took part in the illegal issue. Easton Nat. Bank *v.* American, etc. Co., 64 Atl. Rep. 917 (N. J. 1906), rev'g in part 69 N. J. Eq. 326. Where a promoter induces an owner of timber land to convey it to a corporation for stock, one-quarter to go to the owner and three-quarters to the promoter, for which the promoter pays nothing, the owner may cause the whole transaction to be set aside. Cranor Co. *v.* Miller, 41 S. Rep. 678 (Ala. 1906). Where a corporation has abandoned business for many years and its property has deteriorated, and the officers are not serving, a stockholder may file a bill to liquidate its affairs and to obtain an adjudication as to the validity of certain stock in order that the distribution may be made to those stockholders who are entitled to the assets. Central Land Co. *v.* Sullivan, 44 S. Rep. 614 (Ala. 1907).

[1] Even though a citizen of Massachusetts subscribes and receives stock in a New Hampshire corporation at sixty per cent. of its part value, and even though such stock has been declared void by a court in New Hampshire as being contrary to the statute, yet the subscriber cannot recover back the money paid if he has delayed eight years after the issue of stock before bringing suit. Hallett *v.* New England, etc. Co., 105 Fed. Rep. 217 (1900). A subscriber to stock of the company cannot defeat the subscription on the ground that the person to whom other stock had been issued for patents gave him three shares of such stock for each share that he subscribed for to the company. Marles, etc. Co. *v.* Stulb, 215 Pa. St. 91 (1906). The case Clarke *v.* Lincoln Lumber Co., 59 Wis. 655 (1884), holds that a participating subscriber cannot withdraw and recover back sums already paid. See also Goff *v.* Hawkeye, etc. Co., 62 Iowa, 691 (1883). Knowlton *v.* Congress, etc. Spring Co., 57 N. Y. 518, 537 (1874), holds the same, the court saying: "Such parties are left in the position they have placed themselves." The latter case was decided otherwise in the federal courts,—(Knowlton *v.* Congress, etc. Spring Co., 14 Blatchf. 364 (1877); s. c., 14 Fed Cas. 797; aff'd, Spring Co. *v.* Knowlton, 103 U. S. 49 (1880),—it be-

stock in a similar way, to pay anything further on their stock.[1] Where the stockholders participating in the issue use the stock to rob a railroad and bribe a judge, and then disagree among themselves, the courts will not aid one as against the others.[2]

§ 40. *Transferees of participating stockholders may complain, when?*—Not only the participating and acquiescing stockholders, but also their transferees, are bound by the participation or acquiescence. The transferee cannot claim to have greater rights than

ing there held that a recovery might be had where others are repaid. A person to whom stock is issued for cash at a discount may sue to have his subscription canceled. *Re* Zoedone Co., 60 L. T. Rep. 383 (1889). An employee who by contract with the company is entitled to a proportion of its profits, and has agreed not to enter into business in competition with it, cannot defend against the contract on the ground that the stock is all "pure water," even though the promoters purchased a property for a certain price and then turned it over to the corporation for a similar price in cash and also a large amount of stock. Knapp *v.* S. Jarvis Adams Co., 135 Fed. Rep. 1008 (1905).

Mandamus will not issue to compel the issue of stock at a discount, in performance of a resolution by the stockholders that such issue shall be made. Equity will not aid the fraud. State *v.* Timken, 48 N. J. L. 87 (1886).

[1] Sivin *v.* Mutual Match Co., 66 Atl. Rep. 921 (N. J. 1907). "The rule seems to be established that between stockholders one cannot be legally called upon to make good any shortage in value between assets and the nominal par value of the stock, when his stock is issued under a contract with the company as full paid, whether as a bonus, or for property at an overvaluation, when the issue is consented to by all the stockholders. It is a bargain between the contracting parties, which, in the absence of fraud, they cannot abrogate." Goodnow *v.* American, etc. Co., 66 Atl. Rep. 607 (N. J. 1907). Where two promoters form a partnership and acquire stocks and bonds, one cannot deny the rights of the other on the ground that the stock and bonds were issued by a railroad company in excess of the cost of construction. Leeds *v.* Townsend, 81 N. E. Rep. 1069 (Ill. 1907).

[2] Tobey *v.* Robinson, 99 Ill. 222 (1881). Although a stockholder has transferred certain stock to the president to be used to bribe governmental officials in obtaining a renewal of governmental contracts with the corporation, yet the stockholder may recover back the stock, it not having been used for that purpose. Mulvane *v.* O'Brien, 58 Kan. 463 (1897). The courts will not aid a stockholder as against directors' breaches of trust, where the business is illegal and the stock fictitious and "watered." Le Warne *v.* Meyer, 38 Fed. Rep. 191 (1889). Where an option to buy mining lands is sold to a Missouri corporation for $1,000,000 of stock, the promoters paying practically nothing, the act is illegal under the Kansas constitution, and a suit by one of them against the corporation to obtain his share of the stock will fail. Garrett *v.* Kansas, etc. Min. Co., 113 Mo. 330 (1892). Where "watered" stock is issued to directors and then by common consent an assessment is levied on such stock, an agreement of one of them to cancel his stock is binding on him and his transferees who took with knowledge. Hill *v.* Atoka, etc. Min. Co., 124 Mo. 153 (1894).

his transferrer, as regards a general remedy invalidating the whole transaction. He cannot bring suit in behalf of the corporation and other stockholders against the party or parties participating in the issue, inasmuch as his own title is tainted with the same fraud.[1]

[1] A stockholder in a holding corporation cannot maintain a suit in behalf of the corporation on the ground that its promoters made large, unlawful and secret profits by being interested in the constituent company whose stock was turned in to the holding company in exchange for the stock of the latter, it appearing that when the stock was so turned in the promoters were the only parties interested. If any of the original parties were defrauded their remedy is a suit at law for damages against the guilty parties. The court said (p. 241): "We have here nothing more than the ordinary transaction of parties coming together and agreeing in writing to form a corporation that shall take over from them certain definitely understood properties and cash, for which is to be issued its entire capital stock. It is doubtless true that in many instances there is great overcapitalization, and that the general public is frequently misled by the large amounts of preferred and common stock issued by corporations. The rights of the public are not involved in this litigation." . . . "The stockholders of the constituent companies and the individual defendants were the organizers of the corporation and became its first stockholders; they dealt wholly between themselves as sellers and buyers, organizers and corporation; no other persons had any interest in this initial transaction; if fraud had been practiced by any one of the organizers upon those associated with him, the cause of action would have vested in the party injured." Blum *v.* Whitney, 185 N. Y. 232 (1906).

Even though stock is issued for property which is worth but one-tenth of the par value of the stock, yet if all the stockholders assent thereto a subsequent purchaser of the stock cannot maintain a suit in behalf of the corporation to cancel the stock on the ground of fraud. His remedy, if any, is a personal suit for false representations. Garretson *v.* Pacific, etc. Co., 146 Cal. 184 (1905).

Even though a large quantity of stock has been issued for patents and a portion thereof donated back to the corporation for treasury stock, yet a purchaser of such treasury stock cannot maintain a suit in New York to have the entire issue declared illegal and void, where the corporation was organized under the laws of West Virginia and there is no allegation that the transaction was void under the laws of that state. Insurance Press *v.* Montauk, etc. Co., 83 N. Y. App. Div. 259 (1903); aff'd, 178 N. Y. 623.

Even though two of the directors sell to the corporation certain patents for $3,000,000 full paid stock, being the entire capital stock, and give to the corporation $750,000 of the same as treasury stock, and even though the patents are worth but $10,000, neither the corporation nor a purchaser of treasury stock at fifty cents on the dollar can compel them to return the stock nor hold them liable thereon, but the remedy, if any, is to rescind the transaction and return the patents and demand a return of the stock or the value of such part of the stock as they have sold. Such is the rule, even though the statutes of the state prohibit the issue of stock at less than par. The court said (p. 477): "Whether they knew that the value of the patents did or did not exceed $10,000 was entirely

Nor can he bring an action against the corporation.[1] But the trans-

immaterial. They had a right to hold the letters patent until they were offered the price at which they were willing to sell. They sold them to this company for its whole capital stock, agreeing with the company that that was the value of the patents. I know of no principle which would justify a court of equity in compelling the owners of these patents to accept any consideration for their transfer to the corporation except that agreed on, and, upon the ground that the patents are not worth the sum agreed on as a consideration for the transfer, decree that the vendors must pay back to the company the consideration they had received, less the real value." A purchaser of the treasury stock has of course a remedy at law if there were false representations. Insurance Press *v.* Montauk, etc. Co., 103 N. Y. App. Div. 472 (1905). Compare cases in § 39, *supra*.

A stockholder who has received stock for nothing from a party who has consented to the issue of stock and bonds for an insufficient consideration, may not be able to complain thereof. Ward *v.* Smith, 95 N. Y. App. Div. 432 (1904).

Even though promoters obtain options on a large number of malting plants, and take subscriptions to stock in a corporation to be organized for the purpose of taking over the plants, and use the proceeds of the subscriptions to pay for the plants and furnish a working capital for the company, and receive from the corporation, in payment for the plants, stock sufficient to fill the subscriptions and also to leave with the promoters $500,000 as a profit preferred stock and $7,740,000 common stock, yet neither the corporation nor its stockholders can hold them liable for such profit in stock, there being no proof that the plants were not worth the amount of the stock issued for them, nor that the sale had been rescinded, and there being no complaint made by the original subscribers to the stock and the original subscription having recited that such stock would be so issued for the properties. Hutchinson *v.* Simpson, 92 N. Y. App. Div. 382 (1904).

Where for six years an issue of stock for services has appeared fully on the books of the company and has not been objected to, a stockholder cannot have it set aside, even under the constitution of Colorado, especially where all the stockholders at the time of the issue assented thereto and the party receiving the stock used a large portion of it to interest other persons in the company, and even though the stock so issued to him was $125,000, being one-half of the entire stock, and was in consideration of services rendered in obtaining contracts and options, which were turned over to the company. Calivada, etc. Co. *v.* Hays, 119 Fed. Rep. 202 (1902).

Where a mining company has sold all its property with the consent of the stockholders, a subsequent purchaser of the stock cannot complain. Boldenweck *v.* Bullis, 90 Pac. Rep. 634 (Col. 1907).

See also §§ 730, 735, *infra*. Higgins *v.* Lansingh, 154 Ill. 30 (1895); Parsons *v.* Hayes, 14 Abb. N. Cas. 419 (N. Y. Super. Ct. 1883); Nott *v.* Clews, 14 Abb. N. Cas. (N. Y.) 437

1 Quoted and approved in Gumaer *v.* Cripple Creek, etc. Co., 90 Pac. Rep. 81 (Col. 1907). In *Re* Gold Co., L. R. 11 Ch. D. 701 (1879), the court said: "It was not a wrong done by the company or to the company." In *Re* Ambrose Lake, etc. Min. Co., L. R. 14 Ch. D. 390, 397 (1880), the court said: "There would be no liability on the part of the company as such."

feree is by no means without a remedy. It may be a fraud on the

(1883); Ffooks *v.* Southwestern Ry., 1 Sm. & G. 142 (1853); *Re* British, etc. Box Co., L. R. 17 Ch. D. 467 (1881), holding that new stock also is bound; Flagler, etc. Co. *v.* Flagler, 19 Fed. Rep. 468 (1884); *Re* Syracuse, etc. R. R., 91 N. Y. 1 (1883); Kent *v.* Quicksilver Min. Co., 78 N. Y. 159, 188 (1879); Callanan *v.* Windsor, 78 Iowa, 193 (1889); Venner *v.* Atchison, etc. R. R., 28 Fed. Rep. 581, 591 (1886). Even though bonds and stock are issued for the construction of a road, the face value of which is twice the cost of the road, yet if all the stockholders consented and none of the creditors then existing are injured, transferees of such stock cannot complain on the foreclosure of the mortgage securing the bonds. Wells *v.* Northern T. Co., 195 Ill. 288 (1902). A purchaser at public auction of stock that has been issued below par cannot complain of the issue. Fraser, etc. Min. Co. *v.* Gallagher, 5 British Columbia Rep. 82 (1895). A purchaser of stock issued to a contractor for work cannot attack the issue on the ground that it was watered stock, even though the contractors immediately sell a part of the stock and bonds at the rate of ninety cents on the dollar for the bonds, with nearly an equal amount of stock thrown in. Drake *v.* New York, etc. Co., 26 N. Y. App. 499 (1898). A *bona fide* purchaser of tainted stock stands in no better position than his transferrer. Miller *v.* University, etc. Co., N. Y. L. J., Nov. 13, 1894. Even though a party acquires all the stock of a corporation amounting to $1,500,000, and then through dummy directors issues $3,500,000 additional stock and $4,000,000 of mortgage bonds to himself, and then proceeds to sell the stock and bonds to the public, yet a person who purchases some of the stock cannot file a bill in equity against the corporation to set aside the transaction and to ascertain what part of his stock is legal. His remedy is at law for damages, or he may repudiate and recover back his money. "It is elementary that the court is possessed of no power to make a new contract between parties entirely distinct and different from the contract that they have entered into." Church *v.* Citizens' Street R. R., 78 Fed. Rep. 526 (1897). The purchaser of stock which was issued to directors cannot complain that the directors were guilty of fraud in the issue. Barr *v.* New York, etc. R. R., 125 N. Y. 263 (1891). See also Langdon *v.* Fogg, 18 Fed. Rep. 5 (1883). *Contra*, Parsons *v.* Joseph, 92 Ala. 403 (1891). In Foster *v.* Seymour, 23 Fed. Rep. 65 (1885), an issue of stock for property at an overvaluation is distinctly held to be no fraud upon the corporation, nor upon the stockholders, all of whom participated. "A purchaser of the stock would not be injured by the transaction unless he paid more for it than it was worth; and every purchaser would stand upon the particular circumstances of his purchase." A suit against the guilty parties who were the directors, to compel them to account for a fraudulent disposition of corporate property, will not lie. The fraud is not corporate; it is personal. See also §§ 705–707. "As a general proposition, the purchaser of stock in a corporation is not allowed to attack the acts and management of the company prior to the acquisition of his stock." United Elect. Sec. Co. *v.* Louisiana Elect. Light Co., 68 Fed. Rep. 673 (1895). But in London Trust Co. *v.* Mackenzie, 68 L. T. Rep. 380 (1893), the court said: "I think there is no authority for the general proposition that an ordinary transferee of shares in a limited company is affected by the fact that his transferrer had knowledge which would have disabled him from suing."

vendee of stock to sell him as paid-up stock that which is not paid up, although issued as paid up, the vendor having participated in the issue.[1] He may bring an action for damages against the vendor, or against those who, knowing the facts, induced him to purchase, or those who made it possible for the fraud to be practiced, or who actually assisted in perpetrating the fraud upon him.[2]

1 Sturges *v.* Stetson, 1 Biss. 246 (1858); s. c., 23 Fed. Cas. 311, holding that the vendee is not liable on a note given in payment thereof; Fosdick *v.* Sturges, 1 Biss. 255 (1858); s. c., 9 Fed. Cas. 501, holding that the vendee may recover back money paid; Reeve *v.* Dennett, 145 Mass. 23 (1887); s. c., 141 Mass. 207, where the capital of $1,000,000 was issued for a worthless patent; holding also that the misrepresentations may invalidate also a second and subsequent purchase of stock, even though in the meantime the vendee has become a director in the corporation.

It is a question for the jury whether fraud exists in the sale of stock, represented to be paid up, when part of the payments had been by dividends from the corporation. Kryger *v.* Andrews, 65 Mich. 405 (1887).

A purchaser of stock issued to a contractor for work cannot attack the issue on the ground that it was watered stock, even though the contractors immediately sell a part of the stock and bonds at the rate of ninety cents on the dollar for the bonds, with nearly an equal amount of stock thrown in. Drake *v.* New York, etc. Co., 26 N. Y. App. Div. 499 (1898).

In the case of Reeve *v.* Dennett, 145 Mass. 23 (1887), where the capital of $1,000,000 was issued for a worthless patent, the court held that misrepresentations inducing a purchase of stock may invalidate also a second and subsequent purchase of stock, even though in the meantime the vendee has become a director in the corporation.

Even though the agent of a corporation represents to it that a party owns certain property and will sell it to the corporation for $7,500 in bonds and $30,000 in stock, and the purchase is made on those terms, and the vendor keeps the bonds and gives the stock to such agent, and the agent sells a portion of the stock to a *bona fide* purchaser, yet the latter cannot rescind the sale on the ground of fraud. Foushee *v.* Snyder, 54 S. W. Rep. 730 (Ky. 1900). A person who deeds land in exchange for stock which is represented to be full-paid may have the sale rescinded where only $3 a share had been paid in on the stock. Coolidge *v.* Rhodes, 199 Ill. 24 (1902). A person who has been induced to transfer property to a corporation in exchange for stock may maintain a mandamus to compel the company to allow him to examine the books, papers and records of the company to ascertain whether certain representations made to him are true, to the effect that all the stock had been issued for full value. State *v.* Pan-American Co., 5 Penn. (Del.) 391 (1904).

2 The leading case on this principle of law is Cross *v.* Sackett, 2 Bosw. 617 (1858), argued by eminent counsel and decided by learned judges. A *bona fide* purchaser in open market, from an innocent holder of stock issued as paid up for property taken at an overvaluation, sued a director, being also an original stockholder, for damages. The court in its decision said: "When a party projects and publicly promulgates the scheme of a joint-stock company; when he causes the usual books to be opened, and allows or causes the inscription

The transferee has other remedies. If the sale to him was by one of the participants, he may rescind the sale and recover back the price paid by him;[1] or, if the contract of purchase is not yet completed, he may refuse to take the stock.[2] An indictment of a person for the unlawful obtaining of money by selling worthless

of a person as an owner of an interest to a definite amount and value therein, which is false within his own knowledge; when he embodies such false statements in a certificate of this right directly issued and of the same effect as if signed by himself; when he accompanies that certificate by a written power authorizing a transfer at large by the party to whom he has given the certificate; when that representation induces an innocent person to advance his money —the defendant's own individual act has created the privity of contract, . . . and he must be held responsible to any one who has been deceived." See also § 350, *infra*.

The plaintiff must prove that a representation was made that the stock was paid up, and that he relied thereon, and that the representation was false and fraudulent. McAleer *v.* McMurray, 58 Pa. St. 126 (1868); Priest *v.* White, 89 Mo. 609 (1886).

The court, in *In re* Ambrose Lake, etc. Co., L. R. 14 Ch. D. 390, 397 (1880), said that the transferee has a remedy against the person who, in any way, made the misrepresentations to him. *Re* Gold Co., L. R. 11 Ch. D. 701, 713, 714 (1879), is to the same effect. In Barnes *v.* Brown, 80 N. Y. 527 (1880), the plaintiff, being under contract to receive paid-up stock from defendants, received such, and afterwards discovered that its par value had not been paid in to the corporation. The court held that he could recover damages from the defendant for the fraud.

Where after incorporation and before a business is turned over the owner of the business gets money of an incorporator and delivers a certificate of full-paid stock in payment, although the stock has never been paid up, the former is not a debtor to the latter, although the business is never turned over to the company. *Re* Frye, 75 Hun, 402 (1894). A suit by the purchaser of stock for damages for fraud, in that the stock had been fraudulently paid up by property conveyed to the corporation at an overvaluation, is barred by the statute of limitations applicable to frauds. Smith *v.* Martin, 135 Cal. 247 (1901). Where promoters transfer worthless copyrights for $100,000 common stock and then by misrepresentations as to the value of the preferred stock sell it, in order to raise money for the company, the purchaser may hold them personally liable, even though with each share of preferred stock so sold they contributed one-half of a share of common stock. Grover *v.* Cavanaugh, 82 N. E. Rep. 104 (Ind. 1907).

[1] Fosdick *v.* Sturges, 1 Biss. 255 (1858); s. c., 9 Fed. Cas. 501. In this case the certificate was brought into court to be disposed of as the court should direct. See also § 350, *infra*. The purchaser of stock may maintain a suit to recover back the price on the ground that the vendor sold to the company, for three million dollars par value of its stock, property worth not more than two hundred and fifty thousand dollars and made misrepresentations in regard to it and also misrepresented the capacity of the property. Stern *v.* Stern, 122 N. Y. App. Div. 821 (1907).

[2] Sturges *v.* Stetson, 1 Biss. 246, 253 (1858); s. c., 23 Fed. Cas. 311, 314, the court holding that an action

gold mining stock is not good when the stock was paid for not in money, but by check.[1]

§ 41. *Stockholders dissenting at the time of the issue may complain.*—Stockholders, being such when an issue of paid-up stock is improperly made, and not assenting to or acquiescing in it, may bring suit in a court of equity to enjoin the issue if not yet actually made,[2] or, if the issue has already been made he may file a bill to

for the price of such stock is in the nature of a bill in equity for the specific performance of a contract, and the defendant may defeat it by avoiding the contract altogether, although the certificates have been transferred to him. To same effect, Coolidge *v.* Goddard, 77 Me. 579 (1885). Even though the statutes of a state require stock to be issued at par, yet where property has been turned in for stock at a gross overvaluation, the court will not presume that the price to be paid by the vendee of stock to the vendor of such stock is par. Trœndle *v.* Van Nortwick, 98 Fed. Rep. 785 (1900).

[1] Lory *v.* People, 82 N. E. Rep. 261 (Ill. 1907).

[2] The owner of a single share of stock in a street railway company may file a bill to enjoin the company from issuing stock and bonds to a construction company, where the par value of the stock and bonds is greater than the value of the construction work, and the construction company already controls the railway company and its board of directors. Montgomery Traction Co. *v.* Harmon, 140 Ala. 505 (1904).

Although stock has been sold at about seventy cents on the dollar for cash, yet if the transaction has been closed, a stockholder cannot enjoin it, although possibly he may enjoin the transfer of the stock during the suit. Huet *v.* Piedmont Springs Lumber Co., 138 N. C. 443 (1905).

Even though the court at the instance of a dissenting stockholder has enjoined a corporation from issuing stock in payment for the property of another corporation to be purchased at a high valuation, this does not prevent the majority of the stockholders forming a holding corporation in another state and issuing the stock of the latter in exchange for the stock of the two former corporations at a price equivalent to the above mentioned valuation. The court has no power to enjoin such a transaction at the instance of a dissenting stockholder. The fact that the holding company may name the directors of both companies is not objectionable in itself. Pierce *v.* Old Dominion, etc. Co., 67 N. J. Eq. 399 (1904).

The issue of new stock by the corporation cannot be enjoined where neither the corporation nor any of its directors are parties to the action. White *v.* Wood, 129 N. Y. 527 (1892).

A stockholder may enjoin the issue of stock for property at an overvaluation. Dean *v.* Baldwin, 99 Ill. App. 582 (1902).

The federal court in New Jersey has no jurisdiction of a suit brought by a Pennsylvania stockholder in a New Jersey corporation to enjoin the latter and its directors who are residents of still another state from issuing stock on an alleged illegal contract. Lengel *v.* American, etc. Co., 110 Fed. Rep. 19 (1901). Where the statute authorizing consolidation specifies that the consolidated capital stock shall not be more than the "fair aggregate value" of the property, a stockholder may enjoin a consolidation whose capital stock is far in excess of a fair value of the property. Langan *v.* Francklyn, 20 N. Y. Supp. 404 (1892).

annul and set aside the whole transaction.[1] The court has power to cancel the issue.[2] Where directors issue new stock to their friends

Stockholders may restrain the issue of deferred "bonds," *i. e.* irredeemable bonds entitling the holder to interest after a certain dividend is paid to the stockholders, it being merely a scheme to issue stock below par. Taylor *v.* Philadelphia, etc. R. R., 7 Fed. Rep. 386 (1881). Compare § 762, *infra*. A minority stockholder cannot enjoin the company from issuing its stock in payment for the stock of other similar companies on the ground that the price to be paid is excessive and that three of the directors are interested as stockholders in the other companies, where he does not prove that the price is excessive, and it appears that the stockholders will have to approve the transaction before the directors can issue the stock, and it appears also that the plaintiff owns but a very small amount of the stock. Geer *v.* Amalgamated, etc. Co., 61 N. J. Eq. 364 (1901).

1 In Fisk *v.* Chicago, etc. R. R., 53 Barb. 513 (1868), the court enjoined any transfer of the stock, and appointed a receiver to receive what the corporation had realized from the stock, and to use the funds in retiring the stock and paying damages caused thereby. In Sturges *v.* Stetson, 1 Biss. 246, 254 (1858); s. c., 23 Fed. Cas. 311, 314, and Fosdick *v.* Sturges, 1 Biss. 255, 259 (1858); s. c., 9 Fed. Cas. 501, 503, the court in *dicta* said that the issue could be withdrawn, leaving with the guilty parties so much stock as the money paid by them would equal the par value of.

2 Campbell *v.* Morgan, 4 Bradw. (Ill.) 100 (1879). A court of equity has power to decree the return and cancellation of certificates of stock fraudulently issued. Gibson *v.* Thornton, 112 Ga. 328 (1900).

A dissenting stockholder may cause an issue of stock to be canceled where it was issued for land at five times its real value, and then the capital stock was doubled and the increase issued for nothing. Parsons *v.* Joseph, 92 Ala. 403 (1891).

A dissenting stockholder may cause to be canceled certain stock which was issued without consideration to a construction company in which the directors are interested. Gilman, etc. R. R. *v.* Kelly, 77 Ill. 426 (1875).

Where the president, in order to get control of the corporation, causes a meeting of the board of directors to vote stock in payment for services and property whose value is much less than the par value of the stock, the stock being voted to outside parties, but thereafter secretly transferred to the president, a stockholder may compel him to return the stock to the corporation for cancellation. Such an issue is also illegal by the statutory law of the state in Alabama. Perry *v.* Tuskaloosa, etc. Co., 93 Ala. 364 (1891).

A distribution gratis of stock among the stockholders has been held to be an unauthorized reduction of the capital stock, and it will be ordered to be returned. Holmes *v.* Newcastle, etc. Co., L. R. 1 Ch. D. 682 (1875).

Where the chief promoter of a proposed manufacturing corporation obtains donations from property owners to the proposed corporation on his agreement that $75,000 of stock should be subscribed for within a certain time and then proceeds to organize the company, he himself subscribing for $25,000 of the stock, and the corporation then purchases certain worthless patents and agency contracts and issues therefor $63,250 of full-paid stock, including the $25,000 subscribed for by him, and afterwards the corporation collects $4,000 of such donations and borrows money

at less than par and without offering it to the existing stockholders, the object being to control a coming election, the election will be enjoined and the issue set aside.[1] A person induced to subscribe for stock on the representation of the president that the other stockholders had paid for their stock in full may defend against the subscription on the ground that the other stockholders had not and

from such promoter and gives him a mortgage therefor, his mortgage is not good as against the parties who donated the $4,000. Moore *v.* Universal, etc. Co., 122 Mich. 48 (1899).

Where the four directors issue 58,220 shares of treasury stock to two of their number for $348.40, the court will set aside the issue at the instance of a stockholder, even though that was all the stock was reasonably worth. Mosher *v.* Sinnott, 20 Colo. App. 454 (1905). See 61 S. E. Rep. 762.

A stockholder may maintain a bill in equity to cancel stock issued in payment for property overvalued and also misrepresented as to the price which had been paid for it, and especially may such a bill be maintained when the stock really goes to the president of the company in order that he may maintain control, and the stock is also overissued stock. Crow *v.* Florence, etc. Co., 143 Ala. 541 (1905).

In determining whether a stockholder's suit to cancel stock and bonds which he alleges are illegal may be removed to the federal court, the corporation being an indispensable party will be considered a party complainant only when it is shown that its officers or persons controlling it are actually opposed to the suit. Grael *v.* United, etc. Co., 132 Fed. Rep. 252 (1904).

A stockholder who brings a suit against parties who have received from the corporation $3,000,000 of stock for $10,000 worth of patents may examine the defendants before trial in order to prove what the patents were worth. Insurance Press *v.* Montauk, etc. Co., 70 N. Y. App. Div. 50 (1902).

A stockholder may sue on behalf of the corporation to cancel stock fraudulently issued for good-will or for no consideration whatever. Brahm *v.* M. C. Gehl Co., 112 N. W. Rep. 1097 (Wis. 1907).

A person who is liable on stock cannot avoid the liability by transferring a worthless formula to the corporation as against the dissent of other stockholders. Dean *v.* Baldwin, 99 Ill. App. Rep. 582 (1902).

Stock may be issued for legal services, already performed or to be performed in the future, and a stockholder cannot cause to be set aside an issue of $50,000 par value of stock in a Michigan corporation for legal services, unless actual fraud is proven. Vogeler *v.* Punch, 103 S. W. Rep. 1001 (Mo. 1907).

[1] Way *v.* American, etc. Co., 60 N. J. Eq. 263 (1900). See also § 614, *infra*. Dissenting stockholders may file a bill to obtain a cancellation of stock issued in payment for patents to engage in business outside of the territory described in the charter, the real purpose being to obtain the vote on the stock. Kimball *v.* New England, etc. Co., 69 N. H. 485 (1899). Where unissued shares of the par value of 1*l.* each are worth about 4*l.* each and a portion thereof are offered to the stockholders at 2*l.* 10*s.* each, and an option on the balance is given to underwriters at the same price in consideration of the underwriters agreeing to take such of the stock as is offered to the stockholders and is not taken by the latter, a mi-

were not to pay anything for their stock.[1] A stockholder in a New Jersey corporation may bring suit in the New York state courts to compel persons holding a majority of the stock to return to the corporation for cancellation a large amount of stock which was issued to them illegally and without consideration, but the legality of such issue will not be determined by the statutes of New York.[2] The dissenting stockholders' rights and remedies herein, in their scope and details, are similar to the rights and remedies of stockholders in other cases of *ultra vires* acts or fraud to the injury of the corporation—a subject fully treated in the fourth part of this work.[3] A suit to determine what stock is watered stock and also to set aside transactions by which the corporate property has been misapplied is multifarious.[4] Laches is a bar to a dissenting stockholder's suit.[5] A dissenting stockholder cannot obtain a dissolution

nority stockholder may enjoin the carrying out of such option to the underwriters, it being in violation of the English statute prohibiting the payment of a commission for underwriting subscriptions. Burrows *v.* Matabele, etc. Co., [1901], 2 Ch. 23.

1 Alabama, etc. Works *v.* Dallas, 127 Ala. 513 (1900).

2 Ernst *v.* Rutherford, etc. Co., 38 N. Y. App. Div. 388 (1899).

3 See Ch. XL, *infra*.

4 Church *v.* Citizens' Street R. R., 78 Fed. Rep. 526 (1897). Subscribers to stock may rescind the same on the ground that promoters, who sold property to the company, had misrepresented the character of the property. This suit may be in equity and is not multifarious, although the relief demanded is a cancellation of the sale of the property and for damages against the vendors and co-conspirators, and also for rescission of the subscription. Such a suit lies, although the subscribers paid in only $150,000 of cash for $450,000 of stock. Rule 94 of the federal courts does not apply to such a case. Barcus *v.* Gates, 89 Fed. Rep. 783 (1898).

5 Where the directors sell unissued stock at a discount to a party who resells part of it to a director, other stockholders cannot, ten years afterwards, hold him liable. Keeney *v.* Converse, 99 Mich. 316 (1894).

Where a worthless equity of redemption in land is turned in for stock and then the stock is pledged with the mortgagee of the land, and then "scrip" is taken from the corporation by the parties pledging the stock, this scrip reciting that it represented the equity of the right to the certificates of stock when the mortgage was paid off, such scrip is valid and may be sold, even though it was issued without consideration, it having been treated as valid for twenty years. Higgins *v.* Lansingh, 154 Ill. 301 (1895).

A party who has invested $15,000 in obtaining a bridge franchise, and for plans and specifications, and who transfers the same to another party on an agreement of the latter to organize a corporation to build the bridge and to give to the former $15,000 out of $80,000 preferred stock, the common stock to be such sum as the latter may desire, may object to the latter causing the corporation to issue $95,000 in bonds, $80,000 in preferred stock, and $60,000 in common stock for building the bridge at a cost of $71,000; but if the former takes his $15,000 preferred stock and keeps it for six years, he cannot then

of the company on the ground that stock has been issued at a discount for cash.[1]

§ 42. *Corporate creditors as complainants where the issue is for money—Bonus of stock with bonds—Issue of stock by embarrassed corporation—What creditors may complain.*—According to well-established rules of law in America, corporate creditors may object to certain transactions, which, as between the corporation and its stockholders and third persons, may be valid and binding. This right of corporate creditors is firmly established in law. It is based on the contract, express or implied, that a subscription for or taking of stock creates an obligation to pay for the same at par, except as to parties who have expressly or impliedly waived this obligation. Where stock is issued for property the above principle of law does not afford much protection to corporate creditors, inasmuch as the prevailing rule is that even though the property is overvalued, yet that rescission is the only remedy, the stock being returned and canceled and the property returned to the vendor.[2] That subject is considered elsewhere; the subject now under consideration being an issue of stock for *cash* at less than its par value. The law is well settled that although an issue of stock is for cash, under an agreement that only part of the par value need be paid, yet that corporate creditors may compel the persons receiving the stock to pay the unpaid par value.[3] The fact that the corporation issued the stock

complain. Jutte *v.* Hutchinson, 189 Pa. St. 218 (1899).

Laches on the part of the dissenting stockholder will bar his remedy. Taylor *v.* South, etc. R. R., 13 Fed. Rep. 152 (1882).

Thirty years' delay on the part of a dissenting stockholder is fatal. Foster *v.* Belcher's, etc. Co., 118 Mo. 238 (1893). See also ch. XLIV, *infra*.

1 *Re* Pioneers' etc. Syndicate, 68 L. T. Rep. 163 (1893); *Re* Gold Co., L. R. 11 Ch. D. 701 (1879); Morrison *v.* Globe Panorama Co., 28 Fed. Rep. 817 (1886); *Re* Mashonaland Pioneers, L. R. 1 Ch. 731 (1893).

2 See § 46, *infra*.

3 The leading case on this point is Sagory *v.* Dubois, 3 Sandf. Ch. 466, 499 (1846), where the court said: "The defendant being liable by force of his subscription for the stock, the resolution of the directors . . . not to make any further calls upon the shares was unavailing to discharge his obligation in respect of the association and its creditors." Where the stockholders increase the stock and distribute part of it among themselves as full-paid stock, but give nothing for it, they may be held liable by corporate creditors for the par value thereof. Handley *v.* Stutz, 139 U. S. 417 (1891). In Scovill *v.* Thayer, 105 U. S. 143 (1881), the court said that a contract whereby stockholders are to pay but part of the par value of their stock to the corporation, "though binding on the company, is a fraud in law on its creditors, which they can set aside; when their rights intervene and their claims are to be satisfied, the stockholders can be required to pay their stock in full." Upton *v.* Tribilcock, 91 U. S. 45 (1875), is the first of a

as fully paid does not prevent creditors holding liable for the unpaid par value the person to whom it was issued.[1]

series of cases growing out of the failure of the Great Western Insurance Company of Illinois. The other cases are Sanger *v.* Upton, 91 U. S. 56 (1875); Webster *v.* Upton, 91 U. S. 65 (1875); Chubb *v.* Upton, 95 U. S. 665 (1877); Pullman *v.* Upton, 96 U. S. 328 (1877); Hawley *v.* Upton, 102 U. S. 314 (1880); Upton *v.* Burnham, 3 Biss. 431 (1873); s. c., 3 Biss. 520; s. c., 28 Fed. Cas. 831, and Upton *v.* Hansbrough, 3 Biss. 417 (1873); s. c., 28 Fed. Cas. 839; Great Western Tel. Co. *v.* Gray, 122 Ill. 630 (1887). This series of cases established for the federal courts the rule given above. A stockholder may file a bill in equity to review an assessment obtained by a receiver of an insolvent corporation where the claim upon which the receivership is based and all the proceedings subsequent thereto are permeated with fraud. Farwell *v.* Great West. Tel. Co., 161 Ill. 522 (1896), reviewing in full the twenty years' litigation growing out of the insolvency of the Great Western Telegraph Company. Even though there is no written contract of subscription, but the stock is issued on an oral agreement that the parties taking it should pay only twenty cents on a dollar, yet this is a subscription, and not a sale, and on the insolvency of the corporation the parties are liable for the remaining eighty cents on a dollar. Vermont, etc. Co. *v.* Declez, etc. Co., 135 Cal. 579 (1902). An original issue of stock at fifty per cent. of its par value does not prevent a receiver of the corporation collecting the remaining fifty per cent. New Haven T. Co. *v.* Gaffney, 73 Conn. 480 (1901). Where a corporation issues stock for cash at twenty-five cents on the dollar and agrees not to call for more, a trustee in bankruptcy cannot collect, except the amount necessary to pay debts, and his suit must be in equity in order that the contract may first be set aside for fraud. Felker *v.* Sullivan, 34 Colo. 212 (1905). A sale of stock by the corporation for cash at less than par leaves the holders liable for the difference between the par value and the amount paid. McConey *v.* Belton, 97 Minn. 190 (1906). Where stock was issued for cash at less than par the holder is liable for the difference to corporate creditors, and this liability may be enforced in the bankruptcy court. *In re* Remington, etc. Co., 139 Fed. Rep. 766 (1905); aff'd on this point in 153 Fed. Rep. 345. Where stock is issued for cash at fifty cents on a dollar, the remainder may be collected in behalf of corporate creditors. Vaughn *v.* Alabama Nat. Bank, 143 Ala. 572 (1905). As against a receiver it is no defense that the corporation agreed that the subscriber need pay only fifty per cent. of the par value of the stock, or that fraudulent representations induced him to subscribe, or that the full capital stock was not subscribed, or that the company was defectively organized, or that the name of the company was different from the one contemplated. Cox *v.* Dickie, 93 Pac. Rep. 523 (Wash. 1908).

A person to whom paid-up shares have been issued without consideration and who transfers them to a *bona fide* purchaser is not liable thereon, but if he was a director he is liable for breach of trust. Freeman's case, 7 Ont. W. R. (Can.) 613 (1906). A person subscribing for stock with a bonus of twenty-five per cent. in stock is liable for the bonus on winding up.

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1 Dickerman *v.* Northern T. Co., 176 U. S. 181, 203 (1900).

A resolution by a corporation that upon the stockholders paying in a portion of the par value of the stock the capital shall be deemed to be fully paid is wholly ineffectual as against the creditors of the company.[1] But after subscriptions to stock have been made, pay-

Kydd's case, 6 Ont. W. R. (Can.) 491 (1905). Where stock is issued for cash at less than par, the party receiving it is liable to corporate creditors for the difference. *Re* Thunder Hill Min. Co., 4 British Columbia Rep. 61 (1895). Flinn *v.* Bagley, 7 Fed. Rep. 785 (1881), gives a full review of the American and English doctrine herein. See also *Re* Glen Iron Works, 17 Fed. Rep. 324 (1883); Union, etc. Ins. Co. *v.* Frear Stone Mfg. Co., 97 Ill. 537 (1881); Hickling *v.* Wilson, 104 Ill. 54 (1882); Northrop *v.* Bushnell, 38 Conn. 498 (1871); Eyerman *v.* Krieckhaus, 7 Mo. App. 455 (1879); Skrainka *v.* Allen, 7 Mo. App. 434 (1879); aff'd, 76 Mo. 384; Pickering *v.* Templeton, 2 Mo. App. 424 (1876); Mann *v.* Cooke, 20 Conn. 178 (1850); Myers *v.* Seeley, 10 Nat. Bank Reg. 411 (1874); s. c., 17 Fed. Cas. 1118. Although the statutes authorize the directors to dispose of the capital stock at any time remaining unpaid in such manner as the by-laws may prescribe, yet this does not authorize the issue of stock for cash at less than par. Mathis *v.* Pridham, 1 Tex. Civ. App. 58 (1892).

A resolution discharging stockholders from all liability on stock after thirty per cent. of the par value has been paid, and then suffering a forfeiture of the stock, is void, so far as corporate creditors are concerned. Slee *v.* Bloom, 19 Johns. 456 (1822).

Where the directors of an insurance company issue to themselves all the stock at one-third of its par value, and upon an increase of the capital vote to themselves, for services in selling the increase, one share for every two shares sold, they are liable upon corporate insolvency for the unpaid par value of the first issue, and the par value of the stock received as compensation. Their transferee with notice was held liable. Freeman *v.* Stine, 15 Phila. 37 (1881). An agreement between a corporation and subscribers for its stock that only a certain portion of the par value of the stock shall be collected by the corporation, is binding upon the corporation, but not upon the corporate creditors, unless such agreement was made a part of the recorded articles of incorporation, under the Indiana statutes. Bent *v.* Underdown, 156 Ind. 516 (1901). Where stock is issued for property, but at an agreed price of fifty cents on the dollar for the stock, the certificates of stock not purporting to be full paid, the party is liable to corporate creditors for the other fifty cents on the dollar. Stockton, etc. Co. *v.* Houser, 109 Cal. 1 (1895).

[1] "It is the settled doctrine of this court that the trust arising in favor of creditors by subscriptions to the stock of a corporation cannot be defeated by a simulated payment of such subscription, nor by any device short of an actual payment in good faith. And while any settlement or satisfaction of such subscription may be good as between the corporation and the stockholders, it is unavailing as against the claims of the creditors. Nothing that was said in the recent cases of Clark *v.* Bever, 139 U. S. 96 (1891); Fogg *v.* Blair, 139 U. S. 118 (1891); or Handley *v.* Stutz, 139 U. S. 417 (1891), was intended to overrule or qualify in any way the wholesome principle adopted by this court in the earlier cases, especially as applied to the original subscribers to stock. The later cases were only intended to draw a line beyond which the court was unwilling to go in affixing a liability upon those who had

able in cash, the company may receive land from a third party in payment of the balance due on such subscriptions, and such payment may be sufficient, even though the land turns out to have been overvalued.[1] A corporation in order to retain the services of employees to be rendered thereafter may issue stock at eighty-five cents in cash, the remaining fifteen cents to be paid for by such services.[2] Such a transaction is the same as issuing stock for property, services being property in that connection.[3] A representation of the corporate agents to the person receiving the stock, that full payment will not be required, is immaterial, and constitutes no defense.[4]

purchased stock of the corporation, or had taken it in good faith in satisfaction of their demands." Camden *v.* Stuart, 144 U. S. 104 (1892); Mathis *v.* Pridham, 1 Tex. Civ. App. 58 (1892); Libby *v.* Mt. Monadnock, etc. Co., 32 Atl. Rep. 772 (N. H. 1894); Nenny *v.* Waddill, 6 Tex. Civ. App. 244 (1894).

Persons taking stock from the corporation for cash at forty cents on the dollar cannot avoid liability to corporate creditors for the remaining sixty cents by setting up that unknown to them the stock had previously been issued to a contractor for work to be done, and that he appointed the corporation his agent to sell the stock at forty cents on the dollar. The subscription to the stock was an original subscription and bound them. Bates *v.* Great Western Tel. Co., 134 Ill. 536 (1890). Even though a certificate of incorporation which is filed under the laws of West Virginia provides that stockholders who are paying fifty cents on a dollar to the company for their stock, shall not be liable for the remaining fifty per cent., this is not binding on corporate creditors, under the constitution of West Virginia. Security T. Co. *v.* Ford, 75 Ohio St. 322 (1906). A person who purchases stock for cash from the corporation at twenty-five cents on the dollar cannot claim that he supposed it was full paid stock where he was fully informed as to the financial affairs of the company, even though the stock was first subscribed for by promoters and then a portion of it donated to the company as treasury stock. Campbell *v.* McPhee, 36 Wash. 593 (1905).

Where property is sold to the company for stock and cash, the cash may by the terms of the sale be applied in payment of other subscriptions. *Re* Jones, etc. Co., L. R. 41 Ch. D. 159 (1889).

Where stock is issued for cash at fifty cents on the dollar by a corporation, corporate creditors may compel the stockholders to pay the remaining fifty cents. Guerney *v.* Moore, 131 Mo. 650 (1895); Barron *v.* Burrill, 86 Me. 66 (1893).

1 Carr *v.* Le Fevre, 27 Pa. St. 413 (1856). In the case of Siegel *v.* Andrews & Co., 181 Ill. 350 (1899), where the purchasers of a patent right for $15,000 organized a corporation and personally subscribed for $100,000 of its stock and subsequently paid therefor by turning in the patent right, the court held that each stockholder was liable for the par value of his stock less fifteen per cent., and that a judgment creditor might sue any one or more of the stockholders.

2 Potter *v.* Necedah, etc. Co., 105 Wis. 25 (1899).

3 See § 20, *supra.*

4 Upton *v.* Tribilcock, 91 U. S. 45 (1875); Ogilvie *v.* Knox Ins. Co., 22 How. 380 (1859).

In order to enforce a liability where stock is issued as full-paid stock for *cash* at less than the par value, it is not necessary to prove that fraud enter into the transaction, since there is no possibility of mistaken judgment as to the value of the cash received in payment.[1] "Treasury stock," however, may be sold below par.[2] Partially paid-up stock may be made fully paid-up stock by applying profits thereto instead of declaring dividends.[3] But a payment of the subscription price by what purports to be a dividend or distribution of profits is invalid as against creditors, where such profits do not exist.[4]

It is legal for the company to pay a cash commission to a person who procures subscriptions, even though that commission is deducted from the subscription price.[5] A corporation may maintain

1 Flinn *v.* Bagley, 7 Fed. Rep. 785 (1881).

It has been held that the custom of the country will exempt stockholders from liability on stock issued as paid up when it was not paid up. Such a decision, however, is inconsistent with the great weight of authority, and must be considered poor law.

Re South Mountain, etc. Co., 7 Sawyer, 30 (1881); s. c., 5 Fed. Rep. 403. In this case it is stated that corporate creditors were protected "by the personal liability of each shareholder for his *pro rata* share of the indebtedness of the corporation." See comments on this case, *supra*, § 30. The English rule is now the same as the American. See § 42, *supra*.

Where the capital stock is reduced, and subscribers cancel unpaid subscriptions and take paid-up stock to the extent of their payments on the old stock, old corporate creditors may hold them liable on the former. *Re* State Ins. Co., 14 Fed. Rep. 28 (1882).

2 See § 46, *infra*.

3 Kryger *v.* Andrews, 65 Mich. 405 (1887); Kenton, etc. Co. *v.* McAlpin, 5 Fed. Rep. 737 (1880). See also § 170, *infra*. A bonus paid by citizens may be used by subscribers for stock in partial payment for their stock, unless the bonus was made directly to the corporation. McDermott *v.* Squier, 124 Mich. 523 (1900).

4 Gager *v.* Paul, 111 Wis. 638 (1901).

5 In Metropolitan, etc. Assoc. *v.* Scrimgeour, [1895] 2 Q. B. 604, a commission of five shillings per share on preferred stock and sixpence per share on common stock paid to brokers was held to be legal although the practical result was the issue of stock below par. A corporation may legally agree to pay to a person a commission of ten per cent. in stock on all subscriptions to stock which he obtains. Zabel *v.* New State, etc. Co., 127 Mich. 402 (1901), 160 Fed. Rep. 573.

Even though a promoter by agreement made with a foreign corporation, before the incorporation of a mining company, was to have one share of stock for his services for every ten shares which he obtained subscriptions for, and the company accepted the subscriptions, yet he cannot hold it liable for the value of the stock to be received by him as commissions where he merely demanded it by letter and the company offered to deliver it after suit was brought. Teeple *v.* Hawkeye, etc. Co., 114 N. W. Rep. 906 (Iowa, 1908).

A corporation may agree to give $5,000 of stock to one who will borrow $15,000 for it. Arapahoe, etc. Co. *v.* Stevens, 13 Colo. 534 (1889).

a suit to cancel stock which the directors and president voted to themselves as commissions for selling the stock of the company.[1]

Where one company sells property to another company, the consideration may be stock of the latter company and also a right on the part of stockholders in the former company to subscribe for stock in the latter company below par.[2]

Where stock is given by the company gratuitously as a "bonus" to persons who are induced thereby to purchase the bonds of the company, it has been held that such persons are liable to corporate creditors for the par value of such stock;[3] but in New York a different

A commission of fifteen per cent. may be paid by the company to those who agree to take all the stock not subscribed for by the public. *Re* Licensed Victuallers', etc. Assoc., L. R. 42 Ch. D. 1 (1889).

A company may pay a reasonable commission on the sale of its stock, but where a promoter takes twelve and one-half per cent. and pays his agents but five per cent., the promoter will be compelled to pay back the seven and one-half per cent. Stickney *v.* Buckel, 6 Ont. W. R. (Can.) 751 (1905). *Cf.* 96 Pac. Rep. 787.

Stock for $59,800 issued to a person as a commission for selling $85,000 of bonds does not necessarily render him liable, there being no subscription by him. Unless fraudulent overvaluation is proven he is not liable, and, even if liable, is liable only for the market value of the stock. Jones *v.* Whitworth, 94 Tenn. 602 (1895).

In McNulta *v.* Corn Belt Bank, 164 Ill. 427 (1897), the president sued to recover a two and a half per cent. commission which had been voted by the directors to him on unissued stock for services. The suit failed on several grounds of illegality, particularly that his vote was necessary to carry the same. A ratification by the same directors as stockholders does not cure the defect.

A company may be liable for a commission which it agrees to pay for the sale of its stock. Mason *v.* Morin, 42 S. W. Rep. 88 (Ky. 1897).

1 Central, etc. Co. *v.* Madden, 68 Atl. Rep. 777 (N. J. 1908).

2 *Re* Common Petroleum Eng. Co., [1895] 2 Ch. 759.

3 A "bonus" of paid-up stock to a director who loans money to the company and takes its notes and bonds as collateral is not legal, the issue of the stock being the original issue. The court, in a *dictum*, stated that the director was liable for the full par value of the stock. Richardson *v.* Green, 133 U. S. 30 (1890); Skrainka *v.* Allen, 76 Mo. 384 (1882).

A person who purchases, for $1,000 cash, a mortgage bond for $1,000 and $600 bonus in stock, in a company in process of formation is thereby put on notice that the stock has not been fully paid for, and is liable to creditors under the statutes of New Jersey to the effect that stockholders are liable until the whole capital stock is paid in. See *v.* Heppenheimer, 69 N. J. Eq. 36 (1905).

"Stock issued as a bonus with the sale of bonds, or stock issued through the means of overvaluation of property, cannot properly be regarded as necessarily issued fraudulently. In the absence of intervening rights of creditors, such transactions appear to have been generally supported by the courts, unless positive fraud has been clearly established, notwithstanding the constitutional and statutory provisions of many of the states designed to secure a proper relationship between the capital stock and the as-

rule prevails and the stockholder is not liable.[1] Where a railroad corporation is in financial straits and its stock worth nothing,

sets of corporations." Arnold *v.* Searing, 67 Atl. Rep. 831 (N. J. 1907).

The New York courts will, at the instance of a New York stockholder in a New Jersey corporation, enjoin the latter from issuing stock as a bonus with bonds in violation of the New Jersey statute requiring stock to be issued for money or property, even though the actual value of the stock and bonds so issued does not exceed the par value of the bonds and the amount received by the corporation is the par value of the bonds. The fact that the company is in a failing condition does not change the effect of the statute. Kraft *v.* Griffon Co., 82 N. Y. App. Div. 29 (1903).

It has been held that a person purchasing bonds of a newly formed corporation at par, with a bonus of stock, is not a *bona fide* purchaser, even though he made such purchase not from the corporation, but from a third person. See *r.* Heppenheimer, 69 N. J. Eq. 36 (1905); but see Dickerman *v.* Northern T. Co., 176 U. S. 181, 202 (1900). In the See case stock and bonds were issued for property at an overvaluation and then a $1,000 bond and $600 worth of stock were sold for $1,000 in cash and the court held the purchaser liable for the $600 worth of stock.

Bond purchasers who receive an equal amount of stock, the entire price being the par value of the bonds only, are liable on the stock if they had notice of the fact that it had been issued for worthless property, and it is immaterial that some of them after signing the contract accepted the bonds without taking the certificate of stock. Gillett *v.* Chicago Title & T. Co., 82 N. E. Rep. 891 (Ill. 1907). In this case it was also held that where bonds were sold with a bonus of stock, and the purchasers were held liable on the stock, they were held to be entitled to participate as bondholders in the fund which the court compelled them to pay in on their stock.

A failing corporation in issuing its bonds may give a bonus of stock as full paid, and the parties receiving the same will not be liable thereon if the corporation becomes insolvent. Kinsey *v.* Mt. Auburn Cable Co., Ohio Circuits (1905), 633.

Persons purchasing bonds from a company and taking stock as a "bonus," the stock being unissued until that time, are liable for the par value of the stock. Stutz *v.* Handley, 41 Fed. Rep. 531 (1890); reversed on other grounds; Handley *v.* Stutz, 139 U. S. 417 (1891); Haldeman *v.* Ainslie, 82 Ky. 395 (1884).

In Hebberd *r.* Southwestern, etc. Co., 55 N. J. Eq. 18 (1896), where bonds with a bonus of stock had been issued, the court held that as against the parties receiving the bonds the liability on the stock could be offset against the amount due on the bonds, the company having become insolvent.

In a suit for contribution in the federal court by a Missouri stockholder, who has been compelled by the Missouri courts to pay for stock issued to him as a "bonus," the court will follow the Missouri decision rather than a New York decision holding that the same "bonus" created no liability. Allen *v.* Fairbanks, 45 Fed. Rep. 445 (1891).

Where for every dollar par value of bonds sold at par the company gives to the purchaser an equal amount of stock as a bonus, the persons receiving such stock are liable on it in case of corporate insolvency. *Re* Railway, etc. Pub. Co., 68 L. T. Rep. 649 (1893); aff'd, 71 L. T. Rep. 682. See also 46 S. Rep. 285 (Fla. 1908).

1 In New York it is held that unissued shares of stock may be issued

it is legal for the corporation to settle with one of its creditors by issuing stock to him at twenty cents on the dollar. Other corporate creditors cannot afterwards hold him liable for

gratuitously to stockholders; also bonds of the company; and they are not liable for the par value or any part thereof to the corporation or corporate creditors, unless they agree to pay therefor or the statute requires payment. A subscription is otherwise, since it is a contract. Even though the stockholder has sold such stock and bonds, he is not liable to corporate creditors for the amount received from the sale. He has received nothing from the corporation except a promise to pay. Christensen *v.* Eno, 106 N. Y. 97 (1887), rev'g 21 Week. Dig. 202, and refusing to follow Skrainka *v.* Allen, 7 Mo. App. 434 (1879); s. c., 76 Mo. 384 (1882). Where a corporation issued certain stock as paid up to forty per cent. and induced the holder to pay the other sixty per cent. by transferring to him second mortgage bonds of the company, no right of action exists against him either in favor of the corporation or its judgment creditor for the forty per cent. unpaid on the shares, or for the value of the bonds. Christensen *v.* Quintard, 8 N. Y. Supp. 400 (1890), overruling s. c., 36 Hun, 334. See also § 73, *infra.*

A corporation having charter power to purchase the stock of other corporations may give its certificates of indebtedness in payment therefor, and may also issue with such certificates its preferred stock, the dividends to be used to pay the principal and interest of such certificates, the preferred stock then to belong to the vendors. Ingraham *v.* National Salt Co., 130 Fed. Rep. 676 (1904), overruling 122 Fed. Rep. 40.

Where underwriters have agreed to purchase the bonds of the corporation at a certain price with a bonus of seventy-five per cent. in stock, the corporation may pledge the bonds and assign the underwriting agreement to the pledgee, and the pledgee in order to enforce the underwriting agreement may compel the corporation to furnish the seventy-five per cent. in stock for that purpose. Kirkpatrick *v.* Eastern, etc. Co., 135 Fed. Rep. 146 (1904); aff'd, 137 Fed. Rep. 387.

Even though a corporation sells $161,500 of bonds and $130,000 of its stock for $145,350, yet the remaining bondholders cannot complain on the foreclosure, and even if there was any liability on the stock as an unpaid subscription the statute of limitations may be a bar, and the same is true as to any forfeiture for usury. Weed *v.* Gainesville, etc. R. R., 119 Ga. 576 (1904).

Even though in a foreclosure suit judgment creditors petition the court to direct the receiver to bring suit to hold stockholders liable on stock issued as a bonus, yet the court need not order such suit absolutely and may leave it in the discretion of the receiver to do so, if there is any reasonable prospect of collecting a judgment if obtained. Sterling, etc. Co. *v.* Augusta, etc. Co., 124 Ga. 371 (1905).

In the case Hudson, etc. Ry. *v.* O'Connor, 95 N. Y. App. Div. 6 (1904), an underwriting syndicate agreement was construed where bonds were sold at eighty cents on the dollar with a stock bonus, and it was held that coupons attached to the bonds belonged to the underwriters, even though the bonds were not delivered for some time after the coupons became due.

A corporate creditor who knows that the bonds and stock of the corporation have been issued on the basis of seventy-seven and a half for the bonds, with a bonus of one hundred per cent. of stock, cannot hold

the remaining eighty cents on the dollar.[1] And it is now established law that an embarrassed corporation may, upon an increase of its stock, put such stock upon the market and sell it for the best price that can be obtained, and that the corporation may throw in as a bonus a certain amount of full-paid stock to the purchaser of its bonds, and there will be no liability on the stock.[2] In England

the stockholders liable on the ground that the stock had been issued for property at an overvaluation. Colonial, etc. Co. *v.* McMillan, 188 Mo. 547 (1905), the court saying: "Now, turning to the prospectus, it flew a danger signal, in that it proposed to sell a $1,000 5 per cent. gold mortgage bond for $775 and to give 10 shares of capital stock in a new fledged corporation, of the par value of $1,000 as a bonus. On such facts, it would disturb, it seems to us, all normal methods of reasoning to conclude that a creditor who knew of such offer, and whose experience in corporate stock and bond dealing enabled him to appreciate its significance, and who, as a part of the very inception of his debt, as here, undertook to finance such a company and to foist such a bond and stock sale upon a confiding public, extended credit on the faith of the fact that the corporate stock was fully paid in money, or what might fairly be considered a money's worth. One who knows cannot be misled."

A stockholder cannot avoid a statutory liability on the ground that the stock was given to him for nothing by the corporation. Hallett *v.* Metropolitan, etc. Co., 35 N. Y. Misc. Rep. 659 (1901); s. c., 69 N. Y. App. Div. 258. Stock given as a bonus to a person loaning money to a corporation does not render the holder liable thereon, he never having subscribed for it nor agreed to pay for it, and there being no proof that any creditor was injured by the transaction. Seaboard, etc. Bank *v.* Slater, 117 Fed. Rep. 1002 (1902). It is sufficient to allege that the defendant holds stock which has never been paid up. The defense that the defendant did not subscribe for the stock or did not agree to pay for it or that he is not liable must be set up in the answer. Atlantic T. Co. *v.* Osgood, 116 Fed. Rep. 1019 (1902).

[1] Clark *v.* Bever, 139 U. S. 96 (1891). After deciding that nothing in the Iowa statute forbids the issue of stock below par, the court said:

"If the legislature had intended that the acquisition of stock at less than its face value should be conclusive evidence in every case that the stock, as between creditors and stockholders, is 'unpaid,' it would have been easy to so declare, as has been done in some of the states. If such a rule be demanded by considerations of public policy, the remedy is with the legislative department of the government creating the corporation. A rule so explicit and unbending could be enforced without injustice to any one, for all would have notice from the statute of the will of the legislature."

A limitation on the extent of this case is laid down in that the stockholders are liable "unless it appears that they acquired the stock under circumstances that did not give creditors and other stockholders just ground for complaint." Affirming Clark *v.* Bever, 31 Fed. Rep. 670 (1887). To same effect, Morrow *v.* Nashville, etc. Co., 87 Tenn. 262, 276 (1888).

[2] Quoted and approved in Speer *v.* Bordeleau, 20 Colo. App. 413 (1905). In Handley *v.* Stutz, 139 U. S. 417 (1891), the court said: "To say that a corporation may not, un-

it is held that a creditor of a company who takes its stock as fully paid-up stock in payment of his debt, the debt, however, being less than the par value of the stock, is liable for the unpaid par value

der the circumstances above indicated, put its stock upon the market and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below par. . . . The liability of a subscriber for the par value of increased stock taken by him may depend somewhat upon the circumstances under which, and the purposes for which, such increase was made. If it be merely for the purpose of adding to the original capital stock of the corporation, and enabling it to do a larger and more profitable business, such subscriber would stand practically upon the same basis as a subscriber to the original capital. But we think that an active corporation may, for the purpose of paying its debts, and obtaining money for the successful prosecution of its business, issue its stock and dispose of it for the best price that can be obtained."

An embarrassed corporation may sell its stock at sixty cents on the dollar and a *bona fide* purchaser is not liable for the difference, even though the statute of West Virginia where the issue was made stated that a sale of stock at less than par should be only after a publication of a notice, and no such publication was made, such publication, however, being merely directory. The court said it was immaterial whether the corporate creditors who brought the suit were such before or after the issue because: "If before, no reliance could have been placed on the stock as full paid, and if after, they cannot complain, as the transaction was open to them." McDowell *v.* Lindsay, 213 Pa. St. 591 (1906).

Where a corporation cannot sell its bonds for sixty cents on the dollar it may sell them together with a bonus of stock equal to fifty per cent. of the par value of the bonds, for eighty-five cents on the dollar for the bonds, and such transaction is legal, even though one-half of the stock was contributed by the stockholders who were reimbursed by a stock dividend to that amount. Neither the corporation nor its receiver can complain of the transaction, and creditors who were not deceived and fraudulently induced to purchase the stock or bonds cannot complain. Great Western, etc. Co. *v.* Harris, 128 Fed. Rep. 321 (1903); aff'd, 198 U. S. 561.

Where property mortgaged to secure bonds is of doubtful value and there is a financial stringency in the market, a corporation may sell $40,000 of its mortgage bonds and $5,000 of its stock for $33,000, and a subsequent purchaser of stock of the company with notice of the facts cannot attack the validity of the mortgage. The defense of usury is not good where the issue was made in New York state, although the corporation was organized in New Jersey. Franklin T. Co. *v.* Rutherford, etc. Co., 57 N. J. Eq. 42 (1898).

A failing corporation in issuing its bonds may give a bonus of stock as full paid, and the parties receiving the same will not be liable thereon if the corporation becomes insolvent. Kinsey *v.* Mt. Auburn Cable Co., Ohio Circuits (1905), 633.

In Rickerson, etc. Co. *v.* Farrell, etc. Co., 75 Fed. Rep. 554 (1896), the court held that an issue of an increase of capital stock at fifty cents on the dollar renders the holders liable to subsequent creditors for the remaining fifty cents on the dollar,

of such stock in case the company becomes insolvent. But on the other hand, the company not having fulfilled its contract in giving him fully-paid stock, he may offset the same amount as the amount still due him from the company.[1]

The amount collected must be to the extent and for the purpose of paying corporate creditors' claims only.[2] And only those creditors who complain are entitled to the benefit of a decree.[3] Moreover, only those creditors who become such after the issue of watered stock was made can complain of the issue and hold the stockholders liable. Prior corporate creditors could not have extended credit on the faith of a subsequent issue of stock.[4]

even though the capital stock of the corporation, at the time of the issue, had become impaired and the stock was worth only fifty cents on the dollar. The court distinguished Handley *v.* Stutz, on the ground that in the latter case the corporation was insolvent and the stock was issued to a creditor in cancellation of his debt and at a value in excess of the actual market value, and that the corporation in that case was not a going one. The court held that subsequent creditors who became such, knowing of the issue below par, could not enforce collection of anything further, but that subsequent creditors who became such without notice could enforce the payment of the balance. The court in a *dictum* stated that stock issued for property as full paid would be considered full paid unless there was actual fraud and that gross and obvious overvaluation of property would be merely strong evidence of fraud. In the case Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497, 526 (1899), the court said: "There is no statute in Ohio prohibiting a corporation from disposing of its capital stock at its fair market value, except to a director. Neither is there any policy to be discovered from the statute of that state regulating the organization of railroad corporations from which we might infer a purpose to compel sales of corporate stock at par only."

An issue of increased capital stock for cash at twenty cents on the dollar is legal where the corporation is insolvent and the issue was largely in payment of debts. Peter *v.* Union, etc. Co., 56 Ohio St. 181 (1897).

The bonds of a failing corporation and the mortgage securing them are valid, although when the bonds were issued a large amount of increased capital stock was given by the corporation as a bonus with the bonds. The giving of the bonus is no defense to a foreclosure of the mortgage, it being shown that the corporation was nearly insolvent at the time such increased capital stock was issued. Dummer *v.* Smedley, 110 Mich. 466 (1896), the court relying on the authority of Handley *v.* Stutz, 139 U. S. 417.

1 *Re* Railway, etc. Co., [1899] 1 Ch. 108.

2 Scovill v. Thayer, 105 U. S. 143, 155 (1881).

3 See § § 735 and 848*k*, *infra*.

4 Handley *v.* Stutz, 139 U. S. 417 (1891). See also cases cited in § 46, *infra*. As to whether subsequent creditors can complain, see § 848*k*, *infra*. Even though a stock dividend is declared without a proper basis therefor, yet the stockholders receiving the same are not liable thereon to corporate creditors except to subsequent creditors. Anglo-American, etc. Co. *v.* Lombard, 132 Fed. Rep. 721 (1904). A statute releasing stock-

In Minnesota and elsewhere the doctrine is clearly and boldly announced that the issue of stock for cash at less than par is legal, and that nothing more can be collected on such stock, except by corporate creditors who have relied, or can fairly be presumed to have relied, on the representation that the capital stock is as stated; in other words, that it was paid in full.[1] A corporate creditor, who became such with knowledge of the issue of watered stock, cannot complain thereof.[2]

holders from paying one-half of the par value of the stock and declaring the stock paid up, although but 50% had been paid thereon, is unconstitutional as regards creditors existing at the time such statute was enacted. Williams *v.* Watters, 97 Md. 113 (1903). A creditor of a corporation may object to a mortgage given to secure the individual debts of its stockholders incurred in purchasing stock in the corporation, even though the creditor became such after the transaction. *In re* Haas. Co., 131 Fed. Rep. 232 (1904).

1 The basis of the creditor's suit is not contract, but fraud. Creditors who were such before the watered stock was issued cannot complain of it. Nor can a subsequent creditor complain if he knew of the issue of watered stock. Nor will one who purchased claims after the corporation became insolvent and a receiver was appointed be allowed to complain. Hospes *v.* Northwestern, etc. Co., 48 Minn. 174 (1892). Even though a bonus of stock is given by the corporation upon the sale of bonds, yet creditors cannot complain thereof unless they were deceived thereby. Great Western, etc. Co. *v.* Harris, 128 Fed. Rep. 321 (1903); aff'd, 198 U. S. 561, the court saying (p. 329): "This right is one existing not in favor of all creditors of a corporation, but in favor of a particular class of creditors only, namely, those creditors who were defrauded by said transaction." See also McDowell *v.* Lindsay, 213 Pa. St. 591 (1906). Although for every share of stock subscribed and paid a corporation issues five shares, yet a subscriber who pays for his stock but does not receive any certificate at all is not liable to corporate creditors on the watered stock, which he supposed he was entitled to, and he is not liable, even though other subscribers who actually took their certificates have been held liable on the whole of them. Rogers *v.* Gross, 67 Minn. 224 (1897); Rickerson, etc. Co. *v.* Farrell, etc. Co., 75 Fed. Rep. 554 (1896); Mathis *v.* Pridham, 1 Tex. Civ. App. 58 (1892). A subsequent creditor cannot complain that the corporation has released its subscribers from a portion of their subscriptions, their holdings of stock being reduced proportionately. Vrooman *v.* Vansant, etc. Co. 215 Pa. St. 75 (1906). Where a person, to whom stock has been issued as fully paid for nothing, surrenders the same to the company, and it is then issued to other subscribers, a subsequent creditor cannot complain. Erskine *v.* Peck, 33 Mo. 465 (1884). Where stock is issued for no consideration whatever, the transaction is void and the holder of the stock is not liable thereon. Kellerman *v.* Maier, 116 Cal. 416 (1897). In Canada it is held that subscribers for stock at a discount are not liable even in winding-up proceedings, where such issue of stock was in violation of the charter. *Re* Ontario Ex. & Trans. Co., 21 App. Rep. (Can.) 646 (1894).

2 A corporate creditor who knows that the bonds and stock of the corporation have been issued on the ba-

A creditor may, by express contract, waive his right to compel stockholders to pay their unpaid subscriptions.[1] As affecting corporate creditors herein, the statute of limitations does not commence to run until judgment is recovered by the corporate creditors against the corporation.[2]

Inasmuch as a corporation may pledge its unissued stock to a corporate creditor, the pledgee cannot be held liable thereon on the ground that the stock was "watered."[3]

Where stock has been issued as full paid, without any money or property being paid therefor, a judgment creditor's remedy is in equity and not at law.[4]

In England there has been great doubt on this subject. It formerly was held that, where a contract for the issue of stock for cash at a discount is regularly registered with the public registrar, as provided by statute, then the person to whom the stock was thus issued by contract as paid-up stock was not liable to the corporation, nor corporate creditors, nor any other person for the unpaid par value of the stock, and his transferee was likewise protected.[5]

sis of seventy-seven and a half for the bonds, with a bonus of one hundred per cent. of stock, cannot hold the stockholders liable on the ground that the stock had been issued for property at an overvaluation. Colonial, etc. Co. *v.* McMillan, 188 Mo. 547 (1905), the court saying: "Now, turning to the prospectus, it flew a danger signal, in that it proposed to sell a $1,000 5 per cent. gold mortgage bond for $775 and to give 10 shares of capital stock in a new fledged corporation, of the par value of $1,000, as a bonus. On such facts, it would disturb, it seems to us, all normal methods of reasoning to conclude that a creditor who knew of such offer, and whose experience in corporate stock and bond dealing enabled him to appreciate its significance, and who, as a part of the very inception of his debt, as here, undertook to finance such a company and to foist such a bond and stock sale upon a confiding public, extended credit on the faith of the fact that the corporate stock was fully paid in money, or what might fairly be considered as money's worth. One who knows cannot be misled."

Even though $2,000,000 of stock was issued as full paid to thirteen persons for $28,600 cash, yet if it was agreed between them and the corporation that no more should be paid, a corporate creditor who contracted his debt with knowledge of this fact, cannot enforce any further liability. Miller *v.* Higginbotham's Adm'r, 93 S. W. Rep. 655 (Ky. 1906). See also § 46, *infra*.

1 Bush *v.* Robinson, 95 Ky. 492 (1894).

2 Christensen *v.* Quintard, 36 Hun, 334 (1885). Overruled on another point in s. c., 8 N. Y. Supp. 400. *Cf.* Weed *v.* Gainesville, etc. R. R., 119 Ga. 576 (1904), and §§ 46 and 195, *infra*, and Ch. XLIV, *infra*.

3 See § 247, *infra*.

4 First Nat. Bank *v.* Peavey, 69 Fed. Rep. 455 (1895). See same case in 75 Fed. Rep. 154.

5 *Re* Ince Hall Rolling Mills Co., L. R. 23 Ch. D. 545, n. (1882). The court refused to hold liable the person receiving the stock, but in a *dic-*

The latest authority in England, however, is in accord with the American rule, and holds that stock cannot be issued for cash at a discount.[1] A stock dividend may take the shape of an issue of stock for cash at less than the par value.[2]

tum said: "Assuming that the contract was *ultra vires*, what would be the result? If it is *ultra vires* it must be set aside *in toto*, the consequence being that these gentlemen would be entitled to be relieved of their shares and receive back the money paid upon them." In the case of Guest *v.* Worcester, etc. Ry., L. R. 4 C. P. 9 (1868), where stock had been issued as paid-up stock to a corporate creditor as security for his debt, nothing having been paid on such stock, the court said it did "not entertain a shadow of doubt," and that the holder was not liable thereon. In De Beville's Case, L. R. 7 Eq. Cas. 11 (1868), "paid-up" shares had been issued to De Beville, who had subscribed for "paid-up" shares, but had paid no part of the par value thereof. The court held him not liable. In this case the corporation had authority to issue ordinary shares for cash, and "paid-up" shares for property or services. See also *Re* Gold Co., L. R. 11 Ch. D. 701 (1878); James *v.* Eve, 6 H. L. Cas. 335 (1873); *Re* Plaskynaston Tube Co., L. R. 23 Ch. D. 542 (1883). *Ex parte* Daniell, 1 De G. & J. 372 (1857), is not strictly in accordance with the preceding authorities, but in Daniell's case the issue was to a director who was acting in a fiduciary capacity. The case is so distinguished in Carling's Case, L. R. 1 Ch. D. 115 (1875).

In *Re* Dronfield Silkstone Coal Co., L. R. 17 Ch. D. 76, 97 (1880), the court says: "If the company could not question it, neither can a creditor; for he can obtain nothing but what the company can get from the shareholders." See also *Re* Ambrose Lake, etc. Min. Co., L. R. 14 Ch. D. 390 (1880); *Re* Ince Hall, etc. Co., L. R. 23 Ch. D. 545 n. (1882), where the court said the same as in the preceding case. In Waterhouse *v.* Jamieson, L. R. 2 H. L. (Sc.) 29, 37 (1870), the court said: "I take it to be quite settled that the rights of creditors against the shareholders of a company, when enforced by a liquidator, must be enforced by him in right of the company. What is to be paid by the shareholders is to be recovered in that right." *Cf.* remarks of the lord chancellor, page 32.

[1] Ooregum, etc. Co *v.* Roper, [1892] A. C. 125; Welton *v.* Saffery, [1897] A. C. 299; *Re* Addlestone, etc. Co., L. R. 37 Ch. D. 191 (1887). In *Ex parte* Stephenson, 15 L. R. Ir. 51 (1885), it was held that, upon dissolution of the corporation, the stockholders are entitled to the remaining assets in proportion to the amounts paid by them, without regard to the "water" in the stock. Where debentures are issued at eighty cents on the dollar and by their terms the holder may convert them into stock equal to the par value of the debentures, this is the same as issuing stock at a discount for cash, and may be enjoined by its shareholders. Moseley *v.* Koffyfontein Mines, Ltd., [1904] 2 Ch. 108.

An issue of stock in England for cash at less than par is invalid, even though the contract is duly registered under the Companies Act. The holders are liable for the unpaid par value. *Re* London Celluloid Co., L. R. 39 Ch. D. 190 (1888).

In England an issue of stock for

[2] *Re* Owen, etc. Co., 21 Ont. Rep. (Can.) 349 (1891).

§ 43. *Corporate creditors as complainants where the issue is for property or construction work.*—The rights of corporate creditors, where stock has been issued for property taken at an overvaluation, are considered elsewhere.[1]

§ 44. *Who is liable and the character of the liability—Liability of the corporation.*—The corporation itself, it has been intimated, is not liable to any person by reason of the issue of its stock as full-paid stock, when, as a matter of fact, it has not been fully paid.[2] Of course a subsequent subscriber for stock from the corporation may complain, if any misrepresentations were made.[3] And a stockholder who is such at the time of the objectionable issue may enjoin it.[4] As regards corporate creditors, they cannot complain provided the corporation remains solvent and able to pay its debts. If, on the other hand, it becomes insolvent, it would be no object to them

cash at a discount is illegal, and a holder may sue to rescind the issue to him and for repayment of the money paid. *Re* Almada, etc. Co., L. R. 38 Ch. D. 415 (1888), overruling *Re* Ince Hall, etc. Co., L. R. 23 Ch. D. 545, n. (1882), and *Re* Plaskynaston, etc. Co., L. R. 23 Ch. D. 542 (1883).

A person subscribing for and taking stock for cash at less than par cannot repudiate the same and cancel the subscription on the ground that he supposed that the issue was legal. *Re* Railway, etc. Pub. Co., L. R. 42 Ch. D. 98 (1889). *Cf. Re* Zoedone Co., 60 L. T. Rep. 383 (1889); *Re* Midland, etc. Co., 60 L. T. Rep. 666 (1889).

An agreement of the company that stock may be issued at a certain figure below par is not such a "contract" as upon being duly filed authorizes such an issue. *Re* New Eberhardt Co., L. R. 43 Ch. D. 118 (1889). A subscriber for one share of stock is liable thereon, although afterwards a contractor to whom stock is issued for property transfers to the former one full-paid share of stock to fulfill the subscription. Dalton Time Lock Co. *v.* Dalton, 66 L. T. 704 (1892). Persons taking stock for cash at a discount are liable for the difference on a dissolution and distribution, even though all creditors' have been paid. *Re* Railway, etc. Pub. Co., 71 L. T. Rep. 682 (1894).

1 See §§ 46, 47, and 848, *infra*.

2 In the case of *In re* Ambrose Lake, etc. Min. Co., L. R. 14 Ch. D. 390, 397 (1880), the court says: "There would be no liability on the part of the company as such." In *Re* Gold Co., L. R. 11 Ch. D. 701 (1879), where the proceeding was to compel a winding up of the company on account of an improper issue of paid-up stock, the court refused to support the proceeding and said (p. 713): "It was not a wrong done by the company or to the company." See also Lewis *v.* Meier, 14 Fed. Rep. 311 (1882). *Cf.* §§ 157, 163, *infra*.

3 A person induced to purchase stock and bonds from a corporation, by fraudulent statements in a prospectus as to the value of property for which the bonds and stock have been issued by a Pennsylvania corporation at a fraudulent overvaluation, may maintain a bill in equity to cancel a note given in payment, and to enjoin a suit at law on such note in the hands of a purchaser with notice. Hanning *v.* Berdan, 135 Fed. Rep. 159 (1905). See also § 40, *supra*.

4 See § 41, *supra*.

to bring suit against the corporation on this ground, because a judgment thereon would have no preference over a judgment on their regular claim.

§ 45. *Liability of persons to whom stock is issued for cash at less than par.*—Where stock is issued for cash at less than par, the parties taking it are liable to corporate creditors for the unpaid par value thereof,[1] unless the issue was subsequent to the commencement of business and the real value of the stock was paid in to the corporation in order to enable it to go on with its business instead of becoming insolvent.[2]

§ 46. *Liability of persons to whom stock is issued for property taken by the corporation at an overvaluation*[3]*—Treasury stock.*—A dissenting stockholder may object to such an issue, inasmuch as it decreases the value of his stock. He may have the transaction set aside, and the person receiving the stock compelled to return it.[4] The person receiving stock at a discount is liable also to a *bona fide* transferee of that stock where fraud enters into the transaction.[5]

Corporate creditors, however, are the persons who generally complain. The company becomes bankrupt and they are not paid. They then find that the capital stock did not represent cash; it was paid for by property taken by the corporation at a valuation much greater than its real value. The company being insolvent and its property gone, the corporate creditors seek to hold the stockholders liable. They seek to hold the stockholders liable for the par value of the stock, less the real value of the property which was turned in to the corporation. During the past thirty years there has been a vast amount of litigation on this subject. The courts still disagree in their conclusions, but a careful study of the cases will show that upon authority as well as principle the stockholders cannot be held liable in such a case.[6] In England and New York they cannot be held liable, except on the basis of a rescission. And under all the well-considered decisions they cannot be held liable unless the property was of so trifling a character that it practically had no value whatever. This class of cases has arisen under two aspects: first, at common law; and second, under statutes.

At common law it is well settled that corporate creditors cannot hold stockholders liable on stock which has been issued for property, even though the property was turned over to the corporation

1 See § 42.

2 Quoted and approved in Speer *v.* Bordeleau, 20 Colo. App. 413 (1905). See § 42.

3 For the decisions upholding issues of stock for property at a fair valuation, see §§ 18, etc., *supra.*

4 See § 41.

5 See § 40.

6 Quoted and approved in Orton *v.* Edson Reduction, etc. Co., Ohio Circuits (1905), p. 107; aff'd, 75 Ohio St. 580.

at an agreed valuation which was largely in excess of the real value of the property. There have been cases which refuse to follow this rule, but it is clearly established by the great weight of authority. The reason of the rule is that if the payment by property was fraudulent, then the contract is to be treated like other fraudulent contracts. It is to be adopted *in toto,* or rescinded *in toto* and set aside. Both parties are to be restored as nearly as possible to their original positions. The property or its value is to be returned to the person receiving the stock, and he must return the stock or its real value.[1] In New York and in England, as stated above, at common law the stockholder is not liable at all to corporate creditors, even though the overvaluation was gross and clearly known so to be. The remedy is rescission, and not the making of a new contract by the court. There are other cases, however, which hold that where the property so turned in had no substantial value, or where the overvaluation was "fraudulent," the court will hold the stockholders liable for the par value of the stock, less the value of the property. Still other cases hold that where the stock has no value when it is issued for property, the creditors are not deprived of anything and hence cannot complain. "If, when disposed of by the railroad company, it was without value, no wrong was done to creditors." Such is the language of the supreme court of the United States.[2] The common law decisions on this subject in the federal

[1] Quoted and approved in Orton *v.* Edson Reduction, etc. Co., Ohio Circuits (1905); aff'd, 75 Ohio St. 580.

[2] *Federal courts:* Fogg *v.* Blair, 139 U. S. 118 (1891), holding that where all the stock and a large quantity of bonds are issued by a railroad corporation to its contractor in payment for the construction of the road, the contractor is not liable to corporate creditors on the stock, even though the bonds without the stock were a sufficient consideration for building the road, unless the corporate creditors prove that the stock at the time of its issue had a real or market value. The court said (p. 126): "If, when disposed of by the railroad company, it was without value, no wrong was done to creditors." Even the Missouri constitution and statutes do not change this rule. *Cf.* cases in note 3, p. 190, *infra.*

In Coit *v.* Gold Amal. Co., 119 U. S. 343 (1886), aff'g Coit *v.* North Car. Gold Amal. Co., 14 Fed. Rep. 12 (1882), where this question clearly arose, the court said that the creditors could not hold the stockholders liable unless there was an intentional and fraudulent overvaluation. The court said that "where full-paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account; a gross and obvious overvaluation of property would be strong evidence of fraud." The court held that although a machine and a license to use a patent were put into the company in payment for $100,000 of stock, yet there was no fraud. The lower court said corporators "ought not to be made liable individually for the debts of the company at the instance of creditors, because, at a later day, the estimates fairly put upon the

courts and the various states are given in the notes below in the alphabetical order of the states.

property at that time have become modified by subsequent events, and will not amount to the value which they set upon it."

Before any recovery can be had in this class of cases the transaction must be set aside. Scovill *v.* Thayer, 105 U. S. 143, 156 (1881). Even though only $2,788,000 is paid for thirty-nine paper mills; and the purchaser then turned the property over to a corporation for $5,000,000, payable partly in bonds and partly in stock, yet this does not affect the validity of the mortgage securing the bonds; and even though the purchasers of the bonds received therewith a bonus of stock, yet their claims based on the bonds cannot be decreased by the par value of the stock so received by them, they being innocent purchasers, the promoters secretly receiving a large quantity of additional profit. The remedy of the parties who so turned in their properties is against the promoters and not in defense of a suit to foreclose the mortgage. Dickerman *v.* Northern T. Co., 176 U. S. 181 (1900). In this case the court said it was not called upon to decide whether promoters who receive a large quantity of bonds and stock as their profit are liable for the par value of the stock, or whether the remedy is a rescission of the transaction. The United States Circuit Court of Appeals, in affirming the decision of the court below, in Old Dominion Copper, etc. Co. *v.* Lewisohn, being a suit by the corporation against its promoters, said (148 Fed. Rep. 1020): "The bill prays for relief as follows: First, that the sale of the mining claims to the complainant by Leonard Lewisohn, the defendants' testator, and Albert S. Bigelow, a citizen of Massachusetts and not a party to this action, be rescinded, and the real estate reconveyed to the defendants, upon receipt by the complainant of the consideration paid therefor; second, that defendants return to the complainant the consideration paid by complainant for said property, namely 30,000 shares of its capital stock, or account therefor; third, that, if the court shall decide that the complainant is not entitled to rescind the sale of said real estate to it, then and in that event that the court ascertain the amount of damages sustained by complainant and direct the defendants, as executors, to pay the amount to complainant. We are unable to perceive how this relief, or any part thereof, can be granted the complainant upon the facts alleged in the bill. The fundamental difficulty with the bill is that it fails to state any facts showing that the complainant was in any way injured or defrauded by the transactions complained of. At the time of the transfer by Bigelow and Lewisohn to the company, Bigelow and Lewisohn and their representatives owned the entire issue of stock of the corporation. The sale by them to the corporation was in effect a sale by them to Bigelow and Lewisohn. A corporation can only act through the human beings who compose it. It cannot be deceived or defrauded unless its stockholders and directors are deceived or defrauded. The corporation knew all that Bigelow and Lewisohn knew, and no one of the original parties to the transfer was defrauded by the exchange of the stock controlled by Bigelow and Lewisohn for the real estate controlled by them. It may be that such a large overcapitalization as is alleged in the bill might mislead and deceive careless and credulous purchasers of the stock; but we are not now dealing with the case of a stockholder alleging concealment, fraud, and mis-

At common law there is no contract, express or implied, to pay to the corporation or to corporate creditors the par value of stock

representation. The stockholders, apparently, have no complaint. At least they have not propounded any. . . . The subscribers for the 20,000 shares subsequently issued were not deceived. They asked for no statement, and received none. They got what they purchased, and are not complainants here." Aff'd 210 U. S. 206.

Even though the owners of mining claims organize a corporation in New Jersey, and they themselves as directors, together with dummy directors, cause the corporation to purchase the claims for $750,000 par value of stock, although the mining claims were worth but $5,000, and even though thereafter additional capital stock is sold by the corporation to the public for cash at par, yet the corporation cannot rescind the transaction, inasmuch as there were no other stockholders at the time of the transaction, and hence no one was deceived. Old Dominion, etc. Co. *v.* Lewisohn, 136 Fed. Rep. 915 (1905); aff'd. 148 Fed.Rep. 1020 and 210 U.S.206

A contrary conclusion was reached in regard to the same transaction in Old Dominion, etc. Co. *v.* Bigelow, 188 Mass. 315 (1905).

Where a person sells property to a corporation for all of its stock, excepting seven qualification shares, and such property is the only property the corporation owns, it cannot hold him liable in damages for deceit as to the value of the property, even though he afterwards sells the stock to outside parties at a high price. The court said that there was no damage because there was no difference between the value of the stock and the value of the property, the corporation having given back "in substance that which it received and no more." Stratton's Independence *v.* Dines, 135 Fed. Rep. 449 (1905).

Even though property purchased for $2,500 and worth not over $5,000 is turned in for $13,500 of stock, yet the bankruptcy court where the company is organized cannot hold a non-resident stockholder liable on the stock by service by publication. *In re* Haley, 158 Fed. Rep. 74 (1908).

Even though there is a gross overvaluation of property turned in for stock, yet this merely places the burden of proof upon the stockholders to show that they acted in good faith. Creditors trying to hold them liable must show that they became creditors on the faith that the stock was paid up and that such overvaluation was fraudulent with intent to cheat the creditors. Hence, where a mercantile firm owned property worth $2,700,000 and owed $1,800,000, and sold the property subject to the debt, to a corporation, for $1,500,000 of stock, there was a gross overvaluation, and yet if the parties acted in reliance upon the books of the concern, and the system of bookkeeping used did not show the actual condition of the firm, they are not liable, they having acted in good faith. Taylor *v.* Walker, 117 Fed. Rep. 737 (1902); aff'd, 127 Fed. Rep. 108. Stock given as a bonus to a person loaning money to a corporation does not render the holder liable thereon, he never having subscribed for it nor agreed to pay for it, and there being no proof that any creditor was injured by the transaction. Seaboard, etc. Bank *v.* Slater, 117 Fed. Rep. 1002 (1902). At common law stock may be issued in payment for the construction of a railroad at less than its par value, and may in fact be issued at its actual value. Continental Trust Co. *v.* Toledo, etc. R. R., 86 Fed. Rep. 929 (1898). See 161 Fed. Rep. 540.

In passing upon the validity of a railroad construction contract whereby bonds and preferred stock and

which is issued for property. Not only is there no such contract, but there is no implied fraud even though the property was over-

common stock were issued for construction work, the court in figuring the actual value received by the railroad for these securities figured the common stock at fifteen cents on a dollar, and the preferred stock at thirty cents on the dollar, and the bonds at seventy-six cents on the dollar, and held that this was legal, even under the Ohio statutes. Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497 (1899). In Phelan *v.* Hazard, 5 Dill. 45 (1878); s. c., 19 Fed. Cas. 429, Judge Dillon thoroughly reviewed the authorities and said: "The contract is valid and binding upon the corporation and the original sharetakers unless it is rescinded or set aside for fraud; and . . . while the contract stands unimpeached, the courts, even where the rights of creditors are involved, will treat *that* as a payment which the parties have agreed should be payment." See also Morrison *v.* Globe Panorama Co., 28 Fed. Rep. 817 (1886); Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892).

In Northwestern, etc. Ins. Co. *v.* Cotton, etc. Co., 70 Fed. Rep. 155 (1895), a building company having invested $88,000 in a building sold it to a new corporation having the same stockholders for $125,000 stock and $75,000 of bonds. The property on foreclosure brought only $50,000. A creditor sued to hold a stockholder liable on his stock. The court held that he could not recover, because, (1) "if the real estate transferred for the stock in the new corporation was honestly believed by the parties to the transaction to be equivalent in value to the face of the stock issued, a creditor of the corporation may not assail the transaction, although it should subsequently transpire that the property in fact was overvalued;" and (2) the creditor, "when it became the purchaser of the bonds, was advised of the valuation placed on the property by the directors, and was in possession of other important facts, which, if pursued, would have led to full knowledge of the method pursued by the directors in the said transfer, the fixing of the valuation, and the manner of payment of the cash subscription."

Where an agent is entitled to all that land is sold for above $50,000, and a sale is made for $10,000 cash and $44,000 in stock, par value, he must prove what the stock was worth. He cannot assume that it was worth par. Anderson *v.* Avis, 62 Fed. Rep. 227 (1894).

Where a corporation issues its stock, as full paid, in payment for coal lands, and the stock is sold to a purchaser for value, the purchaser is not liable to creditors of the corporation on the stock on the ground that it is not full-paid stock, even though the land was taken at a great overvaluation, there being no actual fraud in the transaction. The text above was quoted with approval. Du Pont *v.* Tilden, 42 Fed. Rep. 87 (1890).

In the case of Stewart *v.* St. Louis, etc. R. R., 41 Fed. Rep. 736 (1887), where a railroad road-bed worth $2,000 was turned in to a corporation for $200,000 of its notes and $3,600,000 of its stock, the court held that the notes were good and could be collected. There is a class of cases, however, which are to be distinguished from the cases contained in this note. A promoter of a corporation occupies a fiduciary relation towards it, and where a promoter has purchased merely the option on property and then sells that option to the corporation at a largely increased price (the corporation at the same time agree-

valued. If there is express fraud the law provides ample remedies, but such a fraud must be clearly proven and is not implied from proof that the property was worth less than the par value of the stock.

ing to pay the original purchase price), the promoter may be compelled by the corporation to pay over to it the profit made by him. And in still other cases, where the promoter concealed his profit, he may be liable to the corporation for his profit, where the board of directors consists merely of dummies representing such promoter. See § 651, *infra*. Even though stock of a plantation company has been issued for property at an overvaluation and sold to the public, and a receiver has been appointed at the instance of stockholders, yet if a great majority of the stockholders wish to reorganize the company and pay in more money and continue the business, it still being solvent, the court will discharge the receiver. Tolman *v.* Ubero, etc. Co., 142 Fed. Rep. 270 (1905). The bankruptcy court will not compel a creditor to accept in "composition," under the bankrupt act, stock in a corporation, which was issued for good will of the business of the bankrupt, it appearing that such good will was worthless. *In re* Woodend, 133 Fed. Rep. 593 (1904).

In determining whether a statutory reduction in the price of gas is confiscatory and unconstitutional, the actual or reproductive value of the property is taken without regard to its original cost. Land not needed in the business is excluded, but a reasonable working capital is included. Stock of subsidiary companies is not included if their business is collateral. The value of the capital stock of the parent company has little bearing on the subject, and an abnormal depreciation fund will not be allowed. The company is entitled to a profit based not on the legal rate of interest, but on investments of the same character as its business, and in New York City is entitled to 6 per cent. The value of the good-will may be included, and the capital issued for good-will or franchises will be included, dividends having been paid upon it, and the price paid in purchasing franchises may be included. An excessive penalty for not obeying the statute is unconstitutional as a denial of the equal protection of the laws. Consolidated Gas Co. *v.* City of New York, 157 Fed. Rep. 849 (1907). Inasmuch as the franchise, earning power or good-will is generally turned in at a high valuation, it is well to state that the law sustains a fair valuation of the franchise. Thus, where the national government condemns a dam and lock of a canal company, it must pay not only the cost of the dam and lock, but compensation for the taking of the franchise to exact and collect tolls. "The whole value must be paid, and that value depends largely upon the productiveness of the property, the franchise to take tolls." Monongahela Nav. Co. *v.* United States, 148 U. S. 312 (1893).

California: Even though stock is issued for property which is worth but one-tenth of the par value of the stock, yet if all the stockholders assent thereto a subsequent purchaser of the stock cannot maintain a suit in behalf of the corporation to cancel the stock on the ground of fraud. His remedy, if any, is a personal suit for false representations. Garretson *v.* Pacific, etc. Co., 146 Cal. 184 (1905).

Georgia: Where stock is issued for property worth only ten per cent. of the par value of the stock, and known so to be to the stockholders, this is a legal fraud as to subsequent creditors, and the trustee in bankruptcy may enforce the stockholders' liability. Allen *v.* Grant, 122 Ga. 552

This principle of law, that there is no liability on stock issued for property the value of which is less than the par value of the

(1905). The court said: "In England, the contract of subscription is an entirety. There it is either good or it is bad. If void, there is no contract of subscription, and consequently no liability thereon. If good, it is good according to its terms, and the company cannot receive the subscription payable in specifics, and afterwards by itself, creditors or liquidator hold the subscriber for the difference between the value of the property and the face of the shares. But the American doctrine is that a subscriber must pay before he can be relieved from liability to the creditors of the corporation. There is, however, some difference in the method of determining what is payment where other than money is the medium. In those states which adopt the 'true value' rule, motive, intent, and good faith are disregarded. In order for a subscriber to relieve himself, he must show that the property conveyed in satisfaction of the subscription was its equivalent in money, and was worth in dollars the face of the shares. In those states which adopt the 'good faith' rule it is recognized that value is a matter about which men may honestly differ. In them it is therefore held that, if the parties fairly and in good faith value the property conveyed in payment of the subscription, the courts will not go behind their assessment."

Connecticut: In declaring dividends the directors are not justified in assuming that the value of property which was originally received in payment for stock is still worth that value, and if such property at the time of the dividend was not actually worth the par value of the stock which was issued for it, the dividend is illegal and a director receiving such dividend as a stockholder may be compelled to pay it back at the instance of a receiver of the corporation. Davenport *v.* Lines, 72 Conn. 118 (1899). See 78 Conn. 575.

Illinois: See § 47, *infra*.

Indiana: Where $197,000 in stock and $150,000 in bonds are issued to contractors for the construction of waterworks, the company at the time having no debts and everybody assenting to it, and there being no proof of fraud, the transaction is legal, and creditors cannot enforce any liability on the stock. Bruner *v.* Brown, 139 Ind. 600 (1894).

Where stock is issued for construction work, the persons receiving the stock cannot be held liable on the theory of the stock not having been paid up, unless fraud is charged and proved. The statements of one of the officers to tax commissioners are not admissible as evidence of the cost of the work. The act of the company in crediting each of the directors with one thousand dollars on their subscriptions in payment of services rendered and money advanced was upheld. Clow *v.* Brown, 31 N. E. Rep. 361 (Ind. 1892). But see s. c., 134 Ind. 287 (1893), and 150 Ind. 185.

In Coffin *v.* Ransdell, 110 Ind. 417 (1887), the court sustained the rule given in the text and said: "Suppose it to be true that, in consummating the arrangement, the property of Unthank & Coffin was turned in to the corporation at an overvaluation, and that the defendant and the other corporators participated in the alleged wrong. The transaction was the result of an agreement which the parties had the right, as between themselves, to make. . . . Shall [defendant] be capriciously punished by being made liable *ex contractu* upon a contract which he never made? If the defendant has participated in a fraud whereby the creditors of the corporation who exercised ordinary

stock, seems a self-evident principle of law. Moreover, this principle is based on business usage and is sound practice. There is

business sagacity have suffered damage, whatever redress such creditors may now obtain, while their representative retains the defendant's property, must be sought by an action *ex delicto*."

As to the statutory law in Indiana, see § 47, *infra*.

Maryland: Even though promoters turn in property at a very high value, yet if all the parties were aware of all the facts a receiver of the corporation cannot hold the promoters liable. Tompkins *v.* Sperry, etc. Co., 96 Md. 560 (1903). See also Brant *v.* Ehlen, 59 Md. 1 (1882). In this case the court said: "So long as the transaction stands unimpeached for fraud, courts will treat as a payment that which the parties themselves have agreed shall be a payment, and this, too, in cases where the rights of creditors are involved." Crawford *v.* Rohrer, 59 Md. 599 (1882).

Massachusetts: In Massachusetts the Supreme Court has recently held that where a person buys property for the purpose of forming a corporation to take it over, and this plan is carried out by the use of dummies as directors, who issue stock therefor, the par value of which is many times greater than the actual value of the property, the corporation itself may thereafter rescind the transaction and return the property and demand back the stock, even though all the stockholders, directors and officers approved the transaction when it was carried out, it appearing, however, that the property received was worthless and that it was a part of the original plan to sell a large part of the stock to the public, which plan was carried out, and it appearing also that the original stockholders and officers were merely representatives of the vendor, and that there was no independent judgment on the part of the board of directors. The court pointed out that this was a different case from one where it was not contemplated that the public should become interested, except by purchase from the original stockholders.

Where a person buys all the stock of a corporation for about $613,000, and some real estate for about $175,000, and sells the former to a corporation formed by him for that purpose for $2,500,000 par value of stock, having also an actual value of $2,500,000, and sells the real estate for $750,000 par value of stock, having also the same actual value, but it turns out that the real estate was worthless, the corporation so issuing the stock may maintain a separate suit for rescinding the sale and issue of stock for the real estate, or for damages, if the stock cannot be returned, it appearing that the promoter was a director at the time of the sales, and that the fair market value of the stock at the time of issue was par, and so continued to be for a long time thereafter; it further appearing that he made no disclosure of the facts to the corporation and did not see to it that the corporation had adequate independent advice. The court said "that is an obligation resting upon every fiduciary who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and *cestui que* trust, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself. There is no pretense that in the transaction in question the plaintiff corporation was represented by an independent board." It is no defense that every stockholder and director knew of and acquiesced in the transaction at the time, it appearing that the stock was afterwards sold to the public with-

no more harm in the issue of stock below par than there is in the issue of a note or bond below par. The extent to which the courts

out any disclosure of the facts. Old Dominion, etc. Co. *v.* Bigelow, 188 Mass. 315 (1905), the court refusing to follow Old Dominion, etc. Co. *v.* Lewisohn, 136 Fed. Rep. 915; aff'd, 145 Fed. Rep. 1020, and 210 U. S. 206, involving the same issue of stock. The court pointed out that in cases to the contrary it was not contemplated that other parties should become interested in the stock, except by purchase from the original stockholders. If there are two such promoters it seems that in a suit against one, he is liable for the whole stock so issued.

A statute that the commissioner of corporations must pass upon the value of property, which is turned in for stock, cannot be evaded by the parties paying cash to the corporation for the stock and then using that cash to buy the property from themselves. Yet if they do so under advice of counsel, they are not liable for the penalty for doing so. Harvey-Watts Co. *v.* Worcester, etc. Co., 193 Mass. 138 (1906).

Where promoters pay out less than $30,000 to secure options on land and then sell the options to a corporation for $700,000 of stock of the latter, the corporation assuming the purchase price of the land, and then issue a prospectus which is misleading and does not state the facts about the issue of stock, and the corporation becomes insolvent, they are liable to the corporation for the fair market value of the stock at the time the stock was issued, or as soon thereafter as it had a market value. The liability is not for unpaid stock, but for fraud as promoters in making a secret profit in services and not making a full disclosure to the stockholders. The promoters owe a duty to future stockholders. The land need not be tendered back. The promoters are to be credited with their actual disbursements and to be charged with the fair market value of the stock with interest, and also with dividends. The suit should be brought by the corporation itself and not by its receiver, according to the Massachusetts decisions. Hayward *v.* Leeson, 176 Mass. 310 (1900). See also New Haven, etc. Co. *v.* Linden Spring Co., 142 Mass. 349 (1886).

Michigan: Stock which is paid for by the worthless assets of an insolvent corporation and a transfer of stock in such corporation, is not full paid and the stockholder may be held liable by corporate creditors. Dieterle *v.* Ann Arbor, etc. Co., 143 Mich. 416 (1906). Stock may be issued for services but not for influence. A person receiving $2,500 of paid-up stock for recommending the company's product and using his influence to sell the product, but not devoting appreciable time, must pay the $2,500 to corporate creditors, upon corporate insolvency. Peninsular Sav. Bank *v.* Black Flag, etc. Co., 105 Mich. 535 (1895). Where a mine is turned in at a large valuation for stock, no fraud is proved by the mere fact that the mine subsequently turns out to have been worth only one-fifth of that amount. Fraud exists only in case of intentional overvaluation, "or such reckless conduct in the placing of this value, without regard to its real worth, as would indicate, without explanation, an intent to defraud." Young *v.* Erie Iron Co., 65 Mich. 111 (1887). Although patents which the court finds were worth $20,000 were turned in for $100,000 of stock, nevertheless the parties receiving the stock are not liable on the same where there is no proof of intentional fraud or of recklessness in fixing the value. Graves *v.* Brooks, 117 Mich. 424 (1898). In a suit by a judgment creditor to enforce a lia-

have gone in sustaining such issues of stock for property is shown by the fact that even constitutional and statutory prohibitions

bility for stock issued for property at an overvaluation, a stockholder may attack the judgment against the corporation on the ground that it was on a claim for property purchased, which property had been taken back by the vendor. McBryan *v.* Universal, etc. Co., 130 Mich. 111 (1902). Where $500,000 of stock is issued for $2 cash and a formula for cereal breakfast food, and the stock is then sold at less than par to the public, and the company fails, stockholders by statute being liable only to the extent of their unpaid subscriptions, the parties to whom the stock was originally issued may be held liable. Wood *v.* Sloman, 114 N. W. Rep. 317 (Mich. 1907).

Mississippi: Where by a contract between promoters of a street railway one of them was to have one-fourth of all the profits and the others proceed with the enterprise and transfer the franchise to a corporation and afterwards fraudulently cause the corporation to be sold out to a new corporation, the first named party may hold the other promoters and the two corporations personally liable for one-fourth of the value of the property, less the amount which has been expended, and it is no defense that the original plan contemplated issuing stock without paying the full par value thereof. Mulvihill *v.* Vicksburg, etc. Co., 88 Miss. 689 (1906).

Missouri: In the case Colonial T. Co. *v.* McMillan, 188 Mo. 547 (1905), the court, in speaking of watered stock, said: "That corporations created to be the owners of public utilities should be born into a sham and crippled life, and that there seems to be a call for more adequate safeguards against the itching temptation to circumvent our corporation laws by falsehood, whereby the ancient plan for making gain by 'watering stock,' conceived by the shrewd old patriarch Jacob in dealing with Laban (Genesis, xxx, 30 *et seq.*, q. v.), is parodied and brought to blush, may concern the legislative branch of the government, but cannot be remedied by the courts except in sporadic cases, where some relief may be administered if the facts allow."

For other Missouri decisions, see § 47, *infra*.

New Jersey: Where the stock of a cemetery company of the par value of $50 is worth but $5, the directors may issue it for land which is liable to come into competition with the company, even though one motive of the directors is thereby to control an election. Rural Homestead Co. *v.* Wildes, 54 N. J. Eq. 668 (1896), rev'g 53 N. J. Eq. 452 (1895).

Stockholders cannot be held liable for the difference between the par value of their stock and the actual value of property turned in to the corporation in payment of the stock unless fraud is proved. "If the transaction was an honest one, the difference in value between the property constituting the consideration of the sale and the stock had no legal significance. . . . The valuations of property in making the exchange, either on the one side or the other, cannot be supervised or controlled by the court of chancery; for, in the absence of deceit, or some other corrupt constituent, the bargain between the parties cannot be disturbed." Bickley *v.* Schlag, 46 N. J. Eq. 533 (1890). A corporation may maintain a suit to cancel stock which the directors and president voted to themselves as commissions for selling the stock of the company. Central, etc. Co. *v.* Madden, 68 Atl. Rep. 777 (N. J. 1908). A purchaser of stock which has assented to the corporation purchasing its own stock cannot complain. Where by statute the preferred stock shall not exceed two-thirds of the capital

against watered stock have been practically construed away by the courts. Moreover, the laws of trade are more powerful than

stock paid in for cash or property, a preferred stockholder cannot question the value of property received in payment for the preferred stock in a suit instituted by him to enjoin the corporation purchasing its own stock, as allowed by statute, where the assets, less the debts, equal the preferred stock outstanding. Hodge *v.* United States Steel Corp., 53 Atl. Rep. 601 (N. J. 1902). This decision was reversed on other points in 64 N. J. Eq. 807 (1903). Where real estate worth $125,000 and an unsuccessful patent are sold to a corporation for $1,125,000 of full paid stock, and one-half of the stock is then turned back as treasury stock, and the company becomes insolvent, the stockholders are liable for the corporate debts and expenses of administration. Honeyman *v.* Haughey, 66 Atl. Rep. 582 (N. J. 1906). Even though it is clear that property was transferred to a corporation for stock and bonds, the par value of which is much greater than the actual value of the property, yet a dividend on the stock cannot be enjoined by a stockholder on the ground that the profits should be used to add to the actual value of the assets sufficient to make them equal to the par value of the stock and bonds so issued, even though the amount of "water" is $11,000,000, it appearing that there were no floating debts and it not appearing that any one was defrauded. Goodnow *v.* American, etc. Co., 66 Atl. Rep. 607 (N. J. 1907), the court saying: "The rule seems to be established that between stockholders one cannot be legally called upon to make good any shortage in value between assets and the nominal par value of the stock, when his stock is issued under a contract with the company as full paid, whether as a bonus, or for property at an overvaluation, when the issue is consented to by all the stockholders. It is a bargain between the contracting parties which, in the absence of fraud, they cannot abrogate." "Stock issued as a bonus with the sale of bonds, or stock issued through the means of overvaluation of property, cannot properly be regarded as necessarily issued fraudulently. In the absence of intervening rights of creditors, such transactions appear to have been generally supported by the courts, unless positive fraud has been clearly established, notwithstanding the constitutional and statutory provisions of many of the states designed to secure a proper relationship between the capital stock and the assets of corporations." Arnold *v.* Searing, 67 Atl. Rep. 831 (N. J. 1907). See 69 Atl. Rep. 788.

A few cases seem to be in conflict with the above authorities. Thus, in Wetherbee *v.* Baker, 35 N. J. Eq. 501 (1882), the defendant neither owned nor conveyed to the corporation the property which he alleged constituted payment. Savage *v.* Ball, 17 N. J. Eq. 142 (1864), held that the validity of an election is not affected by the question whether the stock voted was issued for value or not.

As to the statutory law in New Jersey, see § 47, *infra*.

New Mexico: Where there is a difference of opinion as to the value of the land which is deeded in payment for stock and no fraudulent intentional overvaluation is proved, the stockholder cannot be held liable on the stock. Medler *v.* Albuquerque, etc. Co., 6 N. M. 331 (1892).

New York: In Van Cott *v.* Van Brunt, 82 N. Y. 535 (1880), a leading case, the court said (p. 542): "The conclusion of law was erroneous that the scheme was fraudulent as against the company and against the creditors, and that the defendants

the laws of men, and in business circles it has become customary to capitalize property at a reasonably high figure. This is due to

were only entitled to credit for the actual outlay paid or incurred, and were liable for the amount unpaid on the stock. The result must be that the defendant was not liable to pay the par value of the stock received by him under the contract for building and equipping a portion of the road." This case has been severely criticised as being contrary to established principles of law; but, as a matter of fact, it is in strict accordance with the law as now established.

A stockholder in a holding corporation cannot maintain a suit in behalf of the corporation on the ground that its promoters made large, unlawful and secret profits by being interested in the constituent company whose stock was turned in to the holding company in exchange for the stock of the latter, it appearing that when the stock was so turned in the promoters were the only parties interested. If any of the original parties were defrauded their remedy is a suit at law for damages against the guilty parties. The court said (p. 241): "We have here nothing more than the ordinary transaction of parties coming together and agreeing in writing to form a corporation that shall take over from them certain definitely understood properties and cash, for which is to be issued its entire capital stock. It is doubtless true that in many instances there is great overcapitalization, and that the general public is frequently misled by the large amounts of preferred and common stock issued by corporations. The rights of the public are not involved in this litigation." . . . "The stockholders of the constituent companies and the individual defendants were the organizers of the corporation and became its first stockholders; they dealt wholly between themselves as sellers and buyers, organizers and corporation; no other persons had any interest in this initial transaction; if fraud had been practiced by any one of the organizers upon those associated with him, the cause of action would have vested in the party injured." Blum *v.* Whitney, 185 N. Y. 232 (1906).

Where a suit by the stockholder in behalf of the corporation is to hold a director liable for stock and bonds issued illegally under a contract, and is also to hold a director liable for bonds which had been pledged by the company to secure a debt, which pledge and bonds the director had acquired, the suit is multifarious, even though one claim is not good. O'Connor *v.* Virginia, etc. Co., 184 N. Y. 46 (1906).

Even though two of the directors sell to the corporation certain patents for $3,000,000 full paid stock, being the entire capital stock, and give to the corporation $750,000 of the same as treasury stock, and even though the patents are worth but $10,000, neither the corporation nor a purchaser of treasury stock at fifty cents on the dollar can compel them to return the stock nor hold them liable thereon, but the remedy, if any, is to rescind the transaction and return the patents and demand a return of the stock or the value of such part of the stock as they have sold. Such is the rule, even though the statutes of the state prohibit the issue of stock at less than par. The court said (p. 477): "Whether they knew that the value of the patents did or did not exceed $10,000 was entirely immaterial. They had a right to hold the letters patent until they were offered the price at which they were willing to sell. They sold them to this company for its whole capital stock, agreeing with the com-

the fact that it is easier to sell stock at less than par than at par, and also to the fact that, by a large capitalization, dividends are

pany that that was the value of the patents. I know of no principle which would justify a court of equity in compelling the owners of these patents to accept any consideration for their transfer to the corporation except that agreed on, and, upon the ground that the patents are not worth the sum agreed on as a consideration for the transfer, decree that the vendors must pay back to the company the consideration they had received, less the real value." A purchaser of the treasury stock has of course a remedy at law if there were false representations. Insurance Press *v.* Montauk, etc. Co., 103 N. Y. App. Div. 472 (1905).

Even though a large quantity of stock has been issued for patents and a portion thereof donated back to the corporation for treasury stock, yet a purchaser of such treasury stock cannot maintain a suit in New York to have the entire issue declared illegal and void, where the corporation was organized under the laws of West Virginia and there is no allegation that the transaction was void under the laws of that state. Insurance Press *v.* Montauk, etc. Co., 83 N. Y. App. Div. 259 (1903); aff'd, 178 N. Y. 623.

Stock may be issued for good-will. White, Corbin & Co. *v.* Jones, 79 N. Y. App. Div. 373 (1903).

A contract by directors to form a corporation to purchase patents and pay therefor in stock is not illegal as depriving the directors of the new corporation of their discretionary power, inasmuch as they may refuse to carry out the agreement. Neither will it be assumed that the price placed upon the patent is excessive. Electric, etc. Co. *v.* Smith, 113 N. Y. App. Div. 615 (1906).

A railroad construction contract by which the work is paid for by stock and bonds is not a stock subscription nor a sale of the stock, but is merely a contract, and the receiver of the railroad cannot hold a contractor liable for the alleged value of the stock and bonds, he being estopped the same as the corporation itself, and there being no promise to pay the par value of the stock. Bostwick *v.* Young, 118 N. Y. App. Div. 490 (1907).

Where the incorporators subscribe for the entire capital stock,—$500,000,—and pay it in by checks, and the corporation then buys from one of the directors a steel plant for $500,000 cash, which he had previously purchased for $85,000, and he then distributes the $500,000 cash among the stockholders in the proportion in which they had paid for their stock, they are liable upon the bankruptcy of the corporation, the transaction being an unauthorized disposition of the corporate assets. Rathbone *v.* Ayer, 121 N. Y. App. Div. 355 (1907).

It is legal for a railroad company to issue bonds and stock in payment for the construction of its road. If all the parties assent no one can complain. "As the stock was issued as a part of the consideration for construction, it cannot be said that it was taken without value given." The par value is immaterial. "The fact that they were created for an expenditure less than the par value of the aggregate issues of capital stock and bonds does not affect the question at all." Barr *v.* New York, etc. R. R., 125 N. Y. 263 (1891).

Parties owning real estate may convey it to a corporation formed for that purpose and take bonds in payment, all assenting. "No just criticism is possible either upon the legality or morality of the transaction. Evidence was given to show that the land conveyed was not worth the sum

kept low enough to avoid the cupidity of possible competitors and the interference of legislatures. To such an extent is this practice

secured, but that is a totally immaterial fact. Whatever the price, it wronged no one and could wrong no one." Seymour *v.* Spring Forest Cem. Assoc., 144 N. Y. 333 (1895); s. c., 157 N. Y. 697.

The issue is valid unless the property was fraudulently overvalued. Powers *v.* Knapp, 85 Hun, 38 (1895); aff'd, 158 N. Y. 733 (1899). See also Continental Tel. Co. *v.* Nelson, 49 N. Y. Super. Ct. 197.

In Flynn *v.* Brooklyn City R. R., 9 N. Y. App. Div. 269 (1896); aff'd, 158 N. Y. 493 (1899), where a West Virginia corporation issued its capital stock of $30,000,000 in payment for the shares of stock purchased by it in certain street railway companies in Brooklyn, New York, the court said: "There is doubtless an element of stock-jobbing or stock-watering in the scheme, the issue of $30,000,000 of traction stock at fifteen cents on the dollar, but this is not condemned by the laws of this state as to railroad companies. It is forbidden as to certain corporations, but there is no such general legislation on the subject that we can say it is condemned by the public policy of the state, whatever may be our own notions as to its wisdom and propriety."

A purchaser of stock issued to a contractor for work cannot attack the issue on the ground that it was watered stock, even though the contractors immediately sell a part of the stock and bonds at the rate of ninety cents on the dollar for the bonds with nearly an equal amount of stock thrown in. Drake *v.* New York, etc. Co., 26 N. Y. App. Div. 499 (1898). In the case of Drake *v.* New York, etc. Co., 36 N. Y. App. Div. 275 (1899), where the owner of ten out of two thousand shares of stock attacked a foreclosure decree on the ground of fraud, the court refused to grant relief, the purchaser at the foreclosure sale being willing to pay to such stockholder his proportion of the actual value of the property, irrespective of the price realized at the foreclosure sale. The court said that the expense of further litigation would be many times the actual value of the plaintiff's interest, and that while the plaintiff in a court of law would be entitled to the full measure of his legal rights, yet in a court of equity a different rule prevails and he may be compelled to take his actual interest.

In Einstein *v.* Rochester Gas, etc. Co., 77 Hun, 149 (1894); aff'd, 146 N. Y. 46 (1895), a new company issued five shares of its stock for every share of an old company purchased by the former company.

Where a statute authorizes the consolidation of gas companies, and provides that the stock of the new company shall not exceed the "fair aggregate value" of the property and franchises of the old companies, a stockholder of one of the old companies may enjoin a consolidation if the stock of the consolidated company exceeds the net value of the property and franchises of the old companies in excess of their liabilities. Langan *v.* Francklyn, 20 N. Y. Supp. 404 (1892).

In *Re* East River Bridge Co., 75 Hun, 119 (1894), the court refused to exercise its discretion given by statute as to authorizing an elevated road in the streets, where the charter allowed the company to issue stock at less than par by allowing the issue on such terms and in such manner as the directors deemed proper.

As to the statutory law in New York, see § 47, *infra*.

North Carolina: In North Carolina it has been held that the value of

carried of issuing stock for property at an overvaluation, that the investing public and persons who give credit to corporations rather

the property turned in in payment for the stock may be ascertained by the court, and the stockholders held liable for the par value of the stock less the real value of the property, if such property was fraudulently overvalued. Clayton *v.* Ore Knob Co., 109 N. C. 385 (1891). Where $100,000 of stock of a Delaware corporation is issued for a lumber business and good-will, the actual value of the lumber being less than $1,000 and the good-will being worth little or nothing, the stockholders may be held liable on the stock as not having been paid up and such liability may be enforced in another state. Hobgood *v.* Ehlen, 141 N. C. 344 (1906).

Ohio: Where an insolvent partnership transfers its assets to a newly-created corporation in payment for its shares of stock, and the corporation *assumes all the debts* of the partnership, the payment for the stock is fraudulent *per se*. A corporate creditor may hold the stockholders liable on the subscription as though no payment had been attempted. Sayler *v.* Simpson, 4 Ry. & Corp. L. J. 195, Cin. Sup. Ct., Taft, J. (1888).

It has been held that the person receiving the stock becomes liable for profits made thereby. Four Mile, etc. R. R. *v.* Bailey, 18 Ohio St. 208 (1868). In the case of Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497 (1899), the court in sustaining the validity of a large issue of bonds and stock by a reorganized railroad corporation, the common stock being issued at fifteen and the preferred about thirty, said that the Ohio statute does not forbid the sale or exchange of stock at its market value.

As to the statutory law in Ohio, see § 47, *infra*.

Pennsylvania: Where a person obtains a license to use a patent and pays $100,000 therefor and then causes the corporation organized for that purpose to pay to him $100,000 cash and issue to him $1,400,000 full paid stock for the said license, a receiver of the corporation cannot hold him personally liable on the stock as unpaid stock, under the constitution of Pennsylvania, which prohibits the issue of stock except for property actually received, it being shown that the patents were apparently very valuable at the time, and that if the expectations had been realized the returns would have been enormous, and there being no evidence that the license was overvalued at the time. The value is to be determined as of the time of forming the company, and not after it became insolvent, especially where the fact of the issue was set forth in the application for the charter, and it is no proof of fraud that the person gave away some of the stock for the experience and skill of others. Finletter *v.* Acetylene, etc. Co., 215 Pa. St. 86 (1906).

A subscriber cannot defeat his subscription on the ground that the agent of the company who obtained it told him that he would never be called upon to pay anything. Marles, etc. Co. *v.* Stulb, 215 Pa. St. 91 (1906).

Where brokers and promoters issue bonds greatly in excess of the value of the corporate property and by fictitious sales give a high market quotation of the bonds and borrow money thereon, the lender may hold them liable in a suit for loss due to a conspiracy. McElroy *v.* Harnack, 213 Pa. St. 444 (1906).

In the case Danville, etc. R. R. *v.* Kase, 39 Atl. Rep. 301 (Pa. 1898), where stock and bonds had been issued by the corporation for land,

expect it, and they no longer rely upon the nominal capitalization

but the stock had no market value, and an effort was made to hold the vendor of the land liable for the par value of the stock and the actual value of the bonds less the actual value of the land, the court refused, and said: "We do not concur with the master in his conclusion that Kase should refund to the company a large sum of money in excess of the profit because of the stock received by him in the transaction. He finds as a fact that the stock was then, and is now, worthless. A court of equity does not perform the duties of a court of quarter sessions; does not order restitution of that which is valuable, and also imposes a heavy fine on the guilty. The company has the land, Kase has a profit of $111,000 bonds, and no profit in the worthless stock. He should account for the bonds alone." In this case the court held that at common law, even though a railroad corporation issues to its president nearly $1,400,000 of mortgage bonds and $700,000 of stock for construction work which cost only about $700,000, nevertheless the purchasers of such stock and bonds cannot cause suit to be brought by the corporation after the foreclosure of its property and hold him liable. The court held that inasmuch as the stock had no market value no harm was done. The court said: "Nor is it true that those who took the stock and bonds, and paid money for them, were cheated by Kase, in any real sense of the word. Is any man of ordinary judgment cheated when he pays seventy-five or eighty cents on the dollar for a seven or eight per cent. railroad bond, receiving with the bond a gift of the stock, in many cases almost equaling the face value of the bond? Such a purchaser knew, just as Kase knew, that the value of the paper was speculative. If Kase lived, if he expended the money in construction, if he completed the road, if the event then proved it to be a meretorious enterprise (that is, if it received and developed traffic sufficient to pay operating expenses, fixed charges, and reasonable dividends), the speculative buyer would probably more than double his money. If any one of the contingencies did not happen, the buyer lost; but he was not cheated, except in the sense that all who bet on the happening of an uncertain event, and lose, are cheated." In Carr *v.* Le Fevre, 27 Pa. St. 413 (1856), the court said that if the directors "took lands at a prospective value, never realized, it is nothing more than many individuals and corporations have done before. Such an error in management or in their judgment of the value of a purchase, made without fraud, forms no ground for rescinding the contract."

As to the statutory law in Pennsylvania, see § 47, *infra*.

Rhode Island: Where stock is subscribed for, although thereafter it is agreed that the subscription shall be paid by the transfer of property, yet, if no actual transfer is made, a subscriber may be liable, even though he understood that the property had been actually transferred. Crowley *v.* Walton, 23 R. I. 331 (1901).

Tennessee: In a suit by the receiver of an insolvent street railway company to hold a construction company liable on stock which, together with bonds, was issued for the construction of a street railway, the claim being that there was no consideration received for the stock, the bill in equity must allege that the construction company had power to acquire such stock. If such stock was issued and received as full-paid stock the construction company is not liable thereon, even though $63,750 of stock and $95,000 in notes secured by

of the company. Experience has taught them that they must in-

bonds were issued for construction work costing but $95,000, there being no proof that the stock ever had any value. Doak *v.* Stahlman, 58 S. W. Rep. 741 (Tenn. 1899).

Wisconsin: A corporation in order to retain the services of employees to be rendered thereafter may issue stock at eighty-five cents in cash, the remaining fifteen cents to be paid for cash services. Potter *v.* Necedah, etc. Co., 105 Wis. 25 (1899).

England: Even though by arrangement between promoters and the owner of a business, the business is sold to a corporation for £22,000 in full paid shares of stock and £3,000 cash, the latter to go to the vendor, and all the stock to go to the promoters, and thereafter the company is wound up and its assets sold for £480, yet the promoters are not liable to creditors, inasmuch as all the stockholders knew of the transaction and no stock was sold or intended to be sold to outsiders, and the creditors might have ascertained the facts from the public registry if they desired, and even though the promoters became directors. The court said: "It cannot be suggested that mere inadequacy or price was sufficient of itself to invalidate the contract. You must show that, these shares not having been paid for at all, the contract for purchase was a colourable transaction, and that in truth and in fact, *qua* value, these shares were not part of the consideration, but were a gift. . . . I see nothing in these affidavits or in anything else in the case to lead me to say that this transaction was not a real transaction, but a colourable transaction hiding the real transaction behind it." *Re* Innes & Co. Ltd., [1903] 2 Ch. 254, rev'g [1903] 1 Ch. 674. In *Re* Wragg, [1897] 1 Ch. 796, Mr. Justice Lindley reviewed carefully the English authorities and held that although property of the value of $75,000, as all parties knew at the time, was sold to a corporation for $100,000 of stock issued as full paid, yet that the transaction was legal, there being no actual value on the stock and there being no actual fraud. The court held that a corporation could buy property and pay for services at any price it thought proper, and pay for them in fully paid-up shares, and provided that it did so honestly and not colorably, and provided that it had not been so imposed upon as to be entitled to be relieved from its bargain, agreements to pay for property or services in paid-up shares were valid and binding on the company and its creditors. To the same effect, Larocque *v.* Beauchemin, [1897] A. C. 358, where property worth $10,000 was sold to a company and credit given on subscriptions to the amount of $35,000. The statute in this case required payment in cash. Subscriptions were made and payment was then made in property.

In Anderson's Case, L. R. 7 Ch. D. 75 (1877), stock was issued to a promoter for property taken at an overvaluation. This action was to render him liable for the par value of the stock, less the real value of the property. The court said, pp. 94, 95, 104: "I am not going to alter men's contracts unless the provisions of an act of parliament compel me to do so. . . . . You cannot alter the contract to such an extent as to say, Though you have bargained for paid-up shares, we will change that into a bargain to take shares not paid up, and put you on the list of contributories on that ground. . . . If you set aside this allotment of shares, you must set it aside altogether, and then you cannot make the holder of them a contributory; and if you do

vestigate the real financial condition of the company, and invest or

not set it aside altogether you must adopt it, and the utmost you can do is, as I said before, that you can take away any profit from the person who has improperly made it." In Currie's Case, 3 De G., J. & S. 367 (1863), the court said that the transaction "was either valid or invalid. If valid, it is clear that neither he [the person receiving the stock] nor his alienees can be called upon to contribute in respect of these shares. If invalid, I cannot see my way to hold that either a court of law or a court of equity could do more than treat the purchase as void, and undo the transaction altogether. It could not, as I apprehend, be competent either to a court of law or to a court of equity to alter the terms of the purchase, and treat as shares not paid-up shares which were given as paid-up shares in part consideration of the purchase. Fraud—assuming there was fraud—would of course warrant the court in treating the purchase as void, or in undoing it; but it could not, as I conceive, authorize any court to substitute other terms." See also Barnett's Case, L. R. 18 Eq. 507 (1874), where the issue had been canceled by the corporation. See also Schroder's Case, L. R. 11 Eq. Cas. 131 (1870); Mege's Case, 10 W. N. (Eng.) 208 (1875); Wood's Claim, 30 L. J. Ch. 373 (1861).

In the important case, *Re* Theatrical Trust, [1895] 1 Ch. 771, a party sold to a corporation for $20,000 in stock the benefit of certain copyrights and all his contracts in respect to theatrical agencies and other business connected therewith, and he agreed also to pay the expense of incorporation, and to serve as managing director for five years at a salary to be agreed upon. He had agreed to give his lawyer $2,000 of the stock. He and his lawyer and two others were the directors who passed on the contract. The stock was issued to the lawyer directly from the company. The selling party did not turn over the copyrights and contracts as agreed. The company thereupon rescinded the agreement and canceled his stock, but did not cancel the lawyer's stock. The court held that there was no liability on any of the stock, not even for the benefit of creditors.

Where a company issues fully paid-up stock to parties in payment for services rendered to the company in its formation and in establishing its business, such a payment is a mere pretense and such persons are liable on such stock as unpaid stock, if the company becomes insolvent. *Re* Eddystone M. Ins. Co., [1893] 3 Ch. 9.

Where a manufacturer, engaged in business which he had carried on for thirty years, desires to turn it into a company so that his estate may be handled more readily, and consequently he incorporates a company for the purchase of the plant and business for £50,000, including £15,000 for the good-will, and he himself is the sole director and is practically the only stockholder, the transaction is legal. It is also legal for him to sell his stock, and he cannot be held liable to the company for turning the property in at an overvaluation. Felix, etc. Ltd. *v.* Hadley, 77 L. T. Rep. 131 (1897).

Canada: Where property received in payment for stock has been sold, the persons receiving the stock cannot be held liable on the ground that the value of the property was not equal to the par value of the stock. *Re* Wakefield Mica Co., 7 Ont. W. R. (Can.) 108 (1906).

Even though a written subscription for stock is made, yet if it was understood that the stock was to be paid for by taking over certain property, and that understanding is carried out and there are no stockholders

give credit upon that alone.[1] Even the fact that a person to whom the stock is issued returns a part of it as a gift to the corporation or to trustees for the corporation to sell the same below par and put the proceeds in the corporate treasury for a working capital does not necessarily prove fraud in the value put upon the property. The person receiving the stock may have been willing to sacrifice a part of his stock and property in order to make the rest more valuable. Such stock is called "treasury stock" and the transaction has frequently been upheld by the courts.[2] As has been well said by a New

but those who knew of the arrangement, the liquidator on winding up cannot hold the subscribers and it is immaterial that the par value of the stock was much greater than the actual value of the property. Hood *v.* Eden, 36 Can. S. C. Rep. 476 (1905).

In *Re* Hess Mfg. Co., 23 S. C. Rep. (Can.) 644, 654 (1894), the court said that there was no liability on stock which had been issued for property "unless a case of fraud was made and proved, which could only be done in a formal action to rescind."

Even though the property is valued higher than what the vendor paid for it, yet he is not liable on stock turned out for it under the English common law as it existed prior to the Companies Act—30 & 31 Vict., ch. 131. Jones *v.* Miller, 24 Ont. Rep. (Can.) 263 (1893).

[1] Quoted and approved in Merchants, etc. Bank *v.* Belington, etc. Co., 51 W. Va. 60 (1902).

[2] In many cases stock is issued to a patentee for his patent, and he then donates and turns back to the corporation a part of this stock to be sold at a reduced price for the benefit of the corporate treasury. This transaction is legal; and it is not at all necessary that the stock so donated be placed in the names of trustees for the benefit of the corporation. It may be transferred to the corporation direct. Lake Superior Iron Co. *v.* Drexel, 90 N. Y. 87 (1882); Williams *v.* Taylor, 120 N. Y. 244 (1890); American Tube, etc. Co. *v.* Hays, 165 Pa. St. 489 (1895). See also Otter *v.* Brevoort Petroleum Co., 50 Barb. 247 (1867); People *v.* Albany, etc. R. R., 55 Barb. 344, 371 (1869); aff'd, 57 N. Y. 161; and § 313, *infra*. 125 N. Y. App. Div. 399.

In the case Insurance Press *v.* Montauk, etc. Co., 103 N. Y. App. Div. 472 (1905), the court said, in regard to treasury stock (p. 476): "The individual defendants then transferred back to the company a certain amount of stock which was to become the property of the company and to be disposed of by it for its own benefit. Such a condition is not unusual in companies of this character. In order to make its stock of any value, it was essential that the company should have a working capital in addition to the patents, and the persons who had exchanged their patents for the stock of the company were willing to give to the company a portion of the stock so that the working capital could be secured and thus give value to the remainder of the stock." In the above case the treasury stock was sold at fifty cents on the dollar.

Even though the holders of a majority of the stock are opposed to the board of directors, yet the former cannot obtain an injunction against the board of directors selling treasury stock. Gillette *v.* Noyes, 92 N. Y. App. Div. 313 (1904).

Stock purchased by the corporation itself and then re-issued is entitled to all dividends subsequently declared, and this result cannot be avoided by the dividend being declared as pay-

Jersey court, "The old theories in regard to the status of the capital stock of a corporation have been very greatly modified of late years, and corporations engage in all sorts of business now, practically

able to stockholders at a preceding date. Hartley *v.* Pioneer Iron Works, 181 N. Y. 73 (1905).

Where a foreign corporation has issued $2,000,000 capital stock for property, and one-half has been returned to the treasury as treasury stock, and the actual capital employed in New York is but $240,000, the New York tax is on the latter amount, even though the entire actual property of the company is within the state of New York. People *v.* Kelsey, 105 N. Y. App. Div. 175 (1905); aff'd, 182 N. Y. 526.

The issue of stock and bonds for property is not necessarily fraudulent, even though $2,000,000 of the $5,000,000 of stock is turned back into the treasury to be sold for the benefit of the corporation. Manhattan Trust Co. *v.* Seattle, etc. Co., 19 Wash. 493 (1898). A person purchasing treasury stock may have the purchase rescinded for fraudulent representations. The fact that he dealt in other shares of the same stock is no defense. Mulholland *v.* Washington, etc. Co., 35 Wash. 315 (1904). A person who purchases stock for cash from the corporation at twenty-five cents on the dollar cannot claim that he supposed it was full paid stock where he was fully informed as to the financial affairs of the company, even though the stock was first subscribed for by promoters and then a portion of it donated to the company as treasury stock. Campbell *v.* McPhee, 36 Wash. 593 (1905). Even though stock is issued for a nominal consideration, yet if it is donated back to the corporation and sold, the corporation cannot set up that its acts were *ultra vires*, and it may be held liable for fraud in misrepresenting the stock to the purchaser. Krisch *v.* Interstate, etc. Co., 39 Wash. 381 (1905). A corporation itself cannot claim that a sale of stock was for its benefit, even though the vendor fraudulently misrepresented to the vendee that he was selling treasury stock belonging to and for the corporation. Chilkat, etc. Co. *v.* Fos, 42 Wash. 201 (1906). The remedy of a corporation against a person who has received stock from a third person under an agreement to sell treasury stock is not a forfeiture of the stock so given. Falk *v.* Schmitz, etc. Co., 87 Pac. Rep. 927 (Wash. 1906). Where the stockholders transfer a portion of their stock to one of their number to be disposed of by him for the interests of the company and to raise money to carry on business, he may use a portion of the same to reimburse one of the stockholders for stock which the latter used in the interest of the company. Playa, etc. Co. *v.* Gage, 60 N. Y. App. Div. 1 (1901); aff'd, 172 N. Y. 630.

The person to whom stock has been issued in payment for property may donate a part of it as a bonus to go with bonds sold at par directly from the corporation to the person taking the bonus. The value of the property in this case was not proved. Davis *v.* Montgomery, etc. Co., 101 Ala. 127 (1890). Even though persons who have bought land for $100,000 organize a company and turn in the land for $1,250,000 of stock and donate $250,000 of the same to the company as treasury stock, yet a corporate creditor who knew the facts when his debt was incurred cannot hold them liable on the stock. Lea *v.* Iron, etc. Co., 42 S. Rep. 415 (Ala. 1906).

Mandamus will not issue to compel a corporation to issue to a purchaser treasury stock which he has purchased, even though he has paid for

without restraint, and without limit upon the amount of money which they get together. The old idea that credit was given upon

the same, unless the stock has some peculiar and special value different from other similar stock in that company, or unless the control of the corporation is at issue. The legal right to the stock must also be clear. State *v.* Jumbo, etc. Min. Co., 94 Pac. Rep. 74 (Neb. 1908). In the case of Van Gestel *v.* Van Gestel Electric Street Car Co. (N. Y. L. J., July 3, 1890), the court enjoined a company from disposing of such stock contrary to the contract. In Hey *v.* Dolphin, 92 Hun, 230 (1895), patentees to whom stock was issued contributed a part of it to be sold on the market, and the proceeds given to the corporation. In Kelley *v.* Fletcher, 94 Tenn. 1 (1894), part of the stock which was issued for property was turned back as a gift to the corporation and then sold at less than par.

A corporation may pledge treasury stock to a director. Where treasury stock, instead of being given to the corporation, is placed in the hands of trustees under a trust agreement, such agreement may be modified by a new agreement and the stock turned over to the corporation. Kinsman *v.* Fisk, 83 Hun, 494 (1895).

A sale of treasury stock to the president in payment of a debt may be set aside by the corporation. Camden Land Co. *v.* Lewis, 101 Me. 78 (1905).

A corporation is bound by a contract made in its behalf by its secretary for the sale of its treasury stock, where the directors knew that he was acting as agent and had formerly approved a previous sale of stock by him. Bauersmith *v.* Extreme, etc. Co., 146 Fed. Rep. 95 (1906).

A subscriber to stock of the company cannot defeat the subscription on the ground that the person to whom other stock had been issued for patents gave him three shares of such stock for each share that he subscribed for to the company. Marles, etc. Co. *v.* Stulb, 215 Pa. St. 91 (1906).

Where promoters sell a mining prospect to a corporation for its entire capital stock and donate a part to the treasury to be sold as treasury stock, and the property turns out to be worthless, a purchaser of the treasury stock may rescind and recover back his money, although he did not bring suit for fully two years, but it appeared that he had not known of the fraud, and his suit will lie even though the company is insolvent, it appearing that no active insolvency has occurred. Hinkley *v.* Sac Oil, etc. Co., 107 N. W. Rep. 629 (Iowa 1906).

A tax on stock "issued and outstanding" applies to treasury stock. Knickerbocker, etc. Co. *v.* State Board, etc., 65 Atl. Rep. 913 (N. J. 1907). The Court in the preceding case intimated that the treasury stock was illegally acquired by the corporation as a gift because it was originally illegally issued, there being no proof that it was issued for full value, but the reasoning of the opinion in that respect can hardly be commended.

If a company has accepted a gift of stock the gift cannot be withdrawn. Wheeler *v.* Mineral, etc. Co., 31 Colo. 110 (1903).

Treasury stock in a limited partnership held in the name of a trustee for the purposes thereof is legal. Stradley *v.* Cargill, etc. Co., 135 Mich. 367 (1904). See 116 N. W. Rep. 410.

Where promoters agree that treasury stock shall be sold for the benefit of the corporation before they sell their own stock, such agreement may be enforced by an injunction at the instance of one of them. Brown *v.* Bracking, 11 Idaho, 678 (1906).

A corporation is not liable for a

the basis of the capital stock of the corporation is largely discarded, and the fact is very generally recognized that credit is given on the

commission on a sale of stock where the stock had already been issued for property and the sale was made for the person to whom the stock was issued and there was no proof that the stock had been returned to the treasury. Demarest *v.* Spiral, etc. Co., 71 N. J. L. 14 (1904).

Where a corporation purchases its own stock such stock cannot be taxed. City of Worcester *v.* Board of Appeal, 184 Mass. 460 (1904).

A street railway company which has purchased shares of its own stock is liable for the price, even though the stock turns out to be worthless. Stock so purchased by the company may be reissued and does not amount to a reduction of the capital stock. A statute prohibiting street railways from owning stock relates to stock in other companies. Leonard *v.* Draper, 187 Mass. 536 (1905).

A receiver will be appointed and other relief granted, in a suit by a stockholder in a mining company alleging that the directors had practically abandoned the property and refused to sell treasury stock, although it could be sold, and had removed the books from the state, and had refused all information and were destroying the value of the stock. Such a suit is not multifarious. Glover *v.* Manila, etc. Co., 19 S. Dak. 559 (1905).

In the case Heartt *v.* Sherman, 82 N. E. Rep. 417 (Ill. 1907), $2,000,000 of stock was issued for a mine, and one-half was donated back to the treasury as treasury stock.

A corporation cannot prove the sale of its treasury stock by entries in its own books. Jacobs *v.* Morgenthaler, 112 N. W. Rep. 492 (Mich. 1907).

Even though the president buys treasury stock from the company at two cents a share and sells it for twenty cents a share, this is not a misappropriation of its funds rendering the directors liable under the California statute. Hercules, etc. Co. *v.* Hocknell, 91 Pac. Rep. 341 (Cal. 1907).

The price at which treasury stock is to be sold may be reduced. Gumaer *v.* Cripple Creek, etc. Co., 90 Pac. Rep. 81 (Col. 1907).

A corporation may hold a promoter liable for not selling its treasury stock in accordance with a contract made by the promoters. Cummings *v.* Brown, 122 N. Y. App. Div. 505 (1907).

An agreement between the corporation and some of its stockholders, by which the latter contribute a part of their stock as treasury stock, on condition that they shall continue to be directors and officers for a certain time is illegal under a statute requiring such officers to be elected annually by the stockholders, and hence even if the corporation accepts the stock and sells it and does not retain such persons in their offices, they cannot hold it liable in damages, nor in claim and delivery, nor for conversion, nor on contract. Glass *v.* Basin, etc. Co., 31 Mont. 21 (1904).

Even though there is treasury stock, the directors may assess stock if the charter authorizes assessments. Nelson *v.* Keith, etc. Co., 91 Pac. Rep. 30 (Utah 1907).

It is legal for persons to whom stock is issued for property to donate a part of it to the treasury. John, etc. Land Co. *v.* Cooke, 103 Ky. 96 (1898). A judgment creditor of a corporation may cause its treasury stock to be sold on execution. Coit *v.* Freed, 15 Utah, 426 (1897).

Where five persons subscribe for $50,000 of stock, and then become directors and turn in property in payment for such subscriptions, the

basis of the difference between the assets and liabilities of the corporation."[1] In a blue book published by the English Government

transaction is legal, they being the only stockholders; and even though they donate the stock to the treasury and cause it to be sold at less than par, the purchasers are not liable on the stock. Kellerman *v.* Maier, 116 Cal. 416 (1897).

In Louisiana the purchase by a corporation of its own stock cancels the stock until re-issued. If, however, in the re-issue the corporation gives away the stock, the parties receiving it are liable to subsequent corporate creditors. No formal contract of subscription is necessary, but the mere taking of the stock is sufficient to render them liable. Belknap *v.* Adams, 49 La. Ann. 1350 (1897).

Where the owner of oil lands agrees to convey them to a corporation for stock, and to give one-half of the stock to another party, who pays the vendor $5,000 and pays to the corporation $25,000, the $25,000 is not to be credited as a payment by the vendor on his stock. Hardee *v.* Sunset Oil Co., 56 Fed. Rep. 51 (1893).

A corporation cannot hold the directors liable on stock which the corporation issued to them for services, at five cents on the dollar, in lieu of salary, where all the stockholders assented thereto, such stock so issued to them being treasury stock; that is, stock which was issued for property as full paid and then donated to the corporate treasury. The evidence showed that the stock represented a patent right and was purely speculative, and had no market value. Divine *v.* Universal, etc. Co., 38 S. W. Rep. 93 (Tenn. 1896).

Even though directors sell property to the corporation in exchange for treasury stock which is issued to them at twelve and a half cents on a dollar, yet if they offer to allow all the stockholders to purchase their proportion of the stock at that price, and they all take the stock excepting one director, the latter cannot object to the transaction where he had himself moved that the stock be so issued. Mackey *v.* Burns, 16 Colo. App. 6 (1901).

Where a corporation having treasury stock in its treasury sells all its assets to another corporation, excepting its patent rights, such sale is not a sale of the treasury stock within the meaning of a prior stock pooling contract of the old corporation that certain other stock should be sold before such treasury stock was sold. Myers *v.* Buell, 67 N. Y. App. Div. 290 (1901).

A sale by a corporation of all its property does not entitle the vendee to stock in the corporation which the corporation itself has purchased on a sale for a delinquent assessment and not re-issued. Tulare, etc. Dist. *v.* Kaweah, etc. Co., 44 Pac. Rep. 662 (Cal. 1896).

Treasury stock which has been once issued and then donated to the corporation to be sold for the benefit of the corporation must be sold at not less than par, under the New Hampshire statute. Kimball *v.* New England, etc. Co., 69 N. H. 485 (1899).

An agreement between two promoters that certain stock should be assigned to them jointly for the general promotion of the interests of the company, and if not disposed of within three months to be divided between them in a certain way, does not establish a trust in favor of the corporation and does not make the stock treasury stock for the benefit of the corporation. Brennan *v.* Vogler, 174 Mass. 272 (1899).

Where a subscription is not paid,

[1] Rubino *v.* Pressed, etc. Co., 54 Atl. Rep. 1050 (N. J. 1903).

in June, 1907, the Comptroller of the Company's Department made the following statement in regard to the Acts of Parliament on the subject of corporations:

"The trend of recent legislation in this country has been to endeavour to afford information concerning joint stock companies to all who may seek for it, on the ground that publicity is the best protection which can be devised for the benefit of creditors and of investors, and that, moreover, it is fair to demand publicity of companies and to compel disclosure of material facts by them in return for the privilege of limited liability. With regard to the protection of creditors and investors it has been truly said that legislation cannot protect people from the consequences of their own imprudence, recklessness, or want of experience. Nor can the Legislature supply them with prudence, judgment, or business habits. It can, however, make it possible for the creditor or investor to obtain the information necessary to enable him to form a judgment." Shares which have been forfeited after being partly paid for may be re-issued at a price equal to the unpaid subscription price or any sum in excess thereof.[1] The question of liability on stock, which has been issued for contract work, which is never completed, is considered elsewhere.[2]

and the stock is transferred to the corporation as "treasury stock" and then sold below par, the purchaser is liable for the unpaid par value. Alling *v.* Wenzel, 133 Ill. 264 (1890).

It is not necessary that treasury stock be placed in the names of trustees for the benefit of the company. See §§ 309-313, *infra*.

In Stribbling *v.* Bank of the Valley, 5 Rand. (Va.) 132 (1827), where the bank took a note for its own stock at a price in excess of the market value of the stock, the court held the note to be usurious. Treasury stock when sold need not be offered proportionately to the stockholders. Crosby *v.* Stratton, 17 Colo. App. 212 (1902). In England a company cannot legally accept a surrender of stock. Bellerby *v.* Rowland, etc. Co., [1902] 2 Ch. 14. See also § 309, *infra*.

1 Morrison *v.* Trustees, etc., 79 L. T. Rep. 605 (1898); Ramwell's Case, 50 L. J. (Ch.) 827 (1881), where the stock had been forfeited. Execution against a corporation cannot be levied on stock owned by the corporation itself, such stock having been purchased by it under statutory authority at a forfeiture sale for non-payment of calls. Robinson *v.* Spaulding, etc. Co., 72 Cal. 32 (1887). Where stock is forfeited and sold at a price which does not give the company the full par value of the subscription price of the stock, the purchaser is liable for the unpaid part. Randt, etc. Co. *v.* New Balkis, etc. Lim., 85 L. T. Rep. 780 (1902); aff'd, [1903] 1 K. B. 461; aff'd, *sub nom.* New Balkis Eersteling *v.* Randt, etc. Co. Ltd., [1904] A. C. 165.

2 See § 766c, *infra*. In the case of Fouche *v.* Merchants', etc. Bank, 110 Ga. 827 (1900), where $50,000 of stock was issued in payment for certain bonds and property, and the bonds were never delivered, and the property that was delivered was worth only $2,500, the court held the stock

Corporate creditors who become such before an issue of stock is made for property at an overvaluation cannot hold the stockholders liable in regard to such issue, inasmuch as those creditors did not rely on that part of the capital stock being paid in.[1] In no case can a corporate creditor complain where, at the time when he contracted with the company, he knew that the stock had been issued for property taken at an overvaluation.[2] In Illinois a contrary

was not full paid, even though the certificate recited that it was full paid and non-assessable, and the court held that the stockholders and transferees with notice were liable on such stock.

1 Handley *v.* Stutz, 139 U. S. 417 (1891); Coit *v.* North Carolina Gold Amal. Co., 14 Fed. Rep. 12 (1882); Coit *v.* Gold Amal. Co., 119 U. S. 343 (1886). *Contra*, Sprague *v.* National Bank, 172 Ill. 149 (1898). "A subsequent creditor of the corporation has no right to complain of a fraud upon his debtor which the debtor has waived or refuses to litigate," and hence creditors of an insolvent railroad corporation cannot attack the validity of an alleged issue of stock and bonds for less than their par value in payment for construction work. Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497 (1899). As to subsequent creditors, see § 848*k*, *infra*. The liability of stockholders cannot be enforced for the benefit of creditors who dealt with the corporation knowing that the stock had been issued for property taken at an overvaluation. Adamant Mfg. Co. *v.* Wallace, 16 Wash. 614 (1897). See also § 42, *supra*.

2 Bank of Fort Madison *v.* Alden, 129 U. S. 372 (1889). An embarrassed corporation may sell its stock at sixty cents on the dollar and a *bona fide* purchaser is not liable for the difference, even though the statute of West Virginia where the issue was made stated that a sale of stock at less than par should be only after a publication of a notice, and no such publication was made, such publication, however, being merely directory. The court said it was immaterial whether the corporate creditors who brought the suit were such before or after the issue because "if before, no reliance could have been placed on the stock as full paid, and if after, they cannot complain, as the transaction was open to them." McDowell *v.* Lindsay, 213 Pa. St. 591 (1906). Creditors who know the basis on which stock has been issued for property cannot thereafter complain. Easton Nat. Bank *v.* American, etc. Co., 69 N. J. Eq. 326 (1905). Even though persons who have bought land for $100,000 organize a company and turn in the land for $1,250,000 of stock and donate $250,000 of the same to the company as treasury stock, yet a corporate creditor who knew the facts when his debt was incurred cannot hold them liable on the stock. Lea *v.* Iron, etc. Co., 42 S. Rep. 415 (Ala. 1906); also 69 Atl. Rep. 788.

Even though $2,000,000 of stock was issued as full paid to thirteen persons for $28,600 cash, yet if it was agreed between them and the corporation that no more should be paid, a corporate creditor who contracted his debt with knowledge of this fact, cannot enforce any further liability. Miller *v.* Higginbotham's Adm'r, 93 S. W. Rep. 655 (Ky. 1906).

Even though a bonus of stock is given by the corporation upon the sale of bonds, yet creditors cannot complain thereof unless they were deceived thereby. Great Western, etc. Co. *v.* Harris, 128 Fed. Rep. 321 (1903) (aff'd, 198 U. S. 561), the court saying (p. 329): "This right is one

rule prevails.[1] It has even been held that where a creditor did not investigate the financial condition of the company and did not rely

existing not in favor of all creditors of a corporation, but in favor of a particular class of creditors only, namely, those creditors who were defrauded by said transaction." Even though a stockholder in a National Bank has sold and transferred his stock to avoid liability and the transferees are irresponsible he is not liable to creditors who became such after the date of the transfer. McDonald *v.* Dewey, 202 U. S. 510 (1906). In New Jersey corporate creditors will be presumed to have known of a statement filed with the Secretary of State that the capital stock had all been paid in, and are presumed to have acted upon information that the capital stock has been fully paid in. See *v.* Heppenheimer, 69 N. J. Eq. 36 (1905). Even though a stockholder may be liable to corporate creditors for the difference between the par value of his stock and the actual value of property transferred in payment for such stock, yet if the debt was incurred with knowledge by a creditor that the stock was so issued, he cannot hold the stockholder liable. State, etc. Co. *v.* Turner, 111 Iowa, 664 (1900). A stockholder paying his stock subscription in property at an agreed value is not liable in equity to a creditor of the corporation, who had knowledge of and assented to the transaction at the time when it took place, upon the ground that the real value turned out to be less than was agreed upon. Rickerson, etc. Co. *v.* Farrell, etc. Co., 75 Fed. Rep. 554 (1896). A creditor who knows that stock has been paid for by property taken at an overvaluation cannot afterwards complain, and if the same person is president of both the creditor and the debtor, his knowledge is notice to the creditor. Berry *v.* Rood, 168 Mo. 316 (1902).

A corporate creditor who took the note of the corporation in payment of an antecedent debt, and took with full knowledge of the facts as to the issue of the stock for property, cannot complain. A corporate creditor cannot complain as to stock issued subsequently to the debt. First Nat. Bank *v.* Gustin, etc. Co., 42 Minn. 327 (1890). As against creditors the company's agreement that stockholders would not be called upon to pay more than thirty per cent. of their subscription is not valid except as against creditors who had notice thereof. Martin *v.* South, etc. Co., 94 Va. 28 (1896); s. c., 97 Va. 349. See also § 848, *infra*.

An issue of stock for an old franchise and uncompleted road-bed of a railroad is valid although the par value of the stock is much more than the value of the property. All the stockholders having assented thereto, and there being no creditors, the transaction is valid. A holder of bonds issued long subsequently, and who purchased with knowledge of the facts, cannot complain and hold the stockholders liable. Walburn *v.* Chenault, 43 Kan. 352 (1890). See Mathis *v.* Pridham, 1 Tex. Civ. App. 58 (1892).

A stockholder who is also a creditor, and who became such with full knowledge that the stock was paid for by property at an overvaluation,

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[1] In Illinois it is held that it is immaterial whether or not the corporate creditor knew that the stock had been issued for property at an overvaluation when he extended credit. Gillett *v.* Chicago Title & T. Co., 82 N. E. Rep. 891 (Ill. 1907).

on the fact that the stock was fully paid, he cannot enforce a stockholder's liability on watered stock, even though such liability is declared in a statute.[1] A decree is for the benefit of only those stockholders who complain.[2]

There is a limit beyond which the courts will not go in sustaining the issue of stock for property taken at an overvaluation. If the property which is turned in is practically worthless, or is unsubstantial and shadowy in its nature, the courts will hold that there has been no payment at all, and that the stockholders are liable on the stock.[3]

cannot, as a creditor, compel other stockholders to make payments on their stock as being partly unpaid. Whitehill *v.* Jacobs, 75 Wis. 474 (1890). Under the Tennessee statutes, creditors prior to an issue of stock for property at an overvaluation may complain as well as those after. Jones *v.* Whitworth, 94 Tenn. 602 (1895). Under the Illinois statutes it is immaterial whether the creditor knew or did not know of the issue of the watered stock, and immaterial as to when he became a creditor. Sprague *v.* Nat. Bank of America, 172 Ill. 149 (1898).

1 McBride *v.* Farrington, 131 Fed. Rep. 797 (1904).

2 See § § 735 and 848*k*, *infra*.

3 The supreme court of the United States, in Camden *v.* Stuart, 144 U. S. 104 (1892), held liable for unpaid subscriptions the subscribers to $150,000 of stock who had turned in therefor a *contract* for real estate and a health resort which a year prior thereto they had taken. The court did not allow any value for the contract and threw out the good-will, and said (p. 115): "The experience and good-will of the partners, which it is claimed were transferred to the corporation, are of too unsubstantial and shadowy a nature to be capable of pecuniary estimation in this connection. It is not denied that the good-will of a business may be the subject of barter and sale as between the parties to it, but in a case of this kind there is no proper basis for ascertaining its value, and the claim is evidently an afterthought. The same remark may be made with regard to the contract of January 30th, and the loss of time and trouble to which the parties were subjected, which are now claimed to be elements of value in the property contributed to the corporation, but of which no account was made at the time."

In the case of Lloyd *v.* Preston, 146 U. S. 630 (1892), affirming Preston *v.* Cincinnati, etc. Ry., 36 Fed. Rep. 54 (1888), where the owner of a railroad sold it to a newly-organized corporation for stock and bonds, the par value of which was fifty times the real value of the railroad, the court held that the bondholders and other creditors who had obtained judgment against the corporation, the execution being returned unsatisfied, might hold the party receiving the stock liable thereon on the ground that the subscription price of such stock has never been paid. The court (p. 642) said: "The entire organization was grossly fraudulent from first to last, without a single honest incident or redeeming feature. It having been found, on convincing evidence, that the overvaluation of the property transferred to the railway company by Harper, in pretended payment of the subscriptions to the capital stock, was so gross and obvious as, in connection with the other

Moreover it is to be borne in mind that the parties receiving watered stock may be liable as promoters to return profits which they have made. This is particularly the case where the promoters merely owned an option which they have sold to the corporation at an exorbitant price.[1]

facts in the case, to clearly establish a case of fraud, and to entitle *bona fide* creditors to enforce actual payment by the subscribers, it only remains to consider the effect of the defenses set up." Where $500,000 of stock is issued for $2 cash and a formula for cereal breakfast food, and the stock is then sold at less than par to the public, and the company fails, stockholders by statute being liable only to the extent of their unpaid subscriptions, the parties to whom the stock was originally issued may be held liable. Wood *v.* Sloman, 114 N. W. Rep. 317 (Mich. 1907). Stock which is paid for by the worthless assets of an insolvent corporation and a transfer of stock in such corporation, is not full paid and the stockholder may be held liable by corporate creditors. Dieterle *v.* Ann Arbor, etc. Co., 143 Mich. 416 (1906). The bankruptcy court will not compel a creditor to accept in "composition," under the bankrupt act, stock in a corporation, which was issued for good-will of the business of the bankrupt, it appearing that such good-will was worthless. *In re* Woodend, 133 Fed. Rep. 593 (1904). In *Re* Theatrical Trust, etc., [1895] 1 Ch. 771, the court in a *dictum* laid down the rule in regard to payment for stock by property as follows: "The conclusion I come to is this: that if the consideration is illusory, or if it presents an obvious money measure which shows that the shares were issued at a discount, or if the shares are openly issued at a discount, in all these cases" the party receiving the stock is liable. "He may give goods, he may give things that have no physical existence, such as a good-will or a license,—in fact, all sorts of things, in consideration of shares allotted to him, and thus pay for the shares. These two cases decide that an allottee must really pay for the shares. They go further than that, and decide that if the contract makes it manifest on the face of it that an allottee is paying less than the nominal cash value of the shares, he may be liable for the balance beyond what he has paid. I do not think, however, that those cases go beyond that. I do not understand them to decide that the court has any duty or power to take each contract and consider whether the price which is agreed to be given is a fair and reasonable price, or whether the thing which is to be taken in payment instead of cash is in the market of a cash value equal the nominal value of the shares."

Where, upon the increase of the capital stock, $3,000 of stock is issued to a party for a patent-right, and in about six months the patent-right is assigned back to him for $1, he will be held liable for the $3,000 in case the corporation becomes insolvent. Peck *v.* Elliott, 79 Fed. Rep. 10 (1897). Where $2,500 of stock is issued for $5,000 cash and services as an officer and manager, the court will allow the fair value of his services and hold him liable for the difference in aid of corporate creditors. Addison *v.* Pacific, etc. Co., 79 Fed. Rep. 459 (1897).

[1] See § 38, *supra*, and §§ 651 and 48, *infra*.

Promoters who obtain an option and then sell the property to a corporation at a secret profit in payment for stock may be held liable by

The remedy of the corporate creditor is in equity.[1] The right of a receiver to bring suit in a foreign jurisdiction to hold a stock-

the receiver upon the insolvency of the corporation for the difference between what they paid and what they received, without regard to the actual value. Central T. Co. *v.* East Tennessee, etc. Co., 116 Fed. Rep. 743 (1902). Where the promoters paid to a person who is to act as chairman of the directors, and his firm who underwrote 10,000 shares, a commission of 12,000 shares, the court held that 10,000 of the 12,000 was for the use of his name and only 2,000 shares for the commission, and hence he was liable, at the instance of an investor in the stock, to pay to the corporation the difference between the amount paid for the stock and its actual value the day after an allotment, the transaction not being fully disclosed in the prospectus. A clause in the prospectus that there "may" be various trade contracts and business arrangements and underwriters' agreements, followed by the usual waiver as to them, does not apply to such a contract, inasmuch as the word "may" was misleading. Cackett *v.* Keswick, 85 L. T. Rep. 14 (1901); aff'd, [1902] 2 Ch. 456. Where promoters pay out less than $30,000 to secure options on land and then sell the options to a corporation for $700,000 of stock of the latter, the corporation assuming the purchase price of the land, and then issue a prospectus which is misleading and does not state the facts about the issue of stock, and the corporation becomes insolvent, they are liable to the corporation for the fair market value of the stock at the time the stock was issued or as soon thereafter as it had a market value. The liability is not for unpaid stock but for fraud as promoters in making a secret profit in services and not making a full disclosure to the stockholders. The promoters owe a duty to future stockholders. The land need not be tendered back. The promoters are to be credited with their actual disbursements and to be charged with the fair market value of the stock with interest, and also with dividends. The suit should be brought by the corporation itself and not by its receiver, according to the Massachusetts decisions. Hayward *v.* Leeson, 176 Mass. 310 (1900).

1 The corporate creditor's remedy herein is not by an action at law for fraud and deceit. Priest *v.* White, 89 Mo. 609 (1886).

In a suit to enforce the liability of the stockholder on stock issued for property at an overvaluation it is not necessary to make all of the stockholders defendants, but any defendant to the creditor's bill may file a cross-bill and bring in the stockholders who are not parties. Coleman *v.* Howe, 154 Ill. 458 (1895).

A bill to compel an assignee for the benefit of creditors of an insolvent corporation to account; and to hold stockholders liable on stock issued for property; and to reach corporate assets in third parties' hands, is multifarious. O'Bear Jewelry Co. *v.* Volfer, 106 Ala. 205 (1895).

Where the assignee of an insolvent corporation, in attacking the payment for stock by property, sues the stockholders as though no payment at all had been made, he cannot prove overvaluation of property turned in in payment. His pleading is wrong. Smith *v.* Prior, 58 Minn. 247 (1894).

The corporate creditor's bill may be by one, but must be in behalf of all. Cleveland Rolling-Mill Co. *v.* Texas, etc. Ry., 27 Fed. Rep. 250 (1886).

In a creditor's suit to enforce subscriptions for stock it is not sufficient to put in evidence a contract showing that the stock had been issued for

holder liable for stock and bonds illegally issued is limited.[1] Neither is a foreclosure suit the proper place for an adjustment of such claims.[2] An action at law for conspiracy is difficult to maintain.[3] The liability on stock issued for property at an overvaluation commences only upon insolvency of the corporation. Hence the statute of limitations runs from that date,[4] or from the date when judgment is obtained against the corporation.[5] Laches may be a bar to the collection of what is claimed to be due on watered stock.[6]

work and services to be performed. Proof must be given of the performance. Clow *v.* Brown, 134 Ind. 287 (1893) and 150 Ind. 285. See s. c., 31 N. E. Rep. 361 (Ind. 1892).

1 Great Western, etc. Co. v. Harris, 198 U. S. 561 (1905).

2 A promoter's possible liability and the liability of stockholders on unpaid stock will not be adjusted and offset in the distribution among bondholders after foreclosure sale, even though the bondholders were promoters and stockholders. Independent suits must be instituted for that purpose, especially as general creditors are interested. Land, etc. Co. *v.* Tatnall, 132 Fed. Rep. 305 (1904). See also § 848, *infra*.

3 It is difficult for a corporate creditor to seek collection by making out a conspiracy. Brackett *v.* Griswold, 13 N. Y. Supp. 192 (1891).

4 Jones *v.* Whitworth, 94 Tenn. 602 (1895), holding also that the time may be shorter as to deceased stockholders. As to the statute of limitations, see also § 225, *infra*. Where $1,000,000 of stock is issued for patents, which by the papers seem to have been valued at less than half of the stock, the stockholders are liable, under the New Jersey statute, even though seventeen years have elapsed, especially where no formal action seems to have been taken by the directors in purchasing the patents. Easton Nat. Bank *v.* American, etc. Co., 70 N. J. Eq. 722 (1906). See also ch. XLIV, *infra*.

5 The statute of limitations does not begin to run against the liability of a stockholder on stock fraudulently issued for property at an overvaluation until the corporate creditor has reduced his claim to a judgment. Kelly *v.* Clark, 21 Mont. 291 (1898). As affecting corporate creditors herein, the statute of limitations does not commence to run until judgment is recovered by the corporate creditors against the corporation. Christensen *v.* Quintard, 36 Hun, 334 (1885), overruled on another point in s. c., 8 N. Y. Supp. 400. See also § 42, *supra*, and § 195, *infra*. The statute of limitations does not begin to run against an unpaid subscription until judgment and execution are returned unsatisfied, even though the stockholders have turned in property in what they considered full payment for the stock. Montgomery, etc. Works *v.* Roman, 41 S. Rep. 811 (Ala. 1906). See also ch. XLIV, *infra*. As to the statute of limitations in Illinois against liability on stock issued for property at a fraudulent overvaluation, see Parmelee *v.* Price, 208 Ill. 544 (1904).

6 Thus, where stock is issued for services, and its actual value is worth much less than the services, and seven years elapse, a creditor cannot complain, especially when he bought up a claim. Wilson *v.* St. Louis, etc. R. R., 120 Mo. 45 (1894). *Cf.* San Antonio St. Ry. *v.* Adams, 87 Tex. 125 (1894), reversing 25 S. W. Rep. 639.

§ 47. *Liability of such persons under various constitutional provisions in Pennsylvania, Illinois, California, Kentucky, Nebraska, Alabama, Arkansas, Missouri, Texas, Louisiana, Colorado, South Dakota and other states, and under statutory provisions in New York, Maine, Ohio, Wisconsin, Minnesota, Tennessee, Indiana, New Jersey, Washington, Iowa, Massachusetts, Oregon and Utah.*—The preceding section contains the common law on the liability of persons who pay for stock in property taken at an overvaluation. The ease with which watered stock could be legally issued under the common law led to the enactment of statutory and constitutional prohibitions against such issues. It was believed that watered stock did much harm; that it deceived people and induced them to buy the stock or bonds, or to extend credit to the company, on the supposition that the capital stock had really been paid for at actual par value. Hence, when it became clear that the common law did not prevent the issue of watered stock, but compelled the public to rely, not upon statements of the capital stock, but on an investigation of the actual condition of the company, a demand arose for statutes and constitutional provisions to protect the people from watered stock.

This demand gave rise to certain constitutional provisions which have been enacted in several states. These provisions are very similar in their wording, and are substantially as follows: "No corporation shall issue stocks or bonds except for money, labor done or money or property actually received; and all fictitious increase of stock or indebtedness shall be void.[1]

It is now over thirty years since the first of these provisions was enacted, and yet it may be said that these constitutional provisions have decidedly failed to remedy the evil which they were expected to cure. They are so sweeping in their effects, and so disastrous to innocent holders of corporate securities, that the courts are reluctant to declare void the stock and bonds which have passed into *bona fide* hands. The provision is held to be applicable and effective only when the issue is entirely fictitious. It does not interfere with the customary methods of starting the corporate enterprise by the issue of stock and bonds in payment for the construction of the corporate

[1] See the constitutions of Alabama, art. XIV, § 6; Arkansas, art. XII, § 8; California, art. XII, § 11; Colorado, art. XV, § 9; Idaho, art. VIII, § 9; Illinois, art. XII, § 13; Kentucky, § 193; Louisiana, art CCXXXVIII; Mississippi, § 196; Missouri, art. XII, § 8; Montana, art. XV, § 10; Nebraska, art. XI, § 5; North Dakota, § 138; Pennsylvania, art. XVI, § 7; South Dakota, art. XVII, § 8; Texas, art. XII, § 6; Washington, art. XII, § 6.

works, and, except in Alabama and Missouri, it may be said that the courts have construed away the language and purpose of the provision.[1]

1 *Federal courts:* The supreme court of the United States, in Memphis, etc. R. R. *v.* Dow, 120 U. S. 287 (1887), held that this provision did not invalidate a transaction upon the reorganization of a company after a foreclosure of its property, and a purchase of the property by a committee for the bondholders, whereby they took in payment of such property the bonds and stock of the new corporation, even though the stock alone of the new company thus taken was, at its par value, equal to the value of the property involved.

Where all the stock and a large quantity of bonds are issued by a railroad corporation to its contractor in payment for the construction of the road, the contractor is not liable to corporate creditors on the stock, even though the bonds were a sufficient consideration for building the road, unless the corporate creditors prove that the stock at the time of its issue had a real or market value. "If when disposed of by the railroad company it was without value, no wrong was done to creditors." Even the Missouri constitution and statutes do not change this rule. Fogg *v.* Blair, 139 U. S. 118 (1891). Even though a bonus of stock is given by the corporation upon the sale of bonds, yet creditors cannot complain thereof unless they were deceived thereby. Great Western, etc. Co. *v.* Harris, 128 Fed. Rep. 321 (1903) (aff'd 198 U. S. 561), the court saying (p. 329) "this right is one existing not in favor of all creditors of a corporation, but in favor of a particular class of creditors only, namely, those creditors who were defrauded by said transaction." A statutory provision that subscribers to stock not fully paid shall be liable thereon is merely declaratory of the common law. Even under the Illinois decisions, the members of a firm are not liable on stock issued for their property where the valuation was made by their manager and no intent on their part to overvalue the same is proved. Taylor *v.* Cummings, 127 Fed. Rep. 108 (1903). A stockholder cannot after ten years' delay, maintain a suit to cancel stock issued for patents, and to compel the holder of such stock to refund dividends thereon, the transaction having been spread on the records of the company and open to the stockholders. An allegation that the patents were of no value is insufficient, even though the constitution of the state (Missouri) required that stock be issued only for "money paid, labor done, or money or property actually received," there being no allegation that the patents were known to be valueless at the time. Kimbell *v.* Chicago, etc. Co., 119 Fed. Rep. 102 (1902). As against the claim of a creditor of an insolvent corporation in the bankrupt court the trustee may set off a claim that the creditor is a stockholder and that stock was issued to him for property at an unreasonable valuation, the corporation being a Missouri corporation and the Missouri decisions being to that effect. In *Re* Royce, etc. Co., 133 Fed. Rep. 100 (1904) the court said: "In other words, as the declared policy of this state is to require absolute payment by stockholders, so that they shall represent to the creditors an actual asset, and the temptation is great among stockholders to put a fictitious or exaggerated value, like an old and abused stock of goods substituted for a money payment for stock by the incorporators, the courts will scrutinize with care the integrity and fairness of such payments,

The supreme court of Alabama and the supreme court of Missouri take issue with the above statement of law and assert that these

in favor of the creditors of the corporation."

Where for six years an issue of stock for services has appeared fully on the books of the company and has not been objected to, a stockholder cannot have it set aside, even under the constitution of Colorado, especially where all the stockholders at the time of the issue assented thereto and the party receiving the stock used a large portion of it to interest other persons in the company, and even though the stock so issued to him was $125,000, being one-half of the entire stock, and was in consideration of services rendered in obtaining contracts and options, which were turned over to the company. Calivada, etc. Co. *v.* Hays, 119 Fed. Rep. 202 (1902).

Even though the owners of mining claims organize a corporation in New Jersey, and they themselves as directors, together with dummy directors, cause the corporation to purchase the claims for $750,000 par value of stock, although the mining claims were worth but $5,000, and even though thereafter additional capital stock is sold by the corporation to the public for cash at par, yet the corporation cannot rescind the transaction, inasmuch as there were no other stockholders at the time of the transaction, and hence no one was deceived. Old Dominion, etc. Co. *v.* Lewisohn, 136 Fed. Rep. 915 (1905); aff'd 148 Fed. Rep. 1020 and 210 U. S. 206. Under a charter power to receive, in payment for stock, property "for the advancement of the purposes for which" the corporation was organized, a trust company may receive stock in a savings association, and even though by statute the payment of stock by property must first be authorized by the stockholders, yet if the corporation receives the stock and pledges it and receives a dividend thereon and retains it two years until it depreciates in value, it cannot then repudiate the transaction. Southern Trust, etc. Co. *v.* Yeatman, 130 Fed. Rep. 798 (1904); aff'd 134 Fed. Rep. 810. Under the New York statute which requires that stock or bonds shall be issued only for money paid or property, the purchaser of bonds from the corporation cannot make payment in the note of a third person where the note is not good. *In re* Waterloo, etc. Co., 134 Fed. Rep. 341 (1904), rev'g 128 Fed Rep. 517 (1904). Where a creditor did not investigate the financial condition of the company and did not rely on the fact that the stock was fully paid, he cannot enforce a stockholder's liability on watered stock, even though such liability is declared in a statute. McBride *v.* Farrington, 131 Fed. Rep. 797 (1904); aff'd 149 Fed. Rep. 114. The case *In re* Remington, etc. Co., 119 Fed. Rep. 441 (1902), involved a suit brought in the federal court in New York by a creditor of a New Jersey corporation against the stockholders to hold them liable on stock, which was alleged to have been issued for an insufficient consideration in the way of property. Where a promoter purchases all the stock of a corporation for $75,000, and then purchases and transfers to it options on the business and property of other companies at a cost to him of about $17,500, and receives therefor $90,000 of bonds, and $200,000 of stock in the first named company, which then becomes insolvent, the bonds are illegal under the Pennsylvania statute that mortgage bonds shall not exceed one-half the capital stock, the issue of the stock itself being illegal, the court refusing to allow anything

constitutional prohibitions have been effective. In reply to this the author refers to the decisions of the supreme court of the United

for a prospective and problematical removal of competition, the basis of the decision being that the value of the property was so slight compared with the par value of the stock and bonds, that the bonds and stocks were void, under the constitution of Pennsylvania. Creditors may object to such bonds in the hands of original holders, except to the extent that the money was actually advanced thereon, and hence such bonds cannot be turned in in part payment of the purchase price on the foreclosure sale. *In re* Wyoming, etc. Co., 153 Fed. Rep. 787 (1907), aff'd 158 *Id.* 608.

In the case Lake, etc. R. R. *v.* Ziegler, 99 Fed. Rep. 114 (1900), where an Illinois corporation issued $6,500,000 of stock and $5,150,000 in bonds for the construction of an elevated road of about seven miles in length, the cost of which was about $3,500,000, the court held that the constitution of Illinois did not invalidate such issue, and furthermore, that the corporation itself could not hold liable the contractor to whom the issue was made, inasmuch as the stock and bonds if invalid were void. The court said (p. 128): "It must not be forgotten that men will not invest large capital in speculative and hazardous enterprises without being assured that, in case of success, they shall receive a profit coresponding relatively to the risk assumed. Whatever may be the correct solution of the problem, the law does not require payment of subscription of stock to be in cash. It may be paid for in work, labor, material, or service rendered. We sit to declare, not to make, the law, and are unable to condemn the transaction in question as within the ban of the constitutional provision. But if this were otherwise, and the constitutional provision denounces this issue of stock, the act was *ultra vires* the corporation, and the stock was void, not merely voidable. It had no validity in the hands of a *bona fide* purchaser for value, without notice. The complainant has not suffered pecuniary injury by its issue, and cannot call upon Ziegler to account for what he received upon its sale, for that would be to affirm a void transaction; to both reprobate and approbate." The Illinois constitutional provision does not render invalid the issue of $9,000,000 of bonds and $18,000,000 of stock for property purchased at foreclosure sale for $1,500,000, there having been added to the property $6,000,000 worth of improvements. The court pointed out that the issue of the stock did not interfere with creditors collecting their claims, inasmuch as their claims were ahead of the stock, and the bonds by themselves were not in excess of the property itself. Continental T. Co. *v.* Toledo, etc. R. R., 82 Fed. Rep. 642 (1897), affirmed in Toledo, etc. R. R. *v.* Continental T. Co., 95 Fed. Rep. 497 (1899). Even though there is a gross overvaluation of property turned in for stock, yet this merely places the burden of proof upon the stockholders to show that they acted in good faith. Creditors trying to hold them liable must show that they became creditors on the faith that the stock was paid up and that such overvaluation was fraudulent with intent to cheat the creditors. Hence, where a mercantile firm owned property worth $2,700,000 and owed $1,800,000, and sold the property subject to the debt, to a corporation, for $1,500,000 of stock, there was a gross overvaluation, and yet if the parties acted in reliance upon the books of the concern, and the system of book-keeping used did not show the actual condition of the firm, they

States and of the supreme courts of various states set forth in the notes below. The trouble with these constitutional prohibitions is

are not liable, they having acted in good faith. Taylor *v.* Walker, 117 Fed. Rep. 737 (1902); aff'd 127 Fed. Rep. 108.

The California constitutional prohibition against the issue of fictitious bonds or stock does not prevent the company pledging its bonds for a debt less than the par value of such bonds. Atlantic, etc. Co. *v.* Woodbridge, etc. Co., 79 Fed. Rep. 842 (1897).

It is legal for a company to issue $67,000 of bonds and $67,000 of full-paid stock even to one of its directors for $67,000 in cash, if this was all that the whole $134,000 of securities were worth, and if all the directors and stockholders knew of it and agreed to it. The provision in the California constitution relative to watered stock and bonds does not invalidate them. Union L. & T. Co. *v.* Southern California, etc. Co., 51 Fed. Rep. 840 (1892).

Although watered stock and bonds are issued in Pennsylvania, yet a *bona fide* purchaser of the bonds may foreclose the mortgage securing them in order to obtain payment. Woodbury *v.* Allegheny, etc. R. R., 72 Fed. Rep. 371 (1895). See 159 Fed. Rep. 783.

In New Castle, etc. Ry. *v.* Simpson, 21 Fed. Rep. 533 (1884), the court, in passing on the provision in the Pennsylvania constitution, held that a contract giving a construction company $300,000 of stock and $300,000 of bonds for work worth but $180,000 would be set aside, although $40,000 of work had been done; but that the construction company should be paid the $40,000 in cash. See s. c., 23 Fed. Rep. 214 (1885), holding that the contractor may recover back not only this, but also a reasonable compensation and interest.

Where $100,000 of bonds and $125,000 of stock are issued in payment of construction work of the value of $121,000, the bonds are valid and may be enforced by *bona fide* purchasers. Wood *v.* Corry, etc. Co., 44 Fed. Rep. 146 (1890). This last case held also that only the state could object to an issue of "watered" stock and bonds as being in violation of this constitutional provision.

Where stock is issued as full paid for labor done, and the good faith is not questioned and the consideration was performed, the stockholders cannot be held liable on the stock as not being paid up in full. Holly Mfg. Co. *v.* New Chester Water Co., 48 Fed. Rep. 879 (1891). Where bonds have been given to the stockholders for nothing, the issue being in payment for construction work, which, however, at the time of the contract, had already been completed and delivered, the corporation may enjoin the foreclosure of a mortgage securing such bonds, the bonds being still in the stockholders' hands, and may cause the bonds themselves to be canceled under the Colorado constitutional prohibition against such an issue. Gunnison, etc. Co. *v.* Whitaker, 91 Fed. Rep. 191 (1898). Even though the stock of a street railway company is issued for property and franchises at an overvaluation, yet the stockholder is not liable, under the Nebraska constitution rendering subscribers liable to the extent of unpaid subscriptions, inasmuch as there was no subscription in such case, there having never been any promise to pay for the stock, and there being no allegation of fraud to the injury of creditors, and no allegation that the stock ever had any actual value. Seaboard, etc. Bank *v.* Slater, 105 Fed. Rep. 179 (1900). The Nebraska prohibition does not render void an issue of $5,940,000 stock and bonds for a railroad purchased at a foreclosure sale, where the old cor-

that they attempt to cure the evil after the harm has been done, instead of attempting to superintend the issue of stock and bonds

poration had over $5,000,000 stock and bonds outstanding, even though it is claimed that the property did not cost over $2,000,000. The court held that the transaction was valid although "the cash value of the physical property and franchises which were acquired by the reorganized company was not fully equal to the par value of its securities." Sioux City, etc. Ry. *v.* Manhattan T. Co., 92 Fed. Rep. 428 (1899).

In the case of Northwestern, etc. Ins. Co. *v.* Cotton, etc. Co., 46 Fed. Rep. 22 (1891), the court held that where property worth $157,000 is turned in to a corporation for $200,000, payable in $125,000 of stock and $75,000 of bonds, the creditors of the company might hold the parties liable on the stock, as though it were unpaid stock, and the creditor is presumed not to have known of the transaction when he contracted the debt.

The constitutional provision in Alabama forbidding the issue of stock or bonds except for value, and the statutory provision requiring subscriptions to railroad stock to be paid in money, labor or property at their money value, does not prevent one railroad company selling its property to another railroad company for bonds and stock of the latter, and the value placed upon the property may be its net earning power and the cost of rebuilding it. It is immaterial that the original cost was much less. Grant *v.* East, R. R., 54 Fed. Rep. 569 (1893).

In the case of Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892), the court held that the above provision in Alabama against watered stock and bonds did not invalidate bonds, although $10,000 of bonds and $10,000 of stock were issued for every mile of road constructed, even though it cost much less than $20,000 cash per mile.

The Texas prohibition is not applicable to a contract of a land improvement company to issue bonds to aid in building a bridge. Fort Worth City Co. *v.* Smith Bridge Co., 151 U. S. 294 (1894).

Under the Texas statute, providing for bringing in the stockholder and holding him liable on his unpaid subscription in the same action in which the corporation itself is sued, the stockholder will not be held liable although he sold the company $55,000 worth of property for $32,500 in cash and $45,000 in stocks and bonds. Thomson-Houston, etc. Co. *v.* Dallas, etc. Co., 54 Fed. Rep. 1001 (1893).

Under the peculiar wording of the Kentucky constitution, to the effect that property or labor shall not be received in payment of stock or bonds "at a greater value than the market price at the time the said labor was done or property delivered," a contract, by which the assets of one corporation are to be turned over to a new corporation, so that the stockholders of the old corporation shall receive preferred stock in the new corporation dollar for dollar for their old stock, and that then $235,000 of common stock is to be given to brokers who agree to sell $100,000 of bonds at ninety cents on the dollar, is illegal, and an action by the brokers for damages for breach of such contract will not lie. Altenberg *v.* Grant, 85 Fed. Rep. 345 (1898).

Illinois: The supreme court of Illinois settled this question for that state properly when it rendered the decision in Peoria, etc. R. R. *v.* Thompson, 103 Ill. 187 (1882). In this case bonds and cash were given to the contractors in payment for the construction of the road. The transaction was upheld.

before the issue is made. There is but one state in the Union which has succeeded in eliminating most of the evils of stock-watering.

This decision was practically the first important decision in the country on this constitutional provision now so common, and the supreme court of Illinois wisely held that the provision was not intended to interfere with the usual business method of issuing the stock and bonds of corporations. Even though bonds and stock are issued for the construction of a road, the face value of which is twice the cost of the road, yet if all the stockholders consented and none of the creditors then existing are injured, transferees of such stock cannot complain on the foreclosure of the mortgage securing the bonds. Wells *v.* Northern T. Co., 195 Ill. 288 (1902).

In the case Parmelee *v.* Price, 208 Ill. 544 (1904), property purchased at an insolvent's sale for $25,000, and worth no more than that sum at any time, was turned over to a corporation for $100,000 full paid stock out of $125,000 capital stock, the remaining $25,000, being paid in cash. The transaction was in May, 1890. In May, 1895, judgments were entered against the corporation, and a creditor's suit commenced to hold the stockholders liable. The court held that the statute of limitations was a bar.

Where $2,000,000 of stock is issued for a worthless unpatented invention and an unwritten play, the stock is not paid up, and the parties receiving the same are liable thereon to corporate creditors. Gillett *v.* Chicago Title & T. Co., 222 Ill. 254 (1907), the court saying that in taking property in payment for stock the property must be valued at its market value, if it has any, and at its selling cash price, if it has not a market value. In this case interest was not allowed from the commencement of the suit to the time of decree, it appearing that no appeal was taken from a supplemental decree to that effect. Even under the Illinois decision, the members of a firm are not liable on stock issued for their property where the valuation was made by their manager and no intent on their part to overvalue the same is proved. Taylor *v.* Cummings, 127 Fed. Rep. 108 (1903).

In Coleman *v.* Howe, 154 Ill. 458 (1895), the court held that, where property of known value and worth but $75,000 is sold to a corporation for $150,000 capital stock and a mortgage for $70,000, fraud is presumed, and the stockholders are liable for the par value of the stock less the $5,000. The court said: "Some of the cases hold that overvaluation will not render the stockholder liable for the difference between the actual and accepted values unles there is an affirmative proof of fraud *aliunde*. But other cases hold what we regard as the better view, namely, that where property whose value is well known, or can be easily learned, is taken at an exaggerated estimate, a strong presumption is raised, that the valuation is not in good faith, and is made for a fraudulent purpose. This presumption will be conclusive unless rebutted by satisfactory evidence explanatory of the apparent fraud. Where the overvaluation is so great that the fraudulent intent appears on its face, and is not explained, the court will hold it to be fraudulent as matter of law." See also People *v.* Sterling, etc. Co., 82 Ill. 457 (1876), holding that the corporation may refuse to allow a transfer of watered stock. In the case of Siegel *v.* Andrews & Co., 181 Ill. 350 (1899), where the purchasers of a patent-right for $15,000 organized a corporation and personally subscribed for $100,000 of its stock, and subsequently paid therefor by turn-

That state is the commonwealth of Massachusetts. The remedy there is a prohibition against the issue of any stock or bonds for

ing in the patent-right, the court held that each stockholder was liable for the par value of his stock less fifteen per cent., and that a judgment creditor might sue any one or more of the stockholders.

The fact that a contractor received stock and bonds four times in par value the value of the work is not fatal, where no fraud is alleged and the actual cost of the work is not alleged. But where the contractor then entered into a contract whereby the mortgage was to be foreclosed, and he was to participate in the property purchased at the sale, all for the purpose of cutting off other creditors, he is liable to them. Cleveland, etc. Co. *v.* Crawford, 9 Ry. & Corp. L. J. 171 (Chicago, 1891).

Where the stockholders in an insolvent California corporation formed an Illinois corporation and exchanged their stock for stock in the latter, in order to avoid the California statutory liability, and then transferred the property of the California corporation to the Illinois corporation, the Illinois court held them liable on the new stock to the extent that the actual value of the property was less than the par value of the stock. Sprague *v.* Nat. Bank of America, 172 Ill. 149 (1898). It appears in the case of Foote *v.* Illinois, etc. Bank, 194 Ill. 600 (1902), that only $32 per share had been paid on the original stock in the Los Angeles Cable Railway Company, and that then this partially paid stock had been exchanged share for share for full-paid stock in the Pacific Railway Company. The court held that such a transaction did not pay up fully the Pacific Railway Company stock, even though it purported to do so.

The fact that a contractor receives stock and bonds much greater in par value than the cost of the work does not make the issue illegal, inasmuch as he is entitled to a margin to cover the risks and also make a profit. Chicago R. R. *v.* Northern Trust Co., 90 Ill. App. 60 (1899).

Pennsylvania: Where a person obtains a license to use a patent and pays $100,000 therefor and then causes the corporation organized for that purpose to pay to him $100,000 cash and issue to him $1,400,000 full-paid stock for the said license, a receiver of the corporation cannot hold him personally liable on the stock as unpaid stock, under the constitution of Pennsylvania, which prohibits the issue of stock except for property actually received, it being shown that the patents were apparently very valuable at the time, and that if the expectations had been realized the returns would have been enormous, and there being no evidence that the license was overvalued at the time. The value is to be determined as of the time of forming the company, and not after it became insolvent, especially where the fact of the issue was set forth in the application for the charter, and it is no proof of fraud that the person gave away some of the stock for the experience and skill of others. Finletter *v.* Acetylene, etc. Co., 215 Pa. St. 86 (1906). Where a water-works company issues all its stock and bonds to a contractor for construction work in advance of the work, and the contractor pledges them to a banker for advances, the other creditors of the water-works company cannot claim an interest in such securities, even though the banker had assumed the contractor's obligation to one other creditor. McNeal, etc. Co. *v.* Bullock, 174 Pa. St. 93 (1896).

It is legal for a corporation to issue stock as full paid to a person in consideration of his leaving an em-

property until after state commissioners have passed upon the proposed issue. That state does not wait until the stock and bonds

ployment in which he is engaged and of assuming the presidency of the corporation. Shannon *v.* Stevenson, 173 Pa. St. 419 (1896).

In the important case, American Tube, etc. Co. *v.* Hays, 165 Pa. St. 489 (1895), the members of a firm engaged in operating gas wells formed a corporation with a capital stock of $500,000. They agreed with the corporation to transfer the firm's property to it in payment of the $500,000 of stock, and also that they should retain only $175,000 of such stock, and turn into the company's treasury the remainder as a working capital. The contracts were performed in good faith. The court held that the stock was paid up, and that the subscribers were not liable to creditors for the amount subscribed by them.

It was also held that the fact that the property transferred to the company afterwards proved to be much less in value than $175,000 did not render the stockholders liable, there being no proof of fraud or bad faith, and the value of the property at the time of the transaction having been largely speculative, it being natural-gas property.

Where stock is actually issued for property, it is useless to check money in and out in payment. "Not a dollar in actual money was used in the transaction, and what end was accomplished by all this idle ceremony it is impossible for us to see. But, if it did no good, we cannot see, in the absence of any finding of fraud intended or practised, that it did any serious harm." American Tube, etc. Co. *v.* Hays, 165 Pa. St. 489 (1895).

Even though a person who has a contract with a street railway company that the latter will lease its street railway on certain terms, turns over such contract to a new corporation for $900,000 of stock of the latter, and the latter then assumes the lease, and even though such stock is illegal under the constitution and statues of Pennsylvania, yet where the state delays three years in filing a bill to declare it void, and meanwhile the stock has passed into *bona fide* hands, and not until five years thereafter are the real owners of the stock made parties defendant, the bill will be dismissed. Commonwealth *v.* Reading, etc. Co., 204 Pa. St. 151 (1902).

The constitutional provision in Pennsylvania against the issue of stock for property at an overvaluation is not self-executing, and the statute which puts it into force as to railroads, by providing that the president shall file a statement with the secretary of state, and that then the Attorney-General, on the complaint of any stockholder, shall test the validity of the same, is exclusive as to the remedy, and hence a stockholder cannot himself file such a bill to enforce the statute. Yetter *v.* Delaware R. R. 206 Pa. St. 485 (1903).

A court of equity has no power, prior to an interlocutory decree or order, to appoint a master to conduct an election, and to finally decide whether certain stock should be allowed to vote or not, on the ground that such stock had been illegally issued for property in violation of the statute, especially where other stockholders are not made parties defendant. Yetter *v.* Delaware, etc. R. R., 206 Pa. St. 485 (1903).

An embarrassed corporation may sell its stock at sixty cents on the dollar and a *bona fide* purchaser is not liable for the difference, even though the statute of West Virginia where the issue was made stated that a sale of stock at less than par should be only after a publication of a notice, and no such publication was made, such publication, however,

have been issued and either sold or used as collateral security. The remedy is applied in the origin of the transaction, and has been

being merely directory. The court said it was immaterial whether the corporate creditors who brought the suit were such before or after the issue, because "if before, no reliance could have been placed on the stock as full paid, and if after, they cannot complain, as the transaction was open to them." McDowell *v.* Lindsay, 213 Pa. St. 591 (1906).

A land-owner who agrees to take pay from a railroad for a right of way in shares of stock must take the stock at its par value and not at its market value. Hoffman *v.* Bloomsburg, etc. R. R. 157 Pa. St. 174 (1893).

Where the president of a railroad corporation secretly owns land in the name of another person, and causes the corporation to purchase it and issues stock and bonds in payment without disclosing his interest in the land, he is liable to the corporation for the difference between the actual market value of the stock and bonds and the actual value of the land. Danville, etc. R. R. *v.* Kase, 39 Atl. Rep. 301 (Pa. 1898).

Land may be turned in in payment for stock, even at an overvaluation, where the valuation is set forth in the incorporation papers, under the Pennsylvania act. Cock *v.* Bailey, 146 Pa. St. 328 (1892).

A contractor who receives bonds in payment of construction work and sells them cannot claim that they are void as contrary to the statute prohibiting "watered" bonds. Reed's Appeal, 122 Pa. St. 565 (1888).

Where a consolidated company of New York and Pennsylvania issues bonds in New York fictitiously, such bonds cannot be enforced in Pennsylvania, since they are void by its constitution. A foreclosure in New York of the mortgage securing the bonds may be set aside and the bonds declared void. Pittsburgh, etc. R. R. *v.* Rothschild, 4 Cent. Rep. 107 (1886).

In passing upon the legality of an issue of $500,000 of stock for a road that had just been sold under a mortgage for $100,000, the court said in Commonwealth *v.* Central Passenger Ry., 52 Pa. St. 506, 515 (1886): "In all such cases the determination of the amount of stock must be an arbitrary adjustment. As we have said, the cost of the property is no fair measure of what the stock represents, and if the real value be adopted as the standard, it is no standard at all. It varies with the estimates of witnesses, and the franchises are incapable of valuation. . . . If that was a sum greater than the actual value of the company's franchises and property, as it was greater than the cost, we are unable to see how the public was affected by the exaggerated estimate."

As to the common law of Pennsylvania on this subject, see § 46, *supra.*

Arkansas: Payment for stock in a lumber company cannot be made by turning in the stock of another lumber company and where the stock of the latter was issued for property at a palpable overvaluation the subscriber to the former is entitled only to credit for the actual value of the latter stock. Lester, etc. *v.* Bemis, etc. Co., 71 Ark. 379 (1903).

California: In California the supreme court, in Stein *v.* Howard, 65 Cal. 616 (1884), has held that the constitutional prohibition does not prevent the issue of stock at less than its par value. The meaning of "fictitious" is defined to be that given in Webster's Dictionary. The court said: "Of the stock proposed to be issued *there is no one share* upon which a person can place his finger and say that share is or will be feigned, imaginary, not real; counter-

found to be effective as well as just. There are few Massachusetts

feit, false, not genuine." An injunction to restrain such an issue of new increased stock was refused.

Even though stock is issued for property which is worth but one-tenth of the par value of the stock, yet if all the stockholders assent thereto a subsequent purchaser of the stock cannot maintain a suit in behalf of the corporation to cancel the stock on the ground of fraud. His remedy, if any, is a personal suit for false representations. Garretson *v.* Pacific, etc. Co., 146 Cal. 184 (1905).

Receiving the subscriber's note in payment for stock does not render the stock void, under this constitutional provision. Pacific Trust Co. *v.* Dorsey, 72 Cal. 55 (1887).

Where a corporation that *has no property* issues $2,475,000 of full-paid stock as the purchase price of property worth $1,200,000, and also assumes mortgage bonds on such property to the amount of $1,050,000, such stock is not fictitious, and a stockholder in the purchasing corporation cannot complain, inasmuch as he is not injured. Smith *v.* Ferries, etc. Ry., 51 Pac. Rep. 710 (Cal. 1897). The supreme court of California, however, in the case of Smith *v.* Martin, 135 Cal. 247 (1901), adopted the reasoning of the dissenting opinion in the preceding case. Even though stock was issued for property taken at an overvaluation, yet such stock in the hands of a *bona fide* purchaser is valid, notwithstanding the constitutional provision in California against such an issue. Smith *v.* Martin, 135 Cal. 247 (1901).

Where stock is issued for property, but at an agreed price of fifty cents on the dollar for the stock, the certificates of stock not purporting to be full paid, the party is liable to corporate creditors for the other fifty cents on the dollar. Stockton, etc. Co. *v.* Houser, 109 Cal. 1 (1895).

Under the California constitution, a note conditioned upon the completion of the road in a given time, and given to the corporation for stock, is void. Jefferson *v.* Hewitt, 103 Cal. 624 (1894); s. c., 95 Cal. 535.

Colorado: Stock issued as full-paid for no consideration whatsoever is void under the constitutional provision that stock shall be issued only "for labor done, services performed, or money or property actually received." The original holder of such stock cannot institute a suit to remedy a wrong done to the corporation by its president. Arkansas River, etc. Co. *v.* Farmers' L. & T. Co., 13 Colo. 587 (1889).

Where a mining location is allowed only after discovery of ore a mining location without such discovery is not a good consideration for the issue of stock, and hence the stockholders are personally liable. Buck *v.* Jones, 18 Colo. App. 250 (1902).

The Colorado constitutional provision does not invalidate a statute authorizing the issue of full paid stock in payment for mining property. Speer *v.* Bordeleau, 20 Colo. App. 413 (1905).

Where for six years an issue of stock for services has appeared fully on the books of the company and has not been objected to, a stockholder cannot have it set aside, even under the constitution of Colorado, especially where all the stockholders at the time of the issue assented thereto and the party receiving the stock used a large portion of it to interest other persons in the company. and even though the stock so issued to him was $125,000, being one-half of the entire stock, and was in consideration of services rendered in obtaining contracts and options, which were turned over to the company. Calivada, etc. Co. *v.* Hays, 119 Fed. Rep. 202 (1902).

cases in this chapter—a proof of the justice and efficacy of the

Connecticut: A creditor of a dissolved Missouri corporation may maintain a suit in equity in Connecticut against citizens of Connecticut who were stockholders in such corporation, to collect unpaid subscriptions, it being alleged that the directors refused to collect the same; and where $100,000 capital stock was issued for land worth only $10,000 the stockholders are liable for the difference under the laws of Missouri, and hence may be held liable in Connecticut. Lewisohn *v.* Stoddard, 78 Conn. 575 (1906).

Kentucky: Even though stock is issued on the understanding that it is to be paid for by stock in another corporation, yet the parties receiving the stock may be held liable to corporate creditors, under the Kentucky statute, for the difference between its par value and the value of the other stock turned in as payment. Kentucky, etc. *v.* Schaefer, 120 Ky. 227 (1905).

Stockholders are not liable as partners on the ground that the stock was watered. Louisville Bkg. Co. *v.* Eisenman, 94 Ky. 83 (1893).

Where a person buys land for $5,000 and pays down one-half thereof, then through friends sells it to a corporation formed for that purpose for $10,000 of stock, the corporation assuming the other two-thirds of the original purchase price, the transaction is legal if the land is worth $10,000, and the stockholders are not liable on the stock even though they received their stock from the vendor for nothing, and even though the land finally sold on foreclosure sale for $3,000 and the original vendor brought suit as a creditor of the corporation. Mercer *v.* Park, etc. Co., 38 S. W. Rep. 841 (Ky. 1897).

Louisiana: In the case of Davies *v.* Monroe, etc. Co., 107 La. 145 (1901), where the entire capital stock, $125,000, had been issued in consideration of the transfer of a franchise from the city to construct a waterworks and electric light plant, the court said, "this is not the way to launch corporations upon the business world in the state of Louisiana, nor was it at the time this company was organized. This is said, merely, in passing." Where a worthless lease is turned in for stock the party receiving the stock and also the promoters with whom he divided the stock are liable thereon under the Louisiana constitution. Dilzell, etc. Co. *v.* Lehmann, 45 S. Rep. 138 (La. 1907).

Montana: Under the constitution and statutes of Montana, where a mine known to be worth not over $125,000 is sold to a corporation for $7,500,000 of stock, and then this stock is sold by the party receiving the same to the parties interested in the project at two and one-half cents on the dollar, the transaction is fraudulent as to corporate creditors, and the holders are liable for the difference between the par value of the stock and the actual value of the mine. Kelly *v.* Clark, 21 Mont. 291 (1898).

Nebraska: In the case of Troup *v.* Horbach, 53 Neb. 795 (1898), the supreme court reversed the court below and held that although $20,000 par value of stock was issued for real estate worth only $6,000, yet that neither the party receiving the stock nor his transferees with notice were liable for the remaining $14,000, no fraud or misrepresentation being shown. s. c., 57 Neb. 644 (1899).

The issue of stock in violation of this provision of the constitution renders the charter liable to forfeiture by the state. State *v.* Atchison, etc. R. R., 24 Neb. 143 (1888); s. c., 38 Neb. 437.

In Gilkie, etc. Co. *v.* Dawson, etc. Co., 46 Neb. 333 (1895), where

Massachusetts remedy. On the other hand, the flood of litigation

$240,000 par value of stock was issued for an equity in land, such equity being worth only $20,000, the court held that the transaction was fraudulent *per se*, and the holders of the stock were liable for the difference between its par value and the $20,000, and the court also held that the transferees, taking with full knowledge of the facts, were also liable. In the case, however, of Penfield *v.* Dawson, etc. Co., 57 Neb. 231 (1898), this same transaction came again before the court, and the court practically overruled the latter case and held that the stockholders were not liable, the lower court having held that they had acted in good faith and without any attempt to defraud the corporation.

Washington: Although coal land which is purchased for $100,000 is immediately turned in to a corporation for $5,000,000 of stock and $320,000 of mortgage bonds, yet the transaction is not fraudulent *per se* and the stockholders are not liable to corporate creditors. Manhattan Trust Co. *v.* Seattle, etc. Co., 19 Wash. 493 (1898), practically overruling 16 Wash. 499. Where a suit is brought by creditors to invalidate mortgage bonds and such suit fails, but an appeal is taken by a part of such creditors and the decision reversed, only those creditors who appealed are entitled to have their claims paid in priority to the bonds. Manhattan Trust Co. *v.* Seattle, etc. Co., 19 Wash. 493 (1898). In the case of Dunlap *v.* Rauch, 24 Wash. 620 (1901), the court approved the rule laid down in Adamant Mfg. Co. *v.* Wallace, 16 Wash. 614, and held "that the estimate of the company placed upon the property by the stockholders of the corporation is not conclusive upon the courts."

Where stock is issued to an attorney and on its face is marked "Paid up," it may nevertheless be a question for the jury whether it was paid for by agreement by services. Elderkin *v.* Peterson, 8 Wash. 674 (1894).

A creditor cannot object where the stock was issued for property honestly believed to be worth the par value of the stock. Turner *v.* Bailey, 12 Wash. 634 (1895).

Even though real estate worth but $2,000 is deeded to a corporation in payment for $4,000 of stock, yet the holder of the stock is not liable for the remaining $2,000, under the statutes of Washington, the court saying that no actual intention of fraud was proved, and that no proof was given that the corporation was formed to issue paper or obligations to third parties, or to incur any indebtedness at all, and that mere overvaluation did not constitute fraud. Kroenert *v.* Johnston, 19 Wash. 96 (1898), limiting prior decisions. A dissenting stockholder in a New Jersey corporation owning a street railway in Washington may enjoin a sale of the property to a Washington street railway company for 20,000 shares of the full paid stock of the latter where dissenting stockholders of the former are to be paid only $35 cash in lieu of each share of the Washington corporation, which he would be entitled to. On its face this is an issue of the Washington stock at $35 per share, and is in violation of the Washington statutes. Coler *v.* Tacoma Ry. etc., 65 N. J. Eq. 347 (1903).

Texas: If the contract does not expressly state that the stock is to be paid-up stock in consideration of the property received, the court will not presume that such was the contract. Keating *v.* McCutcheon, 14 Tex. Civ. App. 150 (1896). The liability of stockholders on watered stock may be decreased by profits of the company which have not been used for dividends. Cole *v.* Adams, 92 Tex. 171 (1898). Under the Texas statutes

in the courts of Alabama, Missouri and the other states, on this

the railroad commissioners have no authority to pass upon the legality of a proposed issue of stock for property nor to declare an issue of stock to be illegal. Davis *v.* San Antonio, etc. Ry., 92 Tex. 642 (1899). In the case of Thayer *v.* Wathem, 17 Tex. Civ. App. 382 (1897), the court referred to the statute allowing a reorganized corporation to issue bonds and stock in payment for the property to an amount fifty per cent. over the value of the property, provided the railroad commission consent, and practically held such statute not to be a violation of the constitutional prohibition. See 108 S. W. Rep. 967.

In Texas parties to whom stock is issued for property are liable to creditors for the difference between the actual value of the property and the par value of the stock, even though the overvaluation was in good faith and without intent to defraud. Any increase in the value of the property after the contract of transfer is made and before the transfer is actually made is taken into consideration. A grant from a municipality for a waterworks system may be turned in for stock. Profits earned after the corporation was organized and not paid out as dividends may also be credited on the stock. Where a receiver brings suit he need not show that the creditors whom he represents did not know of the manner in which the stock was issued. Cole *v.* Adams, 19 Tex. Civ. App. 507 (1898), holding also that a person to whom stock is issued for property, and who transfers the same while the corporation is solvent, cannot be held liable on such stock, even though the property was taken at an overvaluation.

West Virginia: Where a person buys land for $60,000, and pays $6,000 cash and agrees to pay the remainder in instalments, and then sells his interest to other parties for $120,000 cash and $60,000 of the paid-up stock of a company to be organized to take over the property, and the purchasers turn the property in to a corporation for $219,000, and sell $100,000 thereof at a discount to pay certain debts, and the corporation becomes insolvent, none of the parties are liable on the stock as having been fraudulently issued without full payment therefor. Merchants, etc. Bank *v.* Belington, etc. Co., 51 W. Va. 60 (1902). Even though a certificate of incorporation which is filed under the laws of West Virginia provides that stockholders paying fifty cents on a dollar to the company for their stock, shall not be liable for the remaining fifty per cent., this is not binding on corporate creditors, under the constitution of West Virginia. Security T. Co. *v.* Ford, 75 Ohio St. 322 (1906). An embarrassed corporation may sell its stock at sixty cents on the dollar and a *bona fide* purchaser is not liable for the difference, even though the statute of West Virginia where the issue was made stated that a sale of stock at less than par should be only after a publication of a notice, and no such publication was made, such publication, however, being merely directory. The court said it was immaterial whether the corporate creditors who brought the suit were such before or after the issue because "if before, no reliance could have been placed on the stock as full paid, and if after, they cannot complain, as the transaction was open to them." McDowell *v.* Lindsay, 213 Pa. St. 591 (1906).

South Dakota: Under the constitution of South Dakota a corporation may not dispose of stock except for labor, money or property, and a person cannot enforce the agreement of a corporation to issue stock to him for services rendered to another stockholder in selling the stock of

subject, is similar proof of the injustice and failure of the policy of repudiation. Moreover, the bewildering currents of conflicting decisions, even in those states where the most earnest efforts are made to enforce the constitutional provisions, leave the investor on an unknown sea, without chart, compass, landmark or pilot.[1] Even

the company and in making assays. Rogers *v.* Gladiator, etc. Co., 113 N. W. Rep. 86 (S. Dak. 1907).

[1] *Alabama:* Where promoters purchase for $29,000 property worth not more than $50,000 and sell it to a corporation which they organize for that purpose for $50,000 of stock and $30,000 of mortgage bonds, and the property is foreclosed and the bondholders realize only twenty per cent. of their bonds, they may hold the promoters liable and the latter are not entitled to have the value of the property apply altogether to the stock. Montgomery Iron Works *v.* Roman, 41 S. Rep. 811 (Ala. 1906). A stockholder may enjoin the company from issuing $50,000 of bonds to the stockholders as a bonus, the same being in violation of the constitution, there being no proof of undivided profits to that amount. American, etc. Co. *v.* Crane, 142 Ala. 620 (1905). In a suit to hold stockholders liable on watered stock they may also be held liable for corporate assets illegally transferred to them. Montgomery, etc. Works *v.* Capital City Ins. Co., 137 Ala. 134 (1903). Where persons buy a property for $50,000 and make some improvements, and then convey it to a corporation for $50,000 of stock and $25,000 of bonds, the stock is full paid, and a creditor cannot reach the bonds by garnishee process, inasmuch as there was no promise to pay for the bonds, and if they are invalid they cannot be enforced. Roman *v.* Dimmick, 123 Ala. 366 (1899). Where $1,250,000 of stock is issued for real estate which the vendors had just bought for $90,000 and which is worth not over $100,000, the parties receiving the stock are liable for the difference; in other words, for $1,150,000. It is no defense that the charter showed that the stock was to be so issued for the real estate. Lea *v.* Iron, etc. Co., 119 Ala. 271 (1898). In the case Pickering *v.* Townsend, 118 Ala. 351 (1898), the court states that where merely the franchise to build a street railway and an option to purchase land, the entire value of the same not being over $10,000, are turned in to a corporation for $350,000 of stock, the transaction is illegal upon its face. A promoter who takes part in selling property to the corporation for stock, the par value of which is five times the amount paid by the promoters for the property, and who afterwards becomes a director and then sells his stock and becomes a creditor of the corporation, cannot hold the stockholders liable for the difference between its par value and the value of the property. Nicrosi *v.* Calera L. Co., 115 Ala. 429 (1896).

Although $50,000 of stock, issued as full paid, and $25,000 of mortgage bonds are issued for $2,500 worth of property, yet the parties receiving the same are not liable to corporate creditors for the value of the bonds, the bonds still being in the possession of the parties receiving the same. The parties receiving the stock, however, are liable to corporate creditors on the stock as being unpaid. Roman *v.* Dimmick, 115 Ala. 233 (1896). A promissory note given to a corporation to pay for stock issued at fifty cents on the dollar cannot be enforced, and even a renewal

in Alabama and Missouri the courts feel obliged to construe this constitutional provision in such a way as to protect the equities of innocent stockholders.

note in such a transaction cannot be enforced. Alabama Nat. Bank *v.* Halsey, 109 Ala. 196 (1895).

If the tangible property of the corporation is actually in excess of the par value of the capital stock, then a stock dividend to the extent of that excess would be legal, but the proceedings to declare the stock dividend must show these facts or the dividend will be enjoined. Fitzpatrick *v.* Dispatch Pub. Co., 83 Ala. 604 (1887). The court changed the reasoning of its opinion as reported in 2 S. Rep. 727.

A contract by a corporation that it will issue its stock for one-fifth of its par value is void under the Alabama constitutional prohibition. The subscriber having sold his contract to another person cannot collect on such sale. Williams *v.* Evans, 87 Ala. 725 (1889). See also concerning the rule in Alabama, Knox *v.* Childersburg Land Co., 86 Ala. 180 (1889), 34 S. Rep. 210.

The person to whom stock has been issued in payment for property may donate a part of it as a bonus to go with bonds sold at par directly from the corporation to the person taking the bonus. The value of the property in this case was not proved. Davis *v.* Montgomery, etc. Co., 101 Ala. 127 (1890).

Where parties pay $5,000 on a $53,000 contract to buy land, and then organize a corporation and turn this contract in to the corporation for $250,000 of stock issued as full paid, the company agreeing to pay the other $50,000, they are liable to corporate creditors for the difference between $250,000 and the value of the property. The constitution and statute of Alabama forbid such a transaction. Elyton Land Co. *v.* Birmingham, etc. Co., 92 Ala. 407 (1891).

A contract calling for "original, ground floor, or treasury stock," means any of the stock that is issued, where the statutes prohibit fictitious stock. All the stock is then presumed to be "ground floor" stock and to represent at par the actual value received. Williams *v.* Searcy, 94 Ala. 360 (1891).

In regard to the constitutional provision against the issue of fictitious bonds and stock, the supreme court of Alabama has said: "The constitutional provision, standing by itself, does not require that the amount of money, or the value of the labor or property for which stock or bonds are issued, shall correspond with the face value of the stock or bonds for which it is issued." Hence the court held that bonds might be issued at less than their par value, provided that some substantial value was paid for them, such value to be fair and reasonable, and "not a mere trick or device to evade the law." Nelson *v.* Hubbard, 96 Ala. 238 (1892).

A contract for the sale of stock is valid, although the stock is watered stock issued at one-half its par value, in violation of the statute. Beitman *v.* Steiner, 98 Ala. 241 (1893). See also cases in next note. The agreement of a corporation to pay a specified sum of money, with the provision that it shall not be chargeable against a certain part of the capital stock, can be enforced in equity only, inasmuch as an accounting is involved. Heflin, etc. Co., *v.* Hilton, 124 Ala. 365 (1899).

Missouri: In the case Colonial T. Co. *v.* McMillan, 188 Mo. 547 (1905), the court, in speaking of watered stock, said: "That corporations created to be the owners of public utilities should be born into a sham and crippled life, and that there seems to

In fact, in Alabama the supreme court has lately intimated that it will go no further in creating, by reason of this constitutional

be a call for more adequate safeguards against the itching temptation to circumvent our corporation laws by falsehood, whereby the ancient plan for making gain by 'watering stock,' conceived by the shrewd old patriarch Jacob in dealing with Laban (Genesis xxx. 30 *et seq.*, q. v.), is parodied and brought to blush, may concern the legislative branch of the government, but cannot be remedied by the courts except in sporadic cases, where some relief may be administered if the facts allow."

Where $9,200 of stock is issued for a lease which is terminable at any time at the option of the lessor, the stock is not full paid, there being no value to the lease. The holder with notice is liable. Anheuser, etc. Ass'n *v.* Park Novelty Co., 120 Mo. App. 513 (1906).

Where an option which has been purchased at $125,000, of which amount $30,000 has been paid, is sold to an Illinois corporation for $8,000,000 par value of stock, persons taking the stock with notice are liable proportionately to *bona fide* corporate creditors for the difference between the actual value of the property and the par value of the stock. One of the promoters, however, cannot enforce such liability to repay money which he has loaned to the company. Meyer *v.* Ruby, etc. Co., 192 Mo. 162 (1905).

A corporate creditor who knows that the bonds and stock of the corporation have been issued on the basis of seventy-seven and a half for the bonds, with a bonus of one hundred per cent. of stock, cannot hold the stockholders liable on the ground that the stock had been issued for property at an overvaluation. Colonial, etc. Co. *v.* McMillan, 188 Mo. 547 (1905), the court saying: "Now, turning to the prospectus, it flew a danger signal, in that it proposed to sell a $1,000 5 per cent. gold mortgage bond for $775 and to give 10 shares of capital stock in a new fledged corporation, of the par value of $1,000 as a bonus. On such facts, it would disturb, it seems to us, all normal methods of reasoning to conclude that a creditor who knew of such offer, and whose experience in corporate stock and bond dealing enabled him to appreciate its significance, and who, as a part of the very inception of his debt, as here, undertook to finance such a company and to foist such a bond and stock sale upon a confiding public, extended credit on the faith of the fact that the corporate stock was fully paid in money, or what might fairly be considered as money's worth. One who knows cannot be misled."

Where a stock of goods is turned in to a corporation for $75,000 of full paid stock, when, in fact, the goods were worth only $57,000, the parties receiving the stock are liable for the remaining $18,000. Rumsey Mfg. Co *v.* Kaime, 173 Mo. 551 (1903).

Where parties purchase land for $26,000 and immediately turn it over to a corporation in payment for $100,000 of stock, they are liable to corporate creditors for the difference. The court held that it was unnecessary to allege fraud. Shields *v.* Hobart, 172 Mo. 491, 521 (1903).

A creditor of a dissolved Missouri corporation may maintain a suit in equity in Connecticut against citizens of Connecticut who were stockholders in such corporation, to collect unpaid subscriptions, it being alleged that the directors refused to collect the same; and where $100,000 capital stock was issued for land worth only $10,000 the stockholders are liable for the difference under the laws of Missouri, and hence may be held

provision, a liability which none of the parties contemplated at the

liable in Connecticut. Lewisohn *v.* Stoddard, 78 Conn. 575 (1906).

A stockholder cannot after ten years' delay, maintain a suit to cancel stock issued for patents, and to compel the holder of such stock to refund dividends thereon, the transaction having been spread on the records of the company and open to the stockholders. An allegation that the patents were of no value is insufficient, even though the constitution of the state (Missouri) required that stock be issued only for "money paid, labor done, or money or property actually received," there being no allegation that the patents were known to be valueless at the time. Kimbell *v.* Chicago, etc. Co., 119 Fed. Rep. 102 (1902).

As against the claim of a creditor of an insolvent corporation in the bankrupt court the trustee may set-off a claim that the creditor is a stockholder and that stock was issued to him for property at an unreasonable valuation, the corporation being a Missouri corporation and the Missouri decisions being to that effect. *In re* Royce, etc. Co., 133 Fed. Rep. 100 (1904). The court said: "In other words, as the declared policy of this state is to require absolute payment by stockholders, so that they shall represent to the creditors an actual asset, and the temptation is great among stockholders to put a fictitious or exaggerated value, like an old and abused stock of goods substituted for a money payment for stock by the incorporators, the courts will scrutinize with care the integrity and fairness of such payments, in favor of the creditors of the corporation."

In the case State *v.* Hogan, 163 Mo. 43 (1901), it was held that an option to buy a mine is not property for which stock may be issued, under the constitution and statutes of the state of Missouri, there being no proof that the person giving the option owned it. Hence where $90,000 of stock was issued for the option and for services in inspecting the mine, and $30,000 of the stock was turned back for treasury stock, the court held that the state might maintain a bill to forfeit the charter.

Where a stone quarry is turned in for stock at ten times its actual value, the persons receiving the stock are liable to corporate creditors for the difference, and the value of the property may be shown by experts and by tax assessments. Under the Missouri statute declaring stockholders liable to pay for their stock the suit may be at law. Steam, etc. Co. *v.* Scott, 157 Mo. 520 (1900).

A purchaser of stock which has been issued for property taken at an overvaluation is not liable thereon where he took without knowledge of such overvaluation. Berry *v.* Rood, 168 Mo. 316 (1902). In this case, where lands which cost the promoters $20,000 were sold to the corporation for $290,000 of stock, the court held that they were liable for the difference, even though they believed the land had valuable onyx deposits and believed they were worth the par value of the stock, where it turned out afterwards that such deposits did not exist. The court held that the property so received might be sold by the receiver and applied on the debts, and that the subscribers could not claim that the transaction must either be rescinded *in toto* and the property returned, or else confirmed *in toto*. The court said that under any other rule "there will be no necessity for men to shun Missouri as a forum in which to organize the wildest and most visionary schemes, for by such interpretation we break down all the safeguards that distinguish ours from any other laws."

time of the transaction.[1] As already stated, the time has gone by when the capitalist, the business man and the investor rely upon

The court further said that no actual fraud need be shown. The court held, however, that a purchaser of treasury stock at fifty cents on the dollar is not liable for the remaining fifty cents, even though it turned out that originally the stock was issued for property taken at an overvaluation, such purchaser having no knowledge of such overvaluation.

The stockholders were held liable in McClure *v.* Paducah, 90 Mo. App. 567 (1901). Where $100,000 of the stock of an Illinois corporation is issued to parties who agree to turn in a patent therefor, and the patent is never turned in, and in fact turns out to be of no value, the parties receiving the stock with notice are liable thereon to *bona fide* corporate creditors, even though such stock recites on its face that it is fully paid. Van Cleve *v.* Berkey, 143 Mo. 109 (1898). In this case the court claimed that the constitutional prohibition against watered stock in that state had proved to be effective, and the court reviewed the Missouri decisions on this subject. The court declared that certain statements in the opinion in Woolfolk *v.* January, 131 Mo. 620 (1895), were *obiter dicta*. The latter case disapproved of Shickle *v.* Watts, 94 Mo. 410, and upheld an issue of $60,000 of stock and $20,000 of bonds for a gas plant and franchise that cost about $35,000.

Parties who have an option to purchase certain coal lands cannot legally, under the Missouri constitution, sell that option to a corporation for $1,000,000 full-paid stock of the corporation, the corporation agreeing, in addition thereto, to pay, by means of bonds, the full actual cost of the land, the option for which the promoters have turned over to the corporation. On a bill filed by the corporation to ascertain who was entitled to the stock, the court held that it would not order the issue of the stock at all, the contract being still executory. Garrett *v.* Kansas City, etc. Co., 113 Mo. 330 (1892).

In Missouri a contractor who was paid in bonds and stock was held liable to corporate creditors for the par value of the stock over and above the market price of all the bonds and stock so given, where such value was greater than a reasonable price for the contract work. The court said "that where an agreement is entered into between a contractor and a corporation, whereby the former is to perform work for, or furnish material to, the latter, and to take unpaid stock in part or in full payment, that such contractor, whether for labor or material, can only charge therefor the reasonable market value for such labor or material thus given in exchange; and that all agreements by the corporation to pay more than such reasonable compensation will be disregarded and held for naught by the courts, when the rights of creditors intervene; and this is the case even though no fraud be proven." Shickle *v.* Watts, 94 Mo. 410 (1888). Where a person, to whom stock has been issued as fully paid for nothing, surrenders the same to the company and it is then issued to other subscribers, a subsequent creditor cannot complain. Erskine *v.* Peck, 33 Mo. 465 (1884).

[1] In State *v.* Webb, 110 Ala. 214 (1896), the supreme court of Alabama stated with great clearness the difficulties of applying the above-mentioned constitutional provision, and the court stated many questions which remain to be adjudicated, and which would have to be carefully considered when they arise.

In Nicrosi *v.* Irvine, 102 Ala. 648 (1894), where land was turned in for

the nominal capitalization of a corporation. They investigate its real financial condition. In some of the states there may be doubt as to the constitutionality of a statute delegating to a commission the terms upon which capital stock may be issued,[1] but the better opinion is that such a delegation of authority is constitutional, where the statute prescribes that the commission shall act within the "limits prescribed by law," which at common law would require them to be reasonable, and is a sufficient standard and guard against arbitrary action.[2]

Statutes are found in some of the states on this subject. There have been a large number of decisions under these varied statutes, and those decisions have been confused with the cases which were decided on the common law alone. The following are some of these statutes:

In New York directors in manufacturing corporations were formerly made personally liable for all corporate debts, if, in the reports which they were required to file, they misstated facts. Accordingly, if they stated the capital stock to have been paid up, when in fact it was paid for by property taken at a fraudulent overvaluation, then the penalty applied. Most of the New York cases on watered stock arose under this statute. Under this statute the court of appeals was at first in doubt whether proof of a mere overvaluation of the property was sufficient to set aside the payment as a full payment, or whether it was necessary for the plaintiff to prove also that the overvaluation was intentional and fraudulent.[3] Later cases, however, firmly established the principle that not only must proof be given that there was an overvaluation of

stock at five times its value and cost, a corporate creditor garnished a stockholder as being liable on his stock so issued. The process failed, the court holding that the creditor's remedy was in equity alone. The court also disapproved of some of the *dicta* contained in Parsons *v.* Joseph, 92 Ala. 403, and Joseph *v.* Davis, 10 S. Rep. 830 (Ala. 1892).

1 The Supreme Court of Minnesota has held that it is an unconstitutional delegation of authority for a legislature to authorize state railroad commissioners in their judgment to allow an increase of capital stock only for such purposes and on such terms as they may deem advisable or in their discretion to refuse to allow such increase. State *v.* Great Northern Ry., 111 N. W. Rep. 289 (Minn. 1907). The court held that this was different from delegating to the commission the ascertainment of facts and deciding whether the facts bring the application within the specifications of a statute authorizing such an increase.

2 Trustees, etc. *v.* Saratoga Gas, etc. Co., 191 N. Y. 123 (1908), aff'g 122 N. Y. App. Div. 203.

3 Boynton *v.* Hatch, 47 N. Y. 225 (1872). Three of the judges held that proof of fraud was necessary, and three that it was not necessary. All concurred in holding that proof of overvaluation was competent and necessary.

the property or services rendered, but proof also must be given that such overvaluation was intentional and consequently fraudulent.[1]

Moreover, the property was not to be considered as overvalued merely because, subsequently, it turned out to be so. The various circumstances under which the valuation was made were considered in determining the *bona fides* of the transaction.[2] The questions as to whether there was an overvaluation of the property, and whether that overvaluation was intentional and fraudulent, were generally questions of fact to be submitted to the jury.[3]

Where, however, the overvaluation was so great as to bear evidence upon its face that it was intentional and fraudulent, the court held that, unless the transaction was reasonably explained, there was no question of fact for the jury, but that, as a matter of law, the overvaluation was fraudulent. Various cases which arose under that statute are given in the notes below.[4]

1 Douglass *v.* Ireland, 73 N. Y. 100 (1878); Schenck *v.* Andrews, 57 N. Y. 133 (1874); Boynton *v.* Andrews, 63 N. Y. 93 (1875); Lake Superior Iron Co. *v.* Drexel, 90 N. Y. 87 (1882).

2 Schenck *v.* Andrews, 57 N. Y. 133 (1874); Coit *v.* North Carolina, etc. Co., 14 Fed. Rep. 12 (1882); aff'd, Coit *v.* Gold Amal. Co., 119 U. S. 343 (1886).

3 Boynton *v.* Hatch, 47 N. Y. 225 (1872); Lake Superior Iron Co. *v.* Drexel, 90 N. Y. 87 (1882).

4 Thus, where stock for $300,000 was issued for property which the jury found to be worth $64,000, the court held, as a presumption of law, that the transaction was fraudulent. Douglass *v.* Ireland, 73 N. Y. 100 (1878). In another case, involving the same facts, the trial court submitted the question to the jury. Brockway *v.* Ireland, 61 How. Pr. 372 (1880).

In another case, where stock for $100,000 was issued for property worth not more than $50,000, the court held that, in the absence of evidence to explain the presumption of fraud, there was no question for the jury, and that the transaction was fraudulent upon its face. Boynton *v.* Andrews, 63 N. Y. 93 (1875). The case of Lake Superior Iron Co. *v.* Drexel, 90 N. Y. 87 (1882), tended to make the valuation of the property a question for the jury exclusively. In that case stock for $2,500,000 was issued for property in a patent; $900,000 of the stock was returned to the corporation as a gift. The court held that the question of fraud was for the jury. This case was followed in Draper *v.* Beadle, 16 Weekly Dig. 475 (1883). In Bolz *v.* Ridder, 19 Weekly Dig. 463 (1884), N. Y. Com. Pl., the remarkable rise in value of a patent-right from $1,000 to $100,000, when sold for stock issued in payment therefor, was held to be only presumptively fraudulent, and might be explained sufficiently to raise a question for the jury. The directors in estimating the value of property may take the opinion of experts and rely thereon. Brockway *v.* Ireland, 61 How. Pr. 372 (1880). See also Knowles *v.* Duffy, 40 Hun, 485 (1886); Van Vleet *v.* Jones, 75 Hun, 340 (1894). *Cf.* Thurston *v.* Duffy, 38 Hun, 327 (1885).

Under the New York statute, where patents worth $75,000 were transferred to the corporation in payment for $300,000 of stock, and

Formerly under the New York statutes, stockholders were also liable in certain companies to double the amount of their stock unless a certificate was filed to the effect that the capital stock was

$100,000 of the stock was at once donated to the company by the inventor, and other stock at once sold by him for about one-third of the par value, the only fraudulent intent that needed to be proved was that the directors knew that the patents were not worth $300,000. National Tube Works Co. *v.* Gilfillan, 124 N. Y. 302 (1891).

In determining whether property is worth the par value of stock which is issued for it, the intrinsic or market value is the test, but the jury may consider also "its value for the use to which it was to be put, and the adaptability of it to any specific purpose, and any peculiar advantages" it then had. Huntington *v.* Attrill, 118 N. Y. 365 (1890). The evidence of experts as to the value of similar property is not admissible. Huntington *v.* Attrill, 118 N. Y. 365 (1890).

Under the New York statute, where property worth but $60,000 was turned in for $1,000,000 of stock and $200,000 of bonds, the act was held to be fraudulent. Blake *v.* Griswold, 103 N. Y. 429 (1886), sustaining a finding of the special term to that effect. See also Hatch *v.* Attrill, 118 N. Y. 383 (1890).

In the case of Chittenden *v.* Thannhauser, 47 Fed. Rep. 410 (1891), the court held the directors liable under the statute for a false report where $1,500,000 of stock was issued for mines and property which were offered for sale at about the same time for $150,000. See also 155 N. Y. 475. In Ferguson *v.* Gill, 64 Hun, 284 (1892), $100,000 of stock was issued for a patent which turned out to be worthless. The statute made the directors liable if they knew this fact. The court held that the officers were entitled to prove the conversation at which the value was fixed upon.

In Thurber *v.* Thompson, 21 Hun, 472 (1880), the court said the jury should have before them "evidence of the probable enhanced value growing out of the contemplated improvements made and to be made by the company, and of the public improvements which were expected to add largely to the value of the land for the new objects and purposes to which it was to be devoted. It would be extremely unjust to such a company as this to hold that farming lands upon which the site of a city or town is about to be established, and which are bought for that purpose, and mapped, plotted, and subdivided into city or village lots, are to be viewed, upon a question of overvaluation, merely as agricultural lands."

See also Huntington *v.* Attrill, 42 Hun, 459 (1886); aff'd, 118 N. Y. 365, where land costing $80,000 was turned in for $700,000 of stock. The finding of the jury that the act was fraudulent was sustained on appeal.

In New York, under the statute allowing the incorporation of manufacturing companies, it was assumed that an issue of stock as paid up for cash, at less than its par value, is void. Spring Co. *v.* Knowlton, 103 U. S. 49 (1880), aff'g Knowlton *v.* Congress, etc. Co., 14 Blatchf. 364 (1877); s. c., 14 Fed. Cas. 797; Knowlton *v.* Congress, etc. Co., 57 N. Y. 518 (1874). These three decisions arose from the litigation of a single case. After being reversed in the New York court it was removed into the federal court. In all three decisions the invalidity of the stock was conceded by both parties. The federal courts differed from the state courts, and held that a person partly paying for such illegal stock might recover back such payment, although he had allowed

all paid in.[1] All of these statutes were repealed in 1901, however, and the decisions under them are no longer valuable, except as showing to what results a mistaken policy sometimes leads. Under

the stock to be forfeited for non-payment of further calls.

Under the New York Manufacturing Company Act, providing for the issue of stock for property "to the amount of the value thereof," it was held that the value of the property must equal the par value of the stock. Gamble *v.* Queen's, etc. Co., 123 N. Y. 91 (1890); the court referring to and approving Van Cott *v.* Van Brunt, 82 N. Y. 535 (1880), as being a decision sustaining the common-law right to issue stock below par.

In estimating the value of property turned in to a corporation in payment of stock, a fair profit to the contractor was allowed. Gamble *v.* Queen's, etc. Co., 123 N. Y. 91 (1890). Even though a corporation accepted a note instead of cash in payment for a subscription in violation of the statute which provided that only money, labor done or property actually received should be accepted in payment for stocks and bonds, yet a bank which discounted such note for a corporation held the corporation liable thereon. First Nat. Bank *v.* Cornell, 8 N. Y. App. Div. 427 (1896). The common law on this subject as laid down by the New York courts is given in § 46, *supra*. An issue of $190,000 of stock for property worth $27,500 was held to be a fraudulent overvaluation, as a matter of law. Osgood *v.* King, 42 Iowa, 478 (1876).

[1] It was held that an issue of $300,000 of full-paid stock for a right to apply for patents, which the jury found were worth but $75,000, subjected a stockholder to this statutory liability in New York to an amount equal to the par value of the stock, even though the creditor knew all the facts when he gave credit. National Tube Works Co. *v.* Gilfillan, 46 Hun, 248 (1887); aff'd, 124 N. Y. 302 (1891).

Under the statute creating a double liability until the stock was fully paid, a creditor might show that property was taken at an overvaluation knowingly and fraudulently, and might then enforce the liability. Goodrich *v.* Dorman, 14 N. Y. Supp. 879 (1891).

Under the former New York statute making stockholders liable, the creditor was bound to prove that the directors overvalued the property deliberately and with knowledge of the real value of the property. White, etc. Co. *v.* Jones, 86 Hun, 57 (1895), rev'd on another point in 155 N. Y. 475; s. c., 167 N. Y. 158.

In Powell *v.* Murray, 3 N. Y. App. Div. 273 (1896); aff'd, 157 N. Y. 717, where a company, formed to manufacture electric appliances and plant, issued stock in payment for a license to sell the product of a foreign corporation, it was held that the parties so receiving the stock were liable thereon under the New York statute as not being paid-up stock, such contract being *ultra vires*.

In Herbert *v.* Uhl, 20 N. Y. Supp. 743 (1892), the court seemed to hold that at common law the question of whether services rendered in consideration of stock were fairly worth the amount of stock so issued for such services should be submitted to the jury. The New York statute against the issue of stock below par and the issue of bonds below their fair market value does not prevent the issue of stock and bonds by a railroad company for construction work, and such stock and bonds may be delivered in advance of the work being done. Hudson River, etc. R. R. *v.* Hanfield, 36 N. Y. App. Div. 605 (1899). The statute of New York

the present statutes of New York a stockholder is not liable (except for certain labor claims) if his stock has been fully paid.[1]

prohibiting the issue of stock at less than par and of bonds at less than their fair market value does not prohibit the issue of stock and bonds by a gas company in payment for the stock and bonds of a competing gas company, even though a high value is placed upon the franchise of such competing company as a part of the purchase price. Such a transaction is not illegal on the ground of creating a monopoly, nor is it *ultra vires*, provided the charter of the first company allowed it to purchase stock and bonds, as provided in the New York statutes. Rafferty *v.* Buffalo, etc. Co., 37 N. Y. App. Div. 618 (1899). In enforcing the liability of stockholders under the New York statute requiring the capital stock to be paid in, fraud did not have to be alleged or proved if stock was issued for services rendered before incorporation under a statute which authorized the issue of stock only for money or property. Herbert *v.* Duryea, 34 N. Y. App. Div. 478 (1898); aff'd, 164 N. Y. 595 and 596. A stockholder cannot avoid a statutory liability on the ground that the stock was given to him for nothing by the corporation. Where a creditor sues in behalf of himself and others, yet even if no other creditor comes into the suit the court cannot impose the payment of his claim alone upon the solvent stockholders whose stock is not full paid. Hallett *v.* Metropolitan, etc. Co., 69 N. Y. App. Div. 258 (1902).

[1] See § 54 Stock Corp. Law.

Stock subscribed for by the incorporators in the certificate of incorporation may be paid for by property subsequently transferred by the corporation, but if the property is taken at a willful and fraudulent overvaluation such stock is not "fully paid" within the meaning of the New York statute rendering stockholders liable for corporate debts to the amount of their stock until the whole capital stock issued and outstanding has been fully paid. Flour City, etc. Bank *v.* Shire, 88 N. Y. App. Div. 401 (1903); aff'd, 179 N. Y. 587, the court saying: "In passing upon such a question as this the law makes due allowance not only for variations in the judgment of different men passing upon the values of properties but makes allowance for errors and mistakes of judgment when honestly made, but it does not countenance or excuse intentional or fraudulent overvaluations, and when a claim that capital stock has been fully paid is based upon such valuations it must fail and fall as it has in this case."

Even though two of the directors sell to the corporation certain patents for $3,000,000 full paid stock, being the entire capital stock, and give to the corporation $750,000 of the same as treasury stock, and even though the patents are worth but $10,000, neither the corporation nor a purchaser of treasury stock at fifty cents on the dollar can compel them to return the stock nor hold them liable thereon, but the remedy, if any, is to rescind the transaction and return the patents and demand a return of the stock or the value of such part of the stock as they have sold. Such is the rule, even though the statutes of the state prohibit the issue of stock at less than par. The court said (p. 477): "Whether they knew that the value of the patents did or did not exceed $10,000 was entirely immaterial. They had a right to hold the letters patent until they were offered the price at which they were willing to sell. They sold them to this company for its whole capital stock, agreeing with the com-

In Ohio, by statute, an issue of stock to a director, directly or indirectly, for less than the par value thereof, is void,[1] and the gen-

pany that that was the value of the patents. I know of no principle which would justify a court of equity in compelling the owners of these patents to accept any consideration for their transfer to the corporation except that agreed on, and, upon the ground that the patents are not worth the sum agreed on as a consideration for the transfer, decree that the vendors must pay back to the company the consideration they had received, less the real value." A purchaser of the treasury stock has of course a remedy at law if there were false representations. Insurance Press *v.* Montauk, etc. Co., 103 N. Y. App. Div. 472 (1905).

A stockholder is not liable to a corporate creditor, under the New York statute relative to stock not fully paid, on stock issued to him at less than par, unless such stockholder's liability existed when the creditor recovered judgment against the company. Dyer *v.* Drucker, 108 N. Y. App. Div. 238 (1905).

In a suit by a corporate creditor to hold a stockholder liable on watered stock, an allegation that the stockholder owned stock of the par value of $4,800, and that he had paid the company "a sum not exceeding $3,000, leaving a balance due on said stock of at least $1,800," is merely a legal conclusion, where the stock might have been issued for property or services. Dyer *v.* Drucker, 108 N. Y. App. Div. 238 (1905).

The New York courts will, at the instance of a New York stockholder in a New Jersey corporation, enjoin the latter from issuing stock as a bonus with bonds in violation of the New Jersey statute requiring stock to be issued for money or property, even though the actual value of the stock and bonds so issued does not exceed the par value of the bonds and the amount received by the corporation is the par value of the bonds. The fact that the company is in a failing condition does not change the effect of the statute. Kraft *v.* Griffon Co., 82 N. Y. App. Div. 29 (1903).

Under the New York statute which requires that stock or bonds shall be issued only for money paid or property, the purchaser of bonds from the corporation cannot make payment in the note of a third person where the note is not good. *In re* Waterloo, etc. Co., 134 Fed. Rep. 341 (1904), rev'g 128 Fed. Rep. 517 (1904).

A railroad construction contract by which the work is paid for by stock and bonds is not a stock subscription nor a sale of the stock, but is merely a contract, and the receiver of the railroad cannot hold a contractor liable for the alleged value of the stock and bonds, he being estopped the same as the corporation itself, and there being no promise to pay the par value of the stock. Bostwick *v.* Young, 118 N. Y. App. Div. 490 (1907).

Where the incorporators subscribe for the entire capital stock—$500,000—and pay it in by checks, and the corporation then buys from one of the directors a steel plant for $500,000 cash, which he had previously purchased for $85,000, and he then distributes the $500,000 cash among the stockholders, in the proportion in which they had paid for their stock, they are liable upon the bankruptcy of the corporation, the transaction being an unauthorized disposition of the corporate assets. Rathbone *v.* Ayer, 121 N. Y. App. Div. 355 (1907).

1 Ohio Rev. Stat., § 3313, sets forth that "all capital stocks, bonds, notes, or other securities of a company purchased of a company by a

eral statutes of the state are construed as invalidating an issue of stock for property taken at an overvaluation.[1] In Indiana the directors are liable if certain statutory provisions are violated in the issue of stock.[2]

In Maine the former statutes were construed so as to render stockholders liable to corporate creditors where property was taken in

director thereof, either directly or indirectly, for less than the par value thereof, shall be null and void." In Zabriskie *v.* Cleveland, etc. R. R., 23 How. 381 (1859), this provision was held not to affect the liability of a guarantor of such bonds. See § 766, *infra*.

But in Union Trust Co. *v.* New York, etc. R. R., 17 Weekly Law Bull. 176 (Ohio, 1887), the court, in applying this statute, held that where $50,000,000 of paid-up stock and $15,000,000 of bonds are given to a syndicate, of which a director is a member, for $18,000,000 of money, the stock and bonds and the mortgage securing the bonds are void.

1 Under the Ohio constitution and statutes, where a partnership having property worth $37,500 turns it over to a corporation in payment for $75,000 of stock issued as full paid, and the corporation becomes insolvent, the partners are liable on their stock to corporate creditors for the remaining $37,500. Gates *v.* Tippecanoe Stone Co., 57 Ohio St. 60 (1897). In passing upon the validity of a railroad construction contract whereby bonds and preferred stock and common stock were issued for construction work, the court in figuring the actual value received by the railroad for these securities figured the common stock at fifteen cents on a dollar and the preferred stock at thirty cents on a dollar and the bonds at seventy-six cents on a dollar, and held that this was legal, even under the Ohio statutes. Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497 (1899). As to the common law in Ohio, see § 46, *supra*. Where a New Jersey corporation has issued its stock in exchange for stock of a foreign corporation and paid money in addition thereto, and an Ohio court has held that the transaction was illegal, the money to be paid cannot be collected by a suit in New Jersey. Strickland *v.* National Salt Co., 64 Atl. Rep. 982 (N. J. 1906).

2 Where a water-works company issues $197,000 of stock as full paid and $150,000 of mortgage bonds to a contractor for construction work, the work actually costing less than $150,000, and the contractor pays to one of the directors $6,000 in cash and gives to the two others $20,000 each of the stock, such directors are liable to corporate creditors for the debts of the latter, under the Indiana statute rendering the directors liable where the provisions of the statute have been violated. Clow *v.* Brown, 150 Ind. 185 (1898). Where a water-works company issues $197,000 of stock and $150,000 of bonds, for work which is worth only the amount of the bonds, the Indiana statute rendering directors personally liable for not causing the capital stock to be paid up within eighteen months is applicable. The court said "the plan of the promoters, stockholders and directors of the company was to build a water-works without capital and without risk of expense to themselves," and that by taking all the stock and all the bonds they left the corporation where it was unable to pay any other debts, either by the sale of stock or bonds. Brown *v.* Clow, 158 Ind. 403 (1902). As to the common law in Indiana, see § 46, *supra*.

payment at an overvaluation;[1] but in 1901 these statutes were modified so as to protect the stockholders under such circumstances.

In Wisconsin the statute prohibits the issue of stock at less than par, and prohibits the issue of bonds at less than seventy-five cents on the dollar.[2]

1 In Maine it was held that where property purchased by individuals for $6,666.67 was turned in to the corporation for $240,000 of full-paid stock, the stockholders are liable on the stock as though the subscription price had not been paid. This decision was made under the statute that property shall be taken "at a *bona fide* and fair valuation thereof." In this case a part of the stock was turned back as treasury stock and sold at a small figure. The court expressly stated that its decision was based on the statute and that alone. Libby *v.* Tobey, 82 Me. 397 (1890). The liability of subscribers for stock under the Maine statutes where the stock is not properly paid up cannot be enforced in the federal courts by a suit in equity, even though the statutes of Maine authorize such a suit. Alderson *v.* Dole, 74 Fed. Rep. 29 (1896). Under the statutes of Maine a corporate creditor was able, to the extent of his claim, to recover from a person to whom stock was issued for property the difference between the par value of the stock and the actual value of the property, even though such property was taken in good faith. It was held that the creditors were entitled to go behind even the honest opinion of the parties as to the value of the property. Such liability may be enforced by the creditors or by assignees appointed by the court, but such liability is secondary and can be enforced only after the corporate assets have been exhausted and the exact deficiency ascertained. Gillin *v.* Sawyer, 93 Me. 151 (1899).

2 The issue of fictitious or watered stock is a felony in Wisconsin. See Rev. Laws 1905, § 2911. The Wisconsin statute that bonds should not be issued for less than seventy-five per cent. of their par value does not apply to a transaction where old bonds are placed under a new mortgage and the holders of the old bonds receive new bonds in lieu thereof. Mowry *v.* Farmers' L. & T. Co., 76 Fed. Rep. 38 (1896).

Under the Wisconsin statute, if an issue of stock as collateral for a debt of the company is illegal, the stock is void, and the holder thereof is not liable to corporate creditors who were not especially misled by his conduct. Andrews *v.* National, etc. Works, 76 Fed. Rep. 166 (1896).

Even though a statute declares that stock not issued at its par value shall be void, yet this refers to the certificate and not to the stock itself. Pietsch *v.* Krause, 116 Wis. 344 (1903).

Where promoters buy property with a view to organizing a corporation to take it over, and it is taken over with a purchase-money mortgage nearly equal to the price paid, together with a large bonus of stock, yet, even though they are the only stockholders, if thereafter the balance of the capital stock was sold to outsiders to whom misrepresentations were made as to the cost of the land, the promoters are liable to the corporation for their profits. The suit must be at law and is barred by the six years' statute of limitations. Pietsch *v.* Milbrath, 123 Wis. 647 (1904).

Bonds issued by a corporation as collateral for a debt will not be ordered to be canceled because issued in violation of the state statute re-

A statute prohibiting the sale of stock below par does not prevent

quiring payment in money or property of a certain percentage of their face value, unless the money received by the company upon the pledge of the bonds had been repaid or otherwise secured. Andrews *v.* National, etc. Works, 76 Fed. Rep. 166 (1896).

Under this statute stockholders who paid for their stock by turning in mining property known to them to be worth only one-tenth of the par value of the stock are liable for the remaining nine-tenths of the par value to corporate creditors. The question of whether the creditors knew all the facts is a matter to be set up in defense. Gogebic Inv. Co. *v.* Iron Chief Min. Co., 78 Wis. 427 (1891).

Where a statute declares that stock issued for money or labor or property estimated at less than its true money value, actually received, equal to the par value of the stock, shall be void, and the secretary issues to himself and the president some stock for no consideration, and then sells such stock, the bondsmen for such secretary are not liable on account of such issue of stock, there being no sufficient allegation that the purchasers relied on the certificates and were innocent of their general character and that they exercised ordinary care. First Ave. etc. Co. *v.* Parker, 111 Wis. 1 (1901). Where a person owns land subject to a mortgage for its full value, and transfers his equity to a new corporation for $700,000, the fact that the board of directors had authorized the purchase of the land for $1,000,000 of stock does not prove that $700,000 of stock was legally issued for such equity. Heinze *v.* South, etc. Co., 109 Wis. 99 (1901). Where parties who suppose they own a timber tract worth $500,000 sell the same to a corporation for $500,000 full-paid stock, and it afterwards transpires that their title is defective as to a part of the property, and the corporation in order to perfect the title pays out $215,000, although the stock actually issued for that part of the property was only $55,000, the parties to whom the stock was so issued are liable only for the $55,000, especially where a settlement has been made with some of them on that basis. A contract between the original parties by which some guaranteed others against liability on account of any defects in the title cannot be enforced by the corporation, and hence cannot be made the basis of the measure of damages. On the other hand, the parties receiving the $55,000 of stock cannot return it and avoid liability on the ground that the consideration for the issue of the stock had failed. If the stockholders are few in number the court may decree payment directly to the stockholders who complain and directly to such of the stockholders who are entitled to participate in the distribution of the $55,000. Jenkins *v.* Bradley, 104 Wis. 540 (1899). Where a national bank and two of the directors are secretly interested in the profit made by selling property to a corporation for stock the corporation may hold them liable for such profit. The defense of *ultra vires* on the part of the bank is not good. Zinc, etc. Co. *v.* First, etc. Bank, 103 Wis. 125 (1899). Where promoters purchase a saw-mill plant for $20,000, and pay therefor in a purchase-money mortgage, and then sell the equity of redemption to a corporation for $60,000 of stock, the corporation assuming the $20,000 mortgage, it is for the jury to say whether the property was fraudulently and substantially overvalued for the purpose of imposing on the business public, and if so, such promoters are liable to corporate creditors, but if not, they are not liable even though

the corporation from pledging it, and a sale of the stock by the pledgee below its par value is legal.[1]

Minnesota also has a statute on this subject,[2] and in Tennessee,

the equity of redemption was not worth the par value of the stock. National Bank *v.* Illinois, etc. Lumber Co., 101 Wis. 247 (1898).

[1] See § 465, *infra.*

[2] In the case of Brown *v.* Duluth, etc. Ry., 53 Fed. Rep. 889 (1893), the court refused to enjoin an issue of stock and refused to cancel stock already issued, although $900,000 of bonds and $945,000 of stock were issued for construction work which cost $580,000. The court so held, although the statute required the stock to be fully paid, and prohibited issues except for property actually received. The plaintiff, however, was a holder who purchased with full knowledge of the facts. The court said: "This statute was not intended to prevent or interfere with the usual method of raising money to build railroads or for any legitimate corporate purpose. It is not to be construed as obstructive to the extent of restricting and hampering corporations in their internal management, and embarrass them in procuring means to carry out the legitimate purposes of the corporation; and unless it appears that, under the guise of building its road, bonds and stock of the defendant company are to be issued and put upon the market fraudulently that do not and are not intended to represent money and property, this corporation is not prohibited from entering into a real transaction based upon a present consideration, and having reference to legitimate corporate purposes." The court also said that "such a provision does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued."

In First Nat. Bank *v.* Gustin, etc. Co., 42 Minn. 327 (1890), there is a *dictum* to the effect that in certain cases *bona fide* creditors may enforce payment of the difference between par value of the stock and the real value of the property turned in as payment for it in full.

In Minnesota it is held that where stock is issued for property materially overvalued, to the knowledge of the contracting parties, the stockholders are liable to subsequent corporate creditors (who became such without notice) for the difference between the par value of the stock and the real value of the property. Hastings Malting Co. *v.* Iron Range Brewing Co., 65 Minn. 28 (1896). In this case the property received was worth $18,000 and was paid for by the issue of $30,000 par value of stock.

A subscriber for stock who has not paid therefor, except by turning in worthless property, and who afterwards then transfers his stock to another person after the company becomes insolvent, is still liable on the stock. McConey *v.* Belton, etc. Co., 97 Minn. 190 (1906).

Holding also that where incorporators subscribe for stock and subsequently attempt to pay therefor by leases, which are of no value, they may be held liable in Minnesota by a subsequent creditor in good faith of the corporation, and no previous judgment need be obtained in Arizona, where the company was incorporated, it appearing that it had no assets in Arizona and its principal office was in Minnesota, where suit was brought.

A person who takes part in a reorganization by which stock is issued to old stockholders who pay seventy-

by statute, the property received must be "at a fair valuation."[1] In New Jersey there is a statute applicable to stock in railroad corporations,[2] and there is also the usual statutory provision that

five cents on the dollar therefor, cannot afterwards claim that the reorganization was illegal. State *v.* Germania Bank, 90 Minn. 150 (1903).

A person purchasing stock issued for cash at less than par is liable thereon if he purchased with knowledge of the facts, even though the stock purports to be paid up. The statute of Minnesota which apparently authorized the issue of stock at less than par was construed away by the court and the issue of stock at less than par declared illegal. Hence, where a company issues $400,000 of stock for $5,000 and a license to manufacture and sell machinery under certain patents, the entire value of the latter being not more than $130,000, the issue is fraudulent and the stockholders are liable for the $270,000 difference. Wallace *v.* Carpenter Electric, etc. Co., 70 Minn. 321 (1897).

[1] Under the Tennessee statutes that only cash or land "at a fair valuation" shall be received in payment for stock, the fact that the land was overvalued is insufficient. There must be proof of an "overvaluation which was intentionally fraudulent, or which was so gross as to be constructively fraudulent, as against corporate creditors." Jones *v.* Whitworth, 94 Tenn. 602 (1895).

Where land is bought for $125,000, and $35,000 thereof is paid, and then the land is conveyed to a corporation, subject to the $90,000 lien, for $250,000 of stock, this amounts to turning out $250,000 of stock for an equity that cost $35,000. Nevertheless, the stockholders are not liable unless overvaluation is alleged and proved. Shields *v.* Clifton Hill Land Co., 94 Tenn. 123 (1894). To same effect, Kelley *v.* Fletcher, 94 Tenn. 1 (1894). A receiver must obtain special permission from the court before commencing suit against directors for negligence and against stockholders to hold them liable on stock issued in payment for property at an alleged overvaluation. Simmons *v.* Taylor, 106 Tenn. 729 (1901). In a suit by the receiver of an insolvent street railway company to hold a construction company liable on stock which, together with bonds, was issued for the construction of a street railway, the claim being that there was no consideration received for the stock, the bill in equity must allege that the construction company had power to acquire such stock. If such stock was issued and received as full-paid stock the construction company is not liable thereon, even though $63,750 of stock and $95,000 in notes secured by bonds were issued for construction work costing but $95,000. Doak *v.* Stahlman, 58 S. W. Rep. 741 (Tenn. 1899). A corporation cannot hold the directors liable on stock which the corporation issued to them for services, being taken by the directors at five cents on the dollar in lieu of salary, where all the stockholders assented thereto, such stock so issued to them being treasury stock, that is, stock which was issued for property as full paid and then donated to the corporate treasury. The evidence showed that the stock represented a patent right and was purely speculative and had no market value. Divine *v.* Universal, etc. Co., 38 S. W. Rep. 93 (Tenn. 1896).

[2] A railroad mortgage in New Jersey is not valid if it exceeds the amount of cash paid in on its capital stock. The mortgage, however, may be made in advance of construction. Where $900,000 of bonds and $900,000 of stock are issued to a con-

stock must be paid for. This statute, however, has in recent years been given a rather drastic application and it is now somewhat dangerous to issue watered stock in the state of New Jersey.[1] In

tractor for work costing only $900,000, the bonds are invalid, except in *bona fide* hands. On a bill filed by the receiver to cancel the mortgage the court so decreed, upon condition, however, that *bona fide* holders were first paid the amounts they paid for their bonds. Various parties' rights were passed on by the court. Directors and other participating parties holding bonds were allowed nothing. Baker *v.* Guarantee, etc. Co., 31 Atl. Rep. 174 (N. J. 1895). On appeal the court held that where the statutes prohibit debts in excess of the capital stock actually paid in, the excessive bonds in the hands of a director cannot be enforced. Steelman *v.* Baker, 53 N. J. Eq. 672 (1896). But where one issue of bonds was legal and a second issue was illegal, a director holding bonds of the first issue may enforce them. Physick *v.* Baker, 53 N. J. Eq. 673 (1896).

[1] A bill in equity is not multifarious when filed by a receiver of an insolvent corporation against the stockholders and bondholders, alleging that some of them as owners of a large number of paper mills, and others as promoters of the same, caused them to be conveyed to the corporation for bonds and preferred stock and common stock, the par value of all of which was much greater than the actual value of the property so conveyed, even though such bill asks that the claims of the bondholders be reduced to the amount actually paid for the bonds, and that the stockholders be held liable for such part of the par value as was not fairly paid for by the property, and even though such bill asks that the promoters be held liable on loss due to stock and bonds which passed into *bona fide* hands. See *v.* Heppenheimer, 55 N. J. Eq. 240 (1897); aff'd, 56 N. J. Eq. 453. This same transaction was involved in the case of Dickerman *v.* Northern T. Co., 176 U. S. 181 (1900), and the court there held that the mortgage was legal and could be enforced, yet the court intimated that the promoters could be held personally liable.

On the final hearing of the See case, mentioned above, the following points were passed upon:

Where promoters purchase various industrial plants for $2,250,000 and turn them into a corporation, organized by them for that purpose, for $1,000,000 bonds and $4,000,000 stock and then sell part of the bonds and stock on the basis of $1,000 of bonds and $600 stock for $1,000, such issue of stock is illegal, and hence upon the company becoming insolvent such stock is not paid up and, as required by the New Jersey statute, the stockholders must pay up enough to pay the debts, not exceeding the amount still unpaid on such stock, whether the holder of the stock was an original holder or not. Where stock and bonds were issued for property at an overvaluation, and then a $1,000 bond and $600 of stock were sold for $1,000 in cash, the court held the purchaser liable for the $600 worth of stock. The court held that under the New Jersey statute stock could not be issued for good-will or contemplated profits. Where promoters organize a corporation and through a dummy board of directors cause stock to be issued for property at an overvaluation, the stock will not be considered fully paid up and the promoters will be held liable as such stockholders. It is the duty of promoters to furnish the corporation with a competent and independent board of directors to negotiate

New Jersey, at the instance of a dissenting stockholder, a court of

the purchase of property for which stock is issued, and such directors should act wholly in the interest of future stockholders and not be biased or influenced by the persuasions or friendship of the proposed vendors. It is the duty of promoters to tell all the facts to the board of directors, including the actual cost of properties which are to be sold, and they should ask for investigation as to the value and cost of reproduction. An attorney who receives a large amount of stock, which has been issued for property at an overvaluation may be liable thereon. A court of equity may enforce the liability of stockholders who have turned in property in payment for their stock at a fraudulent overvaluation, even though the creditors did not obtain judgments and have executions returned unsatisfied. It is doubtful whether a holder of stock which purports to be fully paid up can be held liable thereon in an action at law, because the certificate of stock must first be disposed of and annulled as having been fraudulently issued. The liability on stock issued for property at an overvaluation may be enforced by a receiver. Where the amount still due on unpaid stock is sufficient the judgment against the stockholders may include the claims proved and allowed with interest; also fees for creditors in winding up the company and in the suit to recover from the stockholders; also counsel fees and compensation to the receiver and expenses incurred in enforcing the decree. As against a liability on stock issued for property at an overvaluation a stockholder cannot set off bonds which he holds but which had not been filed as a claim against the corporation and which have been barred by the decree barring creditors. A non-resident stockholder who appears and contests a claim that he is liable on stock issued for property at an overvaluation is subject to a decree rendered against him. In holding stockholders liable on stock fraudulently issued for property at an overvaluation, the court may hold liable to the full extent of their liability stockholders who reside in the state, leaving the latter to seek contribution from stockholders outside of the state. Stockholders who are held liable on their stock by reason of its not being paid up may have contribution from other stockholders, even though all the stock was originally issued for property taken at an overvaluation. See *v.* Heppenheimer, 69 N. J. Eq. 36 (1905). See 69 Atl. Rep. 643.

Where stock is issued for property at what is known to be an overvaluation, and a part of the stock is then distributed among the directors without payment therefor, the transaction is a fraud as regards corporate creditors, and the stockholders are liable for the difference between the value of the property and the par value of the stock. Mere overvaluation is not sufficient. It must also be proved that the transaction was a fraud on corporate creditors. Where $1,000,000 of stock is issued for patents without a meeting of the board of directors, and the stock is subsequently divided in such a way as to show that the parties knew the patents were not worth that amount, the stockholders may be held liable by a receiver seventeen years afterwards. The issue was valid as between the corporation and the stockholders, but was not binding on corporate creditors. The remedy of the receiver to hold stockholders liable on the stock is by bill in equity and not by petition. Easton Nat. Bank *v.* American, etc. Co., 69 N. J. Eq. 326 (1905).

Where $1,000,000 of stock is issued for patents, which by the papers seem

equity has power to review the judgment of the board of directors

to have been valued at less than half of the stock, the stockholders are liable, under the New Jersey statute, even though seventeen years have elapsed, especially where no formal action seems to have been taken by the directors in purchasing the patents. Where stock is issued for property taken at a fraudulent overvaluation, the contract need not be set aside before holding the stockholders liable for the benefit of corporate creditors. Under the New Jersey statute corporate creditors existing at the time stock is issued as well as creditors who become such afterwards with notice of the character of the issue may hold the stockholders liable if the stock is issued for property taken at an illegal valuation. Under the New Jersey statute where stockholders are held liable to corporate creditors on stock issued for property taken at a fraudulent overvaluation, a creditor is entitled to participate, even though he is also one of the stockholders and took part in the illegal issue. Easton Nat. Bank *v.* American, etc. Co., 64 Atl. Rep. 917 (N. J. 1906), rev'g in part 69 N. J. Eq. 326.

Where real estate worth $125,000 and an unsuccessful patent are sold to a corporation for $1,125,000 of full paid stock, and one-half of the stock is then turned back as treasury stock, and the company becomes insolvent, the stockholders are liable for the corporate debts and expenses of administration. Honeyman *v.* Haughey, 66 Atl. Rep. 582 (N. J. 1906).

Even though it is clear that property was transferred to a corporation for stock and bonds, the par value of which is much greater than the actual value of the property, yet a dividend on the stock cannot be enjoined by a stockholder on the ground that the profits should be used to add to the actual value of the assets sufficient to make them equal to the par value of the stock and bonds so issued, even though the amount of "water" is $11,000,000, it appearing that there were no floating debts and it not appearing that any one was defrauded. Goodnow *v.* American, etc. Co., 66 Atl. Rep. 607 (N. J. 1907), the court saying: "The rule seems to be established that between stockholders one cannot be legally called upon to make good any shortage in value between assets and the nominal par value of the stock, when his stock is issued under a contract with the company as full paid, whether as a bonus, or for property at an overvaluation, when the issue is consented to by all the stockholders. It is a bargain between the contracting parties which, in the absence of fraud, they cannot abrogate."

"Stock issued as a bonus with the sale of bonds, or stock issued through the means of overvaluation of property, cannot properly be regarded as necessarily issued fraudulently. In the absence of intervening rights of creditors, such transactions appear to have been generally supported by the courts, unless positive fraud has been clearly established, notwithstanding the constitutional and statutory provisions of many of the states designed to secure a proper relationship between the capital stock and the assets of corporations." Arnold *v.* Searing, 67 Atl. Rep. 831 (N. J. 1907); also 69 Atl. Rep. 788.

Where stock is issued for property and the transaction is set aside, a suit lies by the receiver of the company to have the stock cancelled. McMaster *v.* Drew, 68 Atl. Rep. 771 (N. J. 1908).

Where a person subscribes for stock and afterwards payment is made in property at a gross overvaluation, the court may hold him liable

in valuing property which the company is about to purchase and

for the difference between the actual value of the property and the par value of the stock, even though the company went through the form of canceling the subscription and issuing the stock as an original issue for property. Hebberd *v.* Southwestern, etc. Co., 55 N. J. Eq. 18 (1896). In the case of Short *v.* Post, 58 N. J. Eq. 130 (1899), where two mortgages and a large amount of stock were issued by a corporation for property worth no more than the first mortgage, and the receiver of the corporation defended against such first mortgage on the ground that the mortgage was usurious, because some of the stock had been given to the mortgagee without consideration, the court held the defense not good under the facts in that case.

Although the incorporators of a New Jersey company have contracted to issue sixty per cent. of its stock to a person for two patents, yet the board of directors after the company is organized may refuse to carry out the agreement, one patent being worthless and the other not having been perfected. The court said: "To justify a corporation in issuing stock under our act for property purchased, there should be an approximation, at least, in true value of the thing purchased to the amount of the stock which it is supposed it represents." Edgerton *v.* Electric, etc. Co., 50 N. J. Eq. 354, 361 (1892).

A dissenting stockholder in a New Jersey corporation owning a street railway in Washington may enjoin a sale of the property to a Washington street railway company for 20,000 shares of the full paid stock of the latter where dissenting stockholders of the former are to be paid only $35 cash in lieu of each share of the Washington corporation, which he would be entitled to. On its face this is an issue of the Washington stock at $35 per share, and is in violation of the Washington statutes. Coler *v.* Tacoma Ry. etc., 65 N. J. Eq. 347 (1903).

Where by statute the preferred stock shall not exceed two-thirds of the capital stock paid in for cash or property, a preferred stockholder cannot question the value of property received in payment for the preferred stock in a suit instituted by him to enjoin the corporation purchasing its own stock, as allowed by statute, where the assets, less the debts, equal the preferred stock outstanding. Hodge *v.* United States Steel Corp., 64 N. J. Eq. 90 (1902).

Where two parties make an agreement by which one turns in property to a New Jersey corporation for stock, the par value of which they know is many times greater than the actual value of the property, such an issue is in violation of the New Jersey statute, and neither party can enforce the contract as against the other, nor compel a division of the stock so obtained. Volney *v.* Nixon, 68 N. J. Eq. 605 (1905), aff'g 67 N. J. Eq. 457.

Where a promoter causes the stockholders in various electric companies to turn in their stock to a new corporation in exchange for bonds of the latter, and also gives to such stockholders the right to purchase, at $30 a share, stock in the latter, a stockholder, who has done so and then discovers that the promoter has made $20,000,000 profit in stock of the new company, may bring suit to compel the promoter to turn over the profit to the corporation and may join the new corporation as a party defendant. It is no defense that the board of directors of the latter thinks it inexpedient that the suit be brought. Groel *v.* United, etc. Co., 69 N. J. Eq. 39 (1905); s. c., 69 N. J. Eq. 397 (1905). The court said (p.

pay for in increased capital stock, but after the stock has been issued

1064): "The authorities hold that it is a matter of discretion in the court whether to permit a suit to be brought by a stockholder on behalf of his corporation, and that the court will exercise its discretion, having in view the circumstances of the parties, their relationships to each other and to the cause of action, the refusal to sue," etc.

A state may tax capital stock issued for letters patent, the issue for patents in this case being the entire capital stock of $2,000,000 except $2,500 which was issued for cash. American, etc. Co. *v.* State, etc., 70 N. J. L. 172 (1903).

While a corporation may issue stock for labor and services, yet it must be at a fair and *bona fide* valuation, and the proof that the issue was made for labor must be clear. Clevenger *v.* Moore, 71 N. J. L. 148 (1904).

Where a court has declared void a conveyance of property to a corporation in payment for stock and the corporation becomes insolvent, the receiver may file a bill to ascertain the rights of the existing stockholders and he need not set forth the condition of the company. McMaster *v.* Drew, 62 Atl. Rep. 558 (N. J. 1906).

Where a New Jersey corporation has issued its stock in exchange for stock of a foreign corporation and paid money in addition thereto, and an Ohio court has held that the transaction was illegal, the money to be paid cannot be collected by a suit in New Jersey. Strickland *v.* National Salt Co., 64 Atl. Rep. 982 (N. J. 1906).

Even though a company has agreed to issue its full paid stock for property, yet if the contract has not been carried out and the directors have not adjudged that the value of the property was equal to the par value of the stock, and it is evident that it was not equal to such par value, a bill by the party owning the property for specific performance will not be upheld. Ecuadorian Assoc. *v.* Ecuador Co., 65 Atl. Rep. 1051 (N. J. 1907).

The case *In re* Remington, etc. Co., 119 Fed. Rep. 441 (1902), involved a suit brought in the federal court in New York by a creditor of a New Jersey corporation against the stockholders to hold them liable on stock which was alleged to have been issued for an insufficient consideration in the way of property.

Even though the owners of mining claims organize a corporation in New Jersey, and they themselves as directors, together with dummy directors, cause the corporation to purchase the claims for $750,000 par value of stock, although the mining claims were worth but $5,000, and even though thereafter additional capital stock is sold by the corporation to the public for cash at par, yet the corporation cannot rescind the transaction, inasmuch as there were no other stockholders at the time of the transaction, and hence no one was deceived. Old Dominion, etc. Co. *v.* Lewisohn, 136 Fed. Rep. 915 (1905); aff'd, 148 Fed. Rep. 1020 and 210 U. S. 206. A contrary conclusion was reached in regard to the same transaction in Old Dominion, etc. Co. *v.* Bigelow, 188 Mass. 315 (1905).

The New York courts will, at the instance of a New York stockholder in a New Jersey corporation, enjoin the latter from issuing stock as a bonus with bonds in violation of the New Jersey statute requiring stock to be issued for money or property, even though the actual value of the stock and bonds so issued does not exceed the par value of the bonds and the amount received by the corporation is the par value of the

the judgment of the directors is conclusive.[1] And there are statutes in Iowa,[2] Massachusetts,[3] Oregon,[4] and Utah[5] on this subject of watered stock.

bonds. The fact that the company is in a failing condition does not change the effect of the statute. Kraft *v.* Griffon Co., 82 N. Y. App. Div. 29 (1903).

As to the common law in New Jersey, see § 46, *supra.*

1 Donald *v.* American, etc. Co., 62 N. J. Eq. 729 (1901), rev'g 61 N. J. Eq. 458. See also McCarter *v.* Pitman, etc. Gas Co., 69 Atl. Rep. 211 (N. J. 1908).

2 In Osgood *v.* King, 42 Iowa, 478 (1876), where stock was issued for land grossly overvalued, the court held the vendor liable for the par value of the stock less the actual value of the land. The person receiving the stock was a director at the time.

3 Under the statute of Massachusetts of 1902 officers and stockholders in a corporation who have taken part in the company's issue of stock for property at an unfair valuation are personally liable for the debts, and this statute was enforced in Anthony, etc. Co. *v.* Metropolitan Art Co., 190 Mass. 35 (1906), where $100,000 of stock was issued for $50,000 worth of property, even though there was no proof of any fraudulent intent or of any actual knowledge that the valuation was unfair.

A statute that the commissioner of corporations must pass upon the value of property, which is turned in for stock, cannot be evaded by the parties paying cash to the corporation for the stock and then using that cash to buy the property from themselves. Yet if they do so under advice of counsel, they are not liable for the penalty for doing so. Harvey-Watts Co. *v.* Worcester, etc. Co., 193 Mass. 138 (1906). See also § 48, *infra.*

4 In Oregon under the constitutional provision making stockholders liable for corporate debts to the amount of their stock subscribed and unpaid, a creditor may show that stock was issued for property taken at an overvaluation and may hold the stockholders liable for the difference between the actual value of the property and the price at which it was received. If the purchase was made in good faith there is no liability, but where parties purchase a half interest in a creamery for $5,000, and on the following day all of the owners transfer their interest to a corporation formed for that purpose for $16,000 of full-paid stock, the transaction is clearly fraudulent as to creditors and the stockholders may be held liable. Macbeth *v.* Banfield, 45 Or. 553 (1904). See 96 Pac. Rep. 528

5 There is a statute also in Utah. Where parties supposed that certain lands were public lands of the United States and open to patent, and they quitclaimed the same to a corporation in payment for stock, and it turns out that the lands had been previously patented by other parties, the former are liable on the stock to corporate creditors. Henderson *v.* Turngren, 9 Utah, 432 (1894).

Where mining claims which are worthless are conveyed to a company for $200,000 of paid-up stock, the stock is not paid up, and the parties receiving the stock are liable for the par value thereof to corporate creditors. Salt Lake Hardware Co. *v.* Tintic Milling Co., 13 Utah, 423 (1896). Stockholders are not personally liable on stock issued as full paid to the amount of $25,000 for mining claims which were reasonably estimated to be worth that sum. Richardson *v.* Treasure, etc. Co., 23 Utah, 366 (1901).

In England, in 1863, the Companies Clauses Consolidation Act[1] prohibited the issue of new stock for a price less than its par value.

In Jackson *v.* Traer, 64 Iowa, 469 (1884), overruling s. c., 16 N. W. Rep. 120 (1884), the stock was not issued to the construction company for the purpose of constructing the corporate works, but was issued after the construction was finished, and a cash debt was due them, which was paid by an issue of the stock to pay that debt already due.

The supreme court of the United States, in Clark *v.* Bever, 139 U. S. 96 (1891), refused to follow the decision in Jackson *v.* Traer, 64 Iowa, 469 (1884). Both of these cases grew out of the same transaction.

In Chisholm *v.* Forny, 65 Iowa, 353 (1884), where full-paid stock was issued for a patent-right, in good faith, but the patent-right subsequently turned out to be worthless, the stockholders were held liable to corporate creditors as though no payment had been made.

Where $100,000 of stock was issued for patents worth $16,000, and $50,000 of the stock was transferred by the patentees to a trustee for all the stockholders, a subscriber for $1,500 of stock, who pays the company therefor $500, is liable to corporate creditors for $1,000, even though the $1,500 of stock was a part of the $50,000 of stock that the inventors retained and directed the company to issue to defendant. The defendant was not a *bona fide* subscriber or transferee, but was one of the promoters and was president of the company. Fraud cannot be alleged in defense. Boulton Carbon Co. *v.* Mills, 78 Iowa, 460 (1889).

In the following case a very peculiar device was successful. Stock was issued conditionally that its issue be complete and binding when it became worth par, and that the price then to be paid for it to the company should be fifty cents on the dollar. The stock was issued and partly paid for, but never reached par in value: Held, that a participating stockholder, who was also a creditor, could not, nor could his assignee, enforce any liability. Callanan *v.* Windsor, 78 Iowa, 193 (1889).

Where land is sold to a corporation in exchange for stock, the actual value of the land being only thirty-six per cent. of the par value of the stock, the holders of the stock are liable for the remaining sixty-four per cent. to corporate creditors. Wishard *v.* Hansen & Co., 99 Iowa, 307 (1896).

In the case of National Park Bank *v.* Peavey, 64 Fed. Rep. 912 (1894), the court refers to the Iowa decisions on this subject of fictitiously paid-up stock as being based upon the Iowa statutes, and held that a corporate creditor might enforce the liability in an action at law as allowed by the Iowa statute.

In Iowa the court considers the value of the property, and credits on the stock only the actual value, and holds the stockholders and transferees with notice liable for the difference, even though the stock was issued as full-paid. Tuthill Spring Co. *v.* Smith, 90 Iowa, 331 (1894).

In White *v.* Greene, 70 N. W. Rep. 182 (Iowa, 1897); aff'd, 105 Iowa, 176 (1898), the court held the stockholder liable on stock where $120,000 of stock had been issued for property which had just been purchased for $20,000.

Where $55,000, par value, of stock is issued for land worth $8,000, a creditor of the corporation may hold the party receiving the stock liable for the remaining $47,000, as the

1 See 26 & 27 Vict., ch. 118, § 21.

An amendment thereto in 1869[1] struck out this prohibition, and gave power to the directors to issue stock on such terms and conditions as they saw fit. The Railway Companies Act[2] of 1867 is to the same effect.

In England the issue of stock for property or services is largely regulated by statute.[3] On account of the many frauds perpetrated upon the public by the issue of stock for property taken at a gross overvaluation, parliament, in 1867, passed an act requiring all contracts whereby stock was issued for property or services to be publicly registered, under penalty of the payment being void.[4] Difficulty then arose as to what was the *status* and liability of a person

owner of stock unpaid for to that amount, and it is immaterial that the articles of incorporation recited that that amount of stock would be issued for the specified land. Stout *v.* Hubbell, 104 Iowa, 499 (1898). The statutory provision in Iowa that a certificate of stock shall state on its face to what extend it is paid up, and whether in money or property, does not invalidate an issue of stock without such statement appearing on the certificate. French *v.* Northwestern Laundry, 107 N. W. Rep. 430 (Iowa, 1906).

1 See 32 & 33 Vict., ch. 48, § 5.

2 See 30 & 31 Vict., ch. 127, § 27. See also Webb *v.* Shropshire Ry., [1893] 3 Ch. 307, where the issue was at a discount of sixty per cent. under a statute. Also Statham *v.* Brighton, etc. Co., [1899] 1 Ch. 189, where stock was issued for cash at less than par.

3 In the case Moseley *v.* Koffyfontein Mines, Ltd., [1904] 2 Ch. 108, the court said: "I hope a day may come when it may be gravely considered by the Legislature whether it would not be for the advantage of the community, and especially of the commercial community, that an Act should be passed requiring that in all cases the full nominal value of a share should be paid in cash and nothing else. I am satisfied from my own judicial experience in the administration of companies that such a law would have a tendency to benefit the companies themselves, and to check a large amount of unwholesome speculation on the Stock Exchange which is largely fed and supported by operations undertaken by vendors, promoters, and others for the purpose of unloading fully-paid shares which they have been allowed to pay for by giving what is called money's worth instead of cash."

4 30 & 31 Vict., ch. 131, § 25. "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made, in writing, and filed with the registrar of joint-stock companies at or before the issue of such shares." Where the stockholders apply long after incorporation for leave to file with the public register the contract whereby stock is issued for property, the court will require them first to provide for existing debts. *Re* Darlington Forge Co., L. R. 34 Ch. D. 522 (1887).

A mere vote of stock to a director in compensation for his services does not render him liable thereon for failure to register the contract, unless he knows of the entry of his name as holder of the shares or accepts certificates for the same. Arnot's Case, L. R. 36 Ch. D. 702 (1887).

receiving stock for property, in case the contract therefor was not publicly registered, as required by act of parliament. The courts finally decided that, if the sums due reciprocally were expressly offset, then that the stock was to be deemed paid for, notwithstanding the statute.[1] But a mere general understanding that the property is payment for the stock is insufficient. The prohibition in the statute then applies, and payment in cash will have to be made upon a winding up.[2] The point decided by these cases seems to have been misapprehended in a few American cases.[3]

Frequently actions herein are against corporate officers who directly or indirectly receive the stock. This class of cases is considered in the next section.

§ 48. *Liability of the officers of the corporation.*—There is great difficulty in defining clearly and accurately the liability of the corporate officers herein. This is because the officers may have committed an *ultra vires* or fraudulent act; or may have participated in the profits as promoters; or may have received a gift of part of the stock from the parties to whom they issued it.

There are few cases holding a director liable for loss to the corporation where an issue of its stock for money or property less in value than the par value of the stock has been made. Such an action would be similar in its character to the numerous cases against directors for their frauds and *ultra vires* acts.[4]

1 Pell's Case, L. R. 5 Ch. App. 11 (1869); *Ex parte* Clark, L. R. 7 Eq. Cas. 550 (1869). See also § 23. In Spargo's Case, L. R. 8 Ch. App. 407 (1873), the court said: "If parties account with each other, and sums are stated to be due on one side, and sums to an equal amount due on the other side on that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid." See also Maynard's Case, L. R. 9 Ch. App. 60 (1873); *Re* Vulcan Iron Works, Law Times, May, 1885, p. 61.

2 Dent's Case, L. R. 15 Eq. Cas. 407 (1873); Fothergill's Case, L. R. 8 Ch. App. 270 (1873); Crickmer's Case, L. R. 10 Ch. App. 614 (1875); Rowland's Case, 42 L. T. Rep. 785 (1880). A person taking stock at a discount for property overvalued may withdraw. *Re* Midland, etc. Co., 60 L. T. Rep. 666 (1889).

3 See Wetherbee *v.* Baker, 35 N. J. Eq. 501 (1882).

4 See Part IV. Where the directors issue stock to a mining expert at ninety cents on the dollar in consideration of an examination and report by him, they are liable to the company for the remaining ten cents on the dollar, but not for surplus value which the stock afterwards acquired. Hirsche *v.* Sims, [1894] A. C. 654.

Although none of the stockholders and creditors of a company which is in difficulties object to a new issue of bonds and stock for contract work, a part of the bonds and stock being then given to the stockholders and bondholders as a bonus, yet where the intention is to have outside people invest in the bonds and stock of

In a suit of this character, however, against an officer of the corporation, he is liable not for the par value of the stock, less the value of the property or labor received therefor, but at the most he can be held liable only for the market value of the stock, less the value of the labor or property received by the corporation.[1]

the company the scheme is illegal. Innocent purchasers of the stock may hold the directors who did the act liable for the stock and bonds thus given as a bonus. London Trust Co. *v.* Mackenzie, 68 L. T. Rep. 380 (1893).

In an action by a treasurer for pay for his services it is no defense that the corporation, with a capital fixed at $1,000,000, had $50,000 paid in in cash to comply with the statute, and then the remaining capital stock, $950,000, together with the cash so paid in, were issued for two patents, and that the treasurer checked out therefor the said $50,000, being the part unexpended at that time. Sears *v.* Kings, etc. Ry., 156 Mass. 440 (1892).

A statement filed with the state commissioner as required by statute, in regard to the amount of the paid-up stock, is not such a representation as will sustain an action for damages for fraudulent representations inducing a person to take the notes of the company. Hunnewell *v.* Duxbury, 154 Mass. 286 (1891).

The fact that the corporate officers have filed a false statement as to the amount of paid-up capital stock will not sustain an action for damages for fraud in inducing a party to take the notes of the corporation. Representations as to the credit of a corporation must be in writing in order to be actionable under the Massachusetts statute. Hunnewell *v.* Duxbury, 157 Mass. 1 (1892).

The statute of limitations runs against an action by taxpayers against the officers and promoters of a railroad to which municipal aid was voted, to compel them to account for watered stock and bonds and to cause the stock, bonds, and mortgage to be canceled. Allen *v.* Wisconsin, etc. Ry., 90 Iowa, 473 (1894). Directors may be personally liable for illegally issuing stock and afterwards paying to the stockholders a portion of the price received by the corporation for bonds and stock, the stock being contributed by the stockholders, but they are not liable jointly for money so paid to each of them separately as stockholders. Great Western, etc. Co. *v.* Harris' Estate, 111 Fed. Rep. 38 (1901).

Unless the title to property is vested in a receiver he cannot sue in courts of a foreign jurisdiction, upon the order of the court appointing him, to recover property. Neither can he bring suit in the name of the corporation, where, if he succeeds, the property would be turned over to him as receiver. His right to sue in a foreign jurisdiction is not recognized on the principle of comity, because every court is entitled to appoint its own receiver to distribute the property within the jurisdiction. Great Western, etc. Co. *v.* Harris, 198 U. S. 561 (1905).

1 In the case of Continental Tel. Co. *v.* Nelson, 49 N. Y. Super. Ct. 197 (1883), the president was sued by the corporation itself for issuing stock in payment of labor, the par value of the stock being worth over twice the value of the labor. The court held that he was liable only for the actual market value of the stock in excess of the value of the labor, and submitted the question to the jury. See also Nott *v.* Clews, 14 Abb. N. C. (N. Y.) 437 (1883), overruling a demurrer. In this case, however,

Where the directors of a bank upon an increase of the capital stock issue a part of the stock for worthless notes, they are liable, upon the bank becoming insolvent, to the receiver for the par value of such stock, unless they can show the stock could not have been otherwise issued or sold.[1]

Where, however, the directors receive a part of the stock themselves either by its issue directly to themselves, or by being secret partners with those to whom it is issued, or by a gift to them from the parties to whom it is issued, then the directors may be compelled to account to the corporation for the stock actually received by themselves. In such a case, however, the directors, as such, cannot be made liable on the capital stock issued to third persons and still retained by them. The directors are liable only to the extent that they themselves received stock. This liability arises from the principle of law that a director must account to his corporation for any secret gift that may be made to him by persons contracting with the corporation, and must account also for profits made by his secret participation in contracts between the corporation and third persons.[2] In such cases the director is liable to the corporation or its creditors, not for the par value of the stock received by him, but for the actual value of the stock, or for the profit or price which he received therefor.[3] A director is disqualified from being

the directors had received part of the stock as a gift. See also Osgood *v.* King, 42 Iowa, 478 (1876); but see Flagler, etc. Co. *v.* Flagler, 19 Fed. Rep. 468 (1884); Langdon *v.* Fogg, 18 Fed. Rep. 5 (1883); s. c., in state court, 14 Abb. N. C. (N. Y.) 435 (1883). A corporation cannot refuse to transfer stock on the ground that the vendor fraudulently induced the company to issue the stock to him where the company has been guilty of laches in not seeking a remedy before the transfer. The vendee in this case was a director. American, etc. Co. *v.* Bayless, 91 Ky. 94 (1891).

1 Cockrill *v.* Abeles, 86 Fed. Rep. 505 (1898).

2 See §§ 649, 650, and cases in notes thereto.

3 In Carling's Case, L. R. 1 Ch. D. 115 (1875), where the person receiving stock for property taken at an overvaluation gave part of it to a corporate director, the court held that the corporation could demand of the director either the stock or the profit realized by him, or the profits thereby lost by the corporation, but could not compel him to pay the full par value of the stock. In De Ruvigne's Case, L. R. 5 Ch. D. 306 (1877), where shares of stock were issued as paid up to a person for services palpably overvalued, and he transferred a part of the stock to a director, De Ruvigne, the court said: "If the company attempt to make the appellant [director] a contributory, and they allege fraud in the original agreement by which he was to take the shares, they must either throw over the agreement altogether or they must take it altogether; they cannot adopt it as to one part and reject it as to the rest." The court said the director could be held liable for breach of trust and be made to pay to the corporation the selling value of the shares; and since

interested in a construction contract with the company;[1] but if all the then existing stockholders assent thereto, and creditors are not injured, such a transaction is legal.[2] On the organization of a company the directors may issue stock to themselves for property where they are the sole stockholders. The presumption is that the stock was issued for full value.[3]

There is still another class of cases, in which a director acts also as a promoter of the company and receives stock for his services. He then is liable to account to the corporation therefor, not only as a director, but also as a promoter.[4]

Another class of cases may exist where the directors vote stock to themselves in payment for their services to the company.[5]

some of the stock was sold at par, he was chargeable with the par value of the stock so received by him.

In Anderson's Case, L. R. 7 Ch. D. 75, 94 (1877), the court held that, if shares were improperly issued to a director at a discount, the contract might be set aside and the consideration returned, or the profits realized by him might be recovered. In Currie's Case, 3 De G., J. & S. 367 (1863), where shares were taken both directly and indirectly by the corporate officers for property and services grossly overvalued, the court held that the transaction might be undone altogether for fraud, but there was no liability on their part to contribute anything on the shares. The only remedy is to set aside the transaction and recover the profits thereof. Langdon *v.* Fogg, 18 Fed. Rep. 5 (1883); s. c., 14 Abb. N. C. (N. Y.) 435, holds that the directors are not liable to the corporation for the par value of the stock issued to their dummy for property and then transferred to themselves. See also § 650, *infra*, and cases in notes.

In the case of *Re* Ambrose Lake, etc. Co., L. R. 14 Ch. D. 390 (1880), it was held that where all the stockholders acquiesced, and there were no creditors' rights involved, the corporation cannot recover from its directors profits realized by them from shares issued to them as paid up in consideration of property taken at a gross overvaluation. The corporation was held to be in no position to complain. In Van Cott *v.* Van Brunt, 82 N. Y. 535 (1880), where the facts were very much the same as in the preceding case, the court said (p. 541): "If the defendant [director and president] had realized a sum beyond the amount actually expended, there might have been, perhaps, some ground for claiming that the arrangement should inure to and for the benefit of the company." A person to whom paid-up shares have been issued without consideration and who transfers them to a *bona fide* purchaser is not liable thereon, but if he was a director he is liable for breach of trust. Freeman's Case, 7 Ont. W. R. (Can.) 613 (1906)

1 See §§ 649, 662, *infra*.

2 See §§ 39, 662, 735, and ch. XLIV.

3 Turner *v.* Fidelity, etc., 2 Cal. App. 122 (1905).

4 See the important case of Chandler *v.* Bacon, 30 Fed. Rep. 538 (1887); also, § 651, *infra*, and cases cited. In Iowa, where "watered" stock is given as a gift by the patentees to a promoter, who afterwards became the first president of the company, he is liable to corporate creditors for all the "water" there is in the stock. Boulton Carbon Co. *v.* Mills, 78 Iowa, 460 (1889).

5 See § 657, *infra*.

Whether the directors are liable herein to purchasers of stock or to corporate creditors in an action for deceit is an open question.[1]

The officers of the corporation who participate in the issue of stock as paid up, when it has not been fully paid, are liable to persons purchasing such stock for damage thereby suffered.[2] In Massachusetts, by statute, corporate officers are made liable for corporate debts, if they issue stock for property at an unfair valuation of the latter.[3] In England there is a statute, under which the court

1 See §§ 157, 158, 355, *infra*.

A sale of pledge of stock stamped "non-assessable," when in fact it was not legally paid up, renders liable for false representations the president and secretary who made such sale or pledge, and who knew that it was not paid-up stock. Windram *v.* French, 151 Mass. 547 (1890).

In Bartholomew *v.* Bentley, 15 Ohio, 659 (1846), certain persons incorporated a bank, incurred large debts, then sold their stock to the bank and left the creditors nothing. A creditor brought an action on the case for fraud. The court sustained the action, and said: "If the defendants, with the design to defraud the public generally, have knowingly combined together and held forth false and deceptive colors, and done acts which were wrong, and have thereby injured the plaintiff, they must make him whole by responding to the full extent of that injury; and they cannot place between him and justice, with any success, the charter of the German Bank of Wooster, whether it be valid or void, forfeited or *in esse*. Neither a good nor a bad thing may be falsely used for purposes of deception and made a scapegoat for responsibility. Nor is it material that there should have been an intention to defraud the plaintiff in particular. If there was a general design to defraud all such as could be defrauded by taking their paper issues, it is sufficient, and the plaintiff may maintain his suit, provided he has taken the paper and suffers from the fraud. . . . The act incorporating the president and directors of the German Bank of Wooster, admitting it to be in force, conferred no authority upon any person to hold out false colors to deceive the public, no authority to issue bills without the means of redeeming them; and those who combined to use it for the purposes of swindling acted for themselves rather than as agents of the bank."

Creditors of a corporation cannot hold the directors liable for fraud, deceit, etc., in forming a sham corporation, when no misrepresentations can be traced to them. Mere statements as to the amount of capital stock are insufficient. Brackett *v.* Griswold, 112 N. Y. 454 (1889).

2 Cross *v.* Sackett, 2 Bosw. 617 (1858); *Re* Gold Co., L. R. 11 Ch. D. 701 (1879). In a suit by a stockholder against the president for misrepresentations inducing the former not to sell his stock, the defendant may be examined before trial on the question of his having received from the corporation $15,000,000 of stock for property worth $800,000, that fact bearing on the misrepresentation which was as to the dividend earning capacity of the company. McDonald *v.* Morse, 96 N. Y. App. Div. 406 (1904).

3 Stats. 1875, ch. 177, § 2. Where an officer of a foreign corporation signs and delivers to the commissioner of corporations a certificate which states that its copyrights and privileges are worth $120,000 when in fact they were worth only $10,000, he is liable to the corporate creditors un-

has power, on the application of creditors, to direct the official receiver to prosecute criminally a director for alleged offenses as director, such prosecution to be carried on at the expense of the assets of the company.[1] It is a criminal offense in England for any director, manager, or officer of a corporation to publish false statements with intent to induce persons to purchase stock. Under this statute a person is liable as a manager for such acts, if he acted as manager, even though he was never appointed.[2]

§ 49. *Liability of the persons purchasing the stock with notice.*— It seems to be generally assumed, as a matter of course, that persons purchasing stock with notice that it had not been paid up, although in fact it had been issued as paid up, are liable on such stock to the same extent that their transferrers were liable.[3] It has

der the statutes of Massachusetts, and it is no defense that the stockholders did not intend to sell the stock. Heard *v.* Pictorial Press, 182 Mass. 530 (1903). See § 47, *supra.*

Under the Massachusetts statute of 1906 making directors of street railways liable for all debts to the extent of the capital stock until it is all paid in, and a certificate to that effect filed, the directors continue liable if the certificate is untrue. Westinghouse, etc. Co. *v.* Reed, 80 N. E. Rep. 621 (Mass. 1907).

In New York, under the statute authorizing the attorney-general to bring suit to remove directors and other corporate officers for misconduct, he may commence suit to remove them as directors and also as officers for issuing stock without consideration. People *v.* Lyon, 119 N. Y. App. Div. 361 (1907).

1 *Re* London, etc., Corp. Ltd., [1903] 1 Ch. 728.

2 Rex *v.* Lawson, [1905] 1 K. B. 541.

3 Upton *v.* Tribilcock, 91 U. S. 45 (1875). In Coleman *v.* Howe, 154 Ill. 458 (1895), the court said: "Where a person purchasing stock issued as paid up has notice that it has not been paid, his liability is the same as that of the party who transferred it to him." But they are not liable if any prior owner was *bona fide* and without notice. Barrow's Case, L. R. 14 Ch. D. 432 (1880). A transferee of "watered" stock taking with notice is liable the same as his transferrer. Boulton Carbon Co. *v.* Mills. 78 Iowa, 460 (1889); White *v.* Greene, 70 N. W. Rep. 182 (Iowa, 1897), aff'd, 105 Iowa, 176 (1898); Sprague *v.* National Bank of America, 172 Ill. 149 (1898). A transferee with notice is liable in the same way as the transferer. Allen *v.* Grant, 122 Ga. 552 (1905). Purchasers with notice of stock that has been issued for property at a fraudulent overvaluation are liable thereon. Garden City, etc. *v.* American, etc. Co., 205 Ill. 42 (1903). Where an option which has been purchased at $125,000, of which amount $30,000 has been paid, is sold to an Illinois corporation for $8,000,000 par value of stock, persons taking the stock with notice are liable proportionately to *bona fide* corporate creditors for the difference between the actual value of the property and the par value of the stock. One of the promoters, however, cannot enforce such liability to repay money which he has loaned to the company. Meyer *v.* Ruby, etc. Co., 192 Mo. 162 (1905). A purchaser of stock which purports to be fully paid, but which he knows is not fully paid, is liable

been held that a person purchasing bonds of a newly formed corporation at par with a bonus of stock, is not a *bona fide* purchaser, even

to corporate creditors for the balance unpaid. Foote *v.* Illinois, etc. Bank, 194 Ill. 600 (1902). Where a person, to whom stock is issued for property at a fraudulent overvaluation, purchases other stock of the same kind, he is liable not only on the stock originally issued to him but also on the stock so purchased by him, even though the stock on its face states that it is "full paid and non-assessable." Higgins *v.* Illinois, etc. Bank, 193 Ill. 394 (1901).

A purchaser of stock in a New York corporation is liable on the statutory liability of stockholders in that state where stock has been issued for property at an intentional overvaluation. White, etc. Co. *v.* Jones, 167 N. Y. 158 (1901). A transferee of stock taking with knowledge that the stock was issued for property at a fraudulent overvaluation is liable thereon under the constitution and statutes of Montana and the liability is enforceable to pay damages for torts of the company. Kelly *v.* Clark, 21 Mont. 291 (1898). In the case of Fouche *v.* Merchants', etc. Bank, 110 Ga. 827 (1900), where $50,000 of stock was issued in payment for certain bonds and property and the bonds were never delivered and the property that was delivered was worth $2,500, the court held the stock was not full paid, even though the certificate recited that it was full paid and non-assessable, and the court held that the stockholders and transferees with notice were liable on such stock. Where the facts are known and it is a question of law, a purchaser cannot claim to be a *bona fide* purchaser. Rogan *v.* Illinois, etc. Bank, 93 Ill. App. 39 (1900).

In Maine it is held that the transferee of stock issued as paid up is not liable to a corporate creditor thereon, even though the transferrer did not pay the corporation for the stock, and even though the transferee knew that fact. Morgan *v.* Howland, 89 Me. 484 (1897). Under the statutes of Maine a transferee of stock is not liable, even though the stock was issued for property at a fraudulent overvaluation. Dunn *v.* Howe, 96 Fed. Rep. 160 (1899); rev'd on another point in 107 Fed. Rep. 849.

Where $100,000 of the stock of an Illinois corporation is issued to parties who agree to turn in a patent therefor, and the patent is never turned in, and in fact turns out to be of no value, the parties receiving the stock with notice are liable thereon to *bona fide* corporate creditors, even though such stock recites on its face that it is fully paid. Van Cleve *v.* Berkey, 143 Mo. 109 (1898).

Where the certificate of stock states on its face that it is "fully paid up" and yet that it is subject to assessment for certain purposes, the holder is bound to investigate. Wishard *v.* Hansen, etc. Co., 99 Iowa, 307 (1896).

In the case of Gilkie, etc. Co. *v.* Dawson, etc. Co., 46 Neb. 333 (1895), where $240,000 par value of stock was issued for an equity in land, such equity being worth only $20,000, the court held that the transaction was fraudulent *per se*, and the holders of the stock were liable for the difference between its par value and the $20,000; and the court also held that the transferees taking with full knowledge of the facts were also liable. In the case, however, of Penfield *v.* Dawson, etc. Co., 57 Neb. 231 (1898), this same transaction came again before the court and the court practically overruled the latter case and held that the stockholders were not liable, the lower court having held that they had acted in good faith and without any attempt to defraud the corporation.

though he made such purchase not from the corporation, but from a third person,[1] but the supreme court of the United States holds otherwise.[2] In Illinois the transferrer of stock is liable secondarily on stock issued for property taken at a fraudulent over-valuation, the transferee being primarily liable.[3] In New Jersey this rule is reversed.[4]

§ 50. *Liability of bona fide transferees without notice.*—A *bona fide* purchaser for value and without notice of stock issued by a corporation as paid up cannot be held liable on such stock in any way, either to the corporation, corporate creditors, or other persons, even though the stock was not actually paid up as represented. Such a purchaser has a right to rely on the representations of the corporation that the stock is paid up. Difficulty sometimes arises, however, in determining what will constitute a sufficient representation that the stock is paid up. A representation by the corporate agents that the full par value will not be required is insuffi-

[1] See *v.* Heppenheimer, 69 N. J. Eq. 36 (1905); Colonial, etc. Co. *v.* McMillan, 188 Mo. 547 (1905).

Dickerman *v.* Northern T. Co., 176 U. S. 181, 202 (1900).

[2] Florsheim *v.* Illinois, etc. Bank, 192 Ill. 382 (1901); aff'g 93 Ill. App. 297 (1901); Rogan *v.* Illinois, etc. Bank, 93 Ill. App. 39 (1900). It has been held by a lower court in Illinois, that even though stock has been issued for property at an overvaluation, yet, if the person receiving the stock has transferred it in good faith and the transfer has been recorded on the books, the transferrer is no longer liable. Parkhurst *v.* Mexican S. R. R., 102 Ill. App. 507 (1902). A stockholder's liability on stock may be offset against bonds held by the stockholder, even though he has transferred them to another, who had knowledge of the facts. Hynes *v.* Illinois, etc. Bank, 80 N. E. Rep. 753 (Ill. 1907). A subscriber for stock who has not paid therefor, except by turning in worthless property, and who afterwards then transfers his stock to another person after the company becomes insolvent, is still liable on the stock. McConey *v.* Belton, etc. Co., 97 Minn. 190 (1906). A person to whom stock is issued for property and who transfers the same while the corporation is solvent cannot be held liable on such stock, even though the property was taken at an overvaluation. Cole *v.* Adams, 19 Tex. Civ. App. 507 (1898). A mere oral notice by a third party that a stockholder had transferred his stock to a designated person does not relieve the former from his liability on the subscription, no formal transfer having been made, the stock having been issued at twenty cents on a dollar. Vermont, etc. Co. *v.* Declez, etc. Co., 135 Cal. 579 (1902).

[3] See *v.* Heppenheimer, 69 N. J. Eq. 36 (1905). Where $500,000 of stock is issued for $2 cash and a formula for cereal breakfast food, and the stock is then sold at less than par to the public, and the company fails, the stockholders by statute being liable only to the extent of their unpaid subscriptions, the parties to whom the stock was originally issued may be held liable. Wood *v.* Sloman, 114 N. W. Rep. 317 (Mich. 1907).

cient.[1] The word "non-assessable," stamped or printed or written on the face of the certificate, is not a sufficient representation that the stock is paid up, so as to protect a *bona fide* purchaser thereof, where the certificate also shows that only twenty per cent. has been paid thereon.[2]

Where, however, a statement is made on the face of the certificate that it is paid-up stock, the *bona fide* purchaser of the certificate need not inquire further, but may rely on that representation, and is protected thereby against liability.[3]

1 Webster *v.* Upton, 91 U. S. 65 (1875); Upton *v.* Tribilcock, 91 U. S. 45 (1875).

2 Webster *v.* Upton, 91 U. S. 65, 71 (1875); Sanger *v.* Upton, 91 U. S. 56 (1875). A statement in the margin of the certificate of stock that the shares are $100 each is a part of the certificate, and if the body of the certificate states that $50 have been paid on each share, the holder has notice that the stock is not full paid. Fish *v.* Gilbert, 73 Conn. 377 (1900).

3 Young *v.* Erie Iron Co., 65 Mich. 111 (1887); *Re* Macdonald, etc. Co., [1894] 1 Ch. 89; Albitztigui *v.* Guadalupe, etc. Co., 92 Tenn. 598 (1893). One who purchases in good faith, in the open market, stock of a corporation which purports, on the face of the certificates, to be full paid and non-assessable, is not liable for assessments on such stock, though in fact it had not been fully paid. Rood *v.* Whorton, 67 Fed. Rep. 434 (1895); s. c., 74 Fed. Rep. 118 (1896). In Coleman *v.* Howe, 154 Ill. 458 (1895), the court said: "A purchaser or assignee of stock which has not been fully paid does not become liable to the corporate creditors for the unpaid balance, where the stock has been issued as fully paid, and he has acquired the same in good faith, and without notice that it has not been fully paid." In Waterhouse *v.* Jamieson, L. R. 2 H. L. (Sc.) 29 (1870), where the stock was purchased in open market, the court said: "Here the appellant is a *bona fide* holder of shares upon which, no doubt, there was a false statement made by the company, of which he had no knowledge, and as to which he was under no obligation to inquire, and therefore he cannot be subjected to liability by having imputed to him a knowledge of the falsehood." A *bona fide* purchaser of stock which upon its face purports to be full-paid stock is not liable thereon. Hess *v.* Trumbo, 84 S. W. Rep. 1153 (Ky. 1905). In Brant *v.* Ehlen, 59 Md. 1 (1882), the court said: "Where shares are issued by the company to the subscriber as full-paid shares, and are sold by the subscriber as such, there is no ground on which a promise can be implied, on the part of the purchaser without notice, to be answerable either to the company or to its creditors, should the representations on the faith of which he purchased prove to be false. He could not be held liable on the ground of contract, because he never agreed to purchase any other shares than full-paid shares; and if it be said that the shares were fraudulently issued, he could not be held liable on the ground of fraud, because he was in no sense a party to the fraud." In Stacy *v.* Little Rock, etc. R. R., 5 Dill. 348 (1879); s. c., 22 Fed. Cas. 1142, Judge Dillon examined, at considerable length, the reasons of the rule protecting *bona fide* purchasers of stock issued as paid up, and sustained the rule itself. See also Burkinshaw *v.* Nicolls, L. R. 3 App. Cas. 1004

"Fully paid-up shares" mean "shares upon which the whole amount that could be called had been called up."[1] If the corporation states to a person about to buy stock that it is full paid, and he purchases it, he cannot be held liable on an unpaid subscription.[2]

A purchaser of stock is entitled to rely on statements in the corporate books that the stock is paid up.[3] The law goes still further, and holds that where a person in open market, in good faith and without notice, purchases certificates, such stock is to be deemed "paid-up" in his hands, and he is protected as a *bona fide* purchaser, even though there is nothing on the face of the certificates stating that they are paid up.[4] This can now be laid down as the estab-

(1878). One case, Myers *v.* Seeley, 10 Nat. Bankr. Reg. 411 (1874); s. c., 17 Fed. Cas. 1118, lays down a different doctrine. The court says: "The assignee of shares can be in no better condition than the assignor. . . . The question is simply whether the stock has been really paid in full to the corporation. The assignee may have paid for it to the assignors, and may have relied on the representations of the latter, and of officers of the company, that the shares bought were fully paid, yet creditors are not bound thereby; and if the stock was not fully paid, the holder is liable to creditors for the amount remaining unpaid." This case must be considered poor law. Where the charter and the certificates of stock provide that the stock shall be subject to assessment to pay a certain mortgage, it is immaterial that the stock states on its face that it is paid up. Western Imp. Co. *v.* Des Moines Nat. Bank, 103 Iowa, 455 (1897).

[1] Bloomenthal *v.* Ford, [1897] A. C. 156.

[2] Rochester, etc. Co. *v.* Roe, 7 N. Y. App. Div. 366 (1896). A *bona fide* purchaser of stock in the open market who is informed by the manager of a corporation at its office that the stock is fully paid is not liable on the stock. *In re* Remington, etc. Co., 153 Fed. Rep. 345 (1907).

[3] Erskine *v.* Lowenstein, 11 Mo. App. 595 (1881); aff'd, 82 Mo. 301.

[4] Keystone Bridge Co. *v.* McCluney, 8 Mo. App. 496 (1880); Foreman *v.* Bigelow, 4 Cliff, 508 (1878); s. c., 9 Fed. Cas. 427, as explained in 8 Mo. App. 496; Johnson *v.* Lullman, 15 Mo. App. 55 (1884), where the court says: "If any presumption of fact arises from the face of a stock certificate in customary form, as was the one in this case, it is that the stock . . . is fully paid for." See also Erskine *v.* Loewenstein, 82 Mo. 301 (1884); Cleveland, etc. Co. *v.* Texas, etc. Ry., 27 Fed. Rep. 250 (1886). If a certificate is silent as to whether the stock is paid up, the purchaser is entitled to consider it paid up. *Re* Wakefield Mica Co., 7 Ont. W. R. (Can.) 104 (1906).

If a certificate of stock is silent on its face as to whether it is full paid or not, a *bona fide* purchaser is protected in considering it full-paid stock. West Nashville, etc. Co. *v.* Nashville Sav. Bank, 86 Tenn. 252 (1888). *Cf.* Burkinshaw *v.* Nicolls, L. R. 3 App. Cas. 1004, 1017 (1878). In Brant *v.* Ehlen, 59 Md. 1 (1882), the court says: "The purchaser is not bound to suspect fraud where everything seems fair. . . . Any other doctrine would virtually destroy the transferable nature of such shares and paralyze the whole of the dealings in the stock of corporations."

A party purchasing a certificate of stock which does not state whether it is paid up or not may assume that it

lished rule. It is based on sound public policy, favoring, as it does, the transfer of personal property, and the *quasi*-negotiability of stock, and discountenancing secret liens and constructive notice.

A purchaser in open market of stock represented to be paid up by a statement to that effect on the certificate is presumed to be a *bona fide* purchaser. Hence there has arisen the well-established rule, both in America and England, that a *bona fide* purchaser for value, and without notice, of stock issued as paid up, is not liable for any part of the par value which may not have been paid.[1] In

is paid up, and will be protected in that assumption. Du Pont *v.* Tilden, 42 Fed. Rep. 87 (1890).

An inquiry by a purchaser of stock of corporate officers, as to whether it was full-paid stock, must be made to officers having authority to speak for the corporation. Browning *v.* Hinkle, 48 Minn. 544 (1892). See also § 257, *infra*.

1 Sprague *v.* Nat. Bank of America, 172 Ill. 149 (1898). A *bona fide* purchaser of stock issued for property at an overvaluation is not liable thereon. Meyer *v.* Ruby, etc. Co., 192 Mo. 162 (1905). *Bona fide* transferees are protected. Easton Nat. Bank *v.* American, etc. Co., 69 N. J. Eq. 326 (1905). A *bona fide* purchaser of a certificate of stock is protected even though nothing whatsoever was paid to the corporation for the stock, and he may compel the corporation to transfer the stock to him on the books. Westminster, etc. Bank *v.* New England, etc., 73 N. H. 465 (1906). A suit by the receiver of a corporation to hold the transferees of stock liable for the par value of such stock on the ground that it had been fraudulently issued without consideration must allege that the transferees purchased the stock with notice of the fraud or were not holders for value. The presumption is that they were not guilty of the fraud and were holders for value. Finletter *v.* Appleton, 195 Pa. St. 349 (1900). Even though stock was issued for property taken at an overvaluation, yet such stock in the hands of a *bona fide* purchaser is valid, notwithstanding the constitutional provision in California against such an issue. Smith *v.* Martin, 135 Cal. 247 (1901). A purchaser of stock which has been issued for property taken at an overvaluation is not liable thereon where he took without knowledge of such overvaluation. Hence, a purchaser of treasury stock at fifty cents on the dollar is not liable for the remaining fifty cents, even though it turned out that originally the stock was issued for property taken at an overvaluation, such purchaser having no knowledge of such overvaluation. This is the rule, even in Missouri, where the court goes to the extreme length in holding parties liable for stock issued for property taken at an overvaluation. Berry *v.* Rood, 168 Mo. 316 (1902). A *bona fide* purchaser of watered stock is not liable thereon. Frazer, etc. Min. Co. *v.* Gallagher, 5 British Columbia Rep. 82 (1895); *Re* Concession Trust, [1896] 2 Ch. 757; Troup *v.* Horbach, 53 Neb. 795 (1898); s. c., 57 Neb. 644 (1899). In *Re* British Farmers', etc. Co., L. R. 7 Ch. D. 533 (1878); aff'd, L. R. 3 App. Cas. 1004 (1878), *sub nom.* Burkinshaw *v.* Nicolls, the court held that, if the *bona fide* purchaser were not protected, "no person buying shares in the market as paid-up shares would be safe, for he would get nothing more than a certificate to show they were paid up. . . . Obviously such a construction would

a case where parties receiving stock and bonds from the corporation in payment for property sold the bonds with a bonus of stock, the

destroy the transferable nature of shares altogether." See also Foreman *v.* Bigelow, 4 Cliff. 508 (1878); s. c., 9 Fed. Cas. 427; McCraken *v.* McIntyre, 1 Duv. (Can.) 479 (1877); Steacy *v.* Little Rock, etc. R. R., 5 Dill. 348 (1879); s. c., 22 Fed. Cas. 1142; Jackson *v.* Sligo, etc. Co., 1 Lea (Tenn.) 210 (1878); Brant *v.* Ehlen, 59 Md. 1 (1882); Waterhouse *v.* Jamieson, L. R. 2 H. L. (Sc.) 29 (1870). *Cf.* Crickmer's Case, L. R. 10 Ch. App. 614 (1875). *Contra*, Myers *v.* Seeley, 10 Nat. Bankr. Reg. 411 (1874); s. c., 17 Fed. Cas. 1118. A *bona fide* purchaser of stock in the open market is not liable on the stock to corporate creditors, although it was issued for cash at less than par, the certificate of stock reciting on its face that it was fully paid up. The court held the party to be a *bona fide* purchaser, although he knew that the company had issued stock at a discount, but did not know that the stock which he purchased was a part of such stock issued at a discount. He was not bound to inquire of the company. *Re* New Chile & Co., 68 L. T. Rep. 15 (1892). It is immaterial that the payment in stock issued as paid up turns out to have been valueless. The *bona fide* purchaser is protected, and the corporation must allow registry by him. Protection Life Ins. Co. *v.* Osgood, 93 Ill. 69 (1879). In Wintringham *v.* Rosenthal, 25 Hun, 580 (1881), the court held that a *bona fide* purchaser of stock, which he purchased supposing it to be paid up, is not liable for the unpaid par value. The stock was issued by a bank, evidently on a cash subscription. This case practically overrules Mann *v.* Currie, 2 Barb. 294 (1848). The general railroad act of New York (Laws, 1850, ch. 140, § 10) prescribed that each stockholder should be liable "to an amount equal to the amount unpaid on the stock held by him." In Tasker *v.* Wallace, 6 Daly, 364, 374 (1876), the court held that under this statute, "as between a stockholder and a creditor, it is wholly immaterial whether he was a *bona fide* and innocent purchaser of stock which the vendor assured him had been paid." This remark was, it seems, a *dictum*, and, being by an inferior court, is doubtful as an authority. The representation, moreover, was not on the face of the certificate, nor was it made by the corporation. In the case of Hubbell *v.* Meigs, 50 N. Y. 480, 489 (1872), where the purchaser of Wisconsin railroad stock sued his vendor for damages for deceit on the ground, among others, that the stock had been issued fictitiously as paid up, the court said: "It is unnecessary to determine whether the corporation was authorized by its charter to sell its stock at less than par, or whether, in so selling, its officers did not violate their duty. The plaintiff was a *bona fide* purchaser, and, being such, acquired a valid title to the stock transferred to him." Where the foreclosure of a mortgage is contested on the ground that bonds and stock were issued largely in excess of the value of the property, and on the ground that the parties who turned in their property for stock were defrauded by the promoters, the court said in regard to the bonds: "We are clearly of opinion that, so far as they were purchased for a valuable consideration by innocent holders, they are not subject to the set-off claimed. The question whether, so far as they are held by parties cognizant of the alleged fraud, they are subject to a set-off, is not one which properly arises in this case, where the bonds must be treated as an entirety, but is a defense applicable to each individ-

supreme court of the United States held that the purchasers were not necessarily purchasers with notice.[1]

But even a *bona fide* purchaser of what purported to be full-paid stock in a corporation was liable on the double liability attached to stock, under the former New York statute, where the stock was issued for property taken at an overvaluation and no certificate of payment had been filed as required by the statute.[2] The liability of the transferrer of stock issued for property at an overvaluation is considered elsewhere.[3]

Where a subscriber who has not yet taken out his certificate of stock instructs the corporation to issue the certificates to a designated transferee, the latter is not held to be the original allottee of that stock; and, even though the stock was irregularly issued as paid-up stock, he can claim to be a *bona fide* transferee without notice.[4]

ual bondholder." Dickerman *v.* Northern T. Co., 176 U. S. 181, 206 (1900). A purchaser of stock in the market is not liable under the Maine statute relative to the value of property which is sold to the corporation in payment for stock, and the original party to whom the stock is issued is only liable to make payment up to par as to debts contracted while he was owner. Maine, etc. Co. *v.* Southern, etc. Co., 92 Me. 444 (1899).

1 Dickerman *v.* Northern T. Co., 176 U. S. 181, 202 (1900), the court saying: "It is true that these parties, in disposing of the bonds, allowed to each purchaser of a one-thousand-dollar bond, two hundred dollars of preferred and four hundred of common stock, but they did not seem to have profited by this themselves. And if it were necessary to the negotiation of the bonds to give a *bonus* in stock, it cannot be considered in the light of a mere donation. Nor, if it were done in good faith, would it necessarily afford a ground of complaint to dissenting stockholders. Certainly, if this *bonus* were received in ignorance of the fraud practised upon the original mill owners, and simply as an inducement to take the bonds, the dissenting stockholders could not compel the bondholders to submit to a deduction from their bonds of the par value of the stock received as a *bonus*, particularly in view of the fact that the stock might turn out to be worthless."

2 If, however, after the issue of the stock further sums of money were paid in by the stockholders equal to the difference between the par value of the stock and the value of the property, the liability ceased as to subsequent creditors. White, Corbin & Co. *v.* Jones, 167 N. Y. 158 (1901). *Cf.* § 42, *supra*, as to who is a *bona fide* purchaser; see also § 293, *infra*.

Persons who purchase stock of a company soon after its organization, without paying anything therefor, except in some instances by services, are chargeable with notice that the stock was not paid up. Gillett *v.* Chicago Title & T. Co., 82 N. E. Rep. 891 (Ill. 1907).

3 See § 49, *supra*

4 Young *v.* Erie Iron Co., 65 Mich. 111 (1887); Carling's Case, L. R. 1 Ch. D. 115 (1875). A *bona fide* purchaser of certificates of stock, which recite on their face that they are fully paid up, is protected even though the vendor was the party to whom the

E. ISSUE OF WATERED STOCK BY A STOCK DIVIDEND.

§ 51. *Third method: Issue by stock dividends.*—The third method of issuing fictitiously paid-up stock is by a wrongful use of the power to make stock dividends. It seems to be generally conceded that if the capital stock and the actual property of the corporation are not increased to the extent of the par value of the stock distributed as a dividend, then that the issue of stock by such dividend is irregular, and under certain circumstances fraudulent. On the other hand, if an equal amount of property is thereby added to the capital of the corporation, the stock dividend is legal.[1] Where

stock was issued at a discount, and even though he caused the corporation to issue the stock directly from the corporation to such purchaser. *Re* Building, etc. Co., [1896] 1 Ch. 100. Nominees of a person to whom full-paid stock is to be issued, same as transferees, are not liable, though the original issue was to them. *Re* Macdonald, etc. Co., [1894] 1 Ch. 89. See also § 62, *infra*. *Cf.* Rowland's Case, 42 L. T. Rep. 785 (1880); *Re* British Farmers', etc. Co., 38 L. T. Rep. 757 (1878); *Re* Vulcan Iron Works, Law Times, 1885, p. 61.

1 In Williams *v.* Western Union Tel. Co., 93 N. Y. 162 (1883), the court (p. 189) said that a stock dividend "could be declared by a corporation without violating its letter, its spirit, or its purpose. . . . There is no public policy which, in all cases, condemns such dividends. . . No harm is done to any person, provided the dividend is not a mere inflation of the stock of the company, with no corresponding values to answer to the stock distributed. . . . So long as every dollar of stock issued by a corporation is represented by a dollar of property, no harm can result to individuals or the public from distributing the stock to the stockholders." Howell *v.* Chicago, etc. Ry., 51 Barb. 378 (1868), is to the same effect. In Bailey *v.* Railroad Co., 22 Wall. 604 (1874), the court (p. 635) said that net earnings, however expended or invested, belong "to the stockholders, and may be distributed, as they may direct, in dividends of stock . . . or by a sale of property." See also ch. XXXII, *infra*. A stock dividend need not be delivered forthwith to a stockholder who paid for his original stock by a note to the corporation secured by the original certificate of stock. Alford *v.* Laurel Imp. Co., 86 Miss. 375 (1905). In the case Chester *v.* Buffalo, etc. Mfg. Co., 183 N. Y. 425 (1906), there was involved incidentally a five hundred per cent. stock dividend. A stock dividend was involved in Great Western, etc. Co. *v.* Harris, 128 Fed. Rep. 321 (1903); aff'd, 198 U. S. 561. The court in this last case said such a dividend was not a withdrawal of the assets of the corporation, and the court adopted the language of the brief as follows: "After the issue they (the stockholders) owned the same thing. They gained nothing and the corporation parted with nothing by the issue of additional stock. It merely placed in the hands of the stockholders an instrument whereby they could conveniently detract from the value of the shares of stock which they formerly held, in order to vest new and equal rights in the persons to whom they might transfer the new shares. Whatever of value passed to the purchasers of those shares was

the directors of a national bank place a fictitious value on the assets of the bank, in order to declare a stock dividend, such directors are liable for the par value of the stock to the receiver of the bank for the benefit of its creditors, unless the directors show that the stock could not have been otherwise issued or sold.[1] A stock dividend may take the shape of an issue of stock for cash at less than the par value.[2]

withdrawn, not from the assets of the company, but from the antecedent equity or interest which was vested in the stockholders making the sale. Taking the stock transaction by itself, it did not affect the company in any way. It merely diminished the relative interest in the corporation of those stockholders who engaged in it." Where the company is under obligations to issue stock to represent interest on subscriptions until dividends are declared, a stock dividend does not stop the interest. Hardin County *v.* Louisville, etc. R. R., 92 Ky. 412 (1891). In the case of Rose *v.* Barclay, 191 Pa. St. 594 (1899), the validity of a stock dividend whereby a gas company having $300,000 capital stock distributed $300,000 additional capital stock among its stockholders as a stock dividend to represent the enhanced value of the property was not questioned. A stock dividend was sustained in Cole *v.* Adams, 19 Tex. Civ. App. 507 (1898), to the extent that such dividend represented profits which had been used in the property but not to the extent that such dividends represented a rise in the value of the property of the company. A scheme by which founders' shares are to be exchanged for ordinary stock at the rate of one hundred shares of the latter for each share of the former is *ultra vires* and illegal, and will not be sanctioned by the court. *Re* Development Co. etc., [1902] 1 Ch. 547.

1 Cockrill *v.* Abeles, 86 Fed. Rep. 505 (1898). A stock dividend is not in itself injurious to the corporation or its creditors, and the creditors cannot complain of it, and hold the stockholders liable thereon, but a subsequent gratuitous issue of stock to stockholders, a part of which they then contribute to go with a sale of bonds by the corporation, a portion of the price therefor to be paid to the stockholders, is illegal, and such proportion so paid to the stockholders may be recovered back by bondholders upon the corporation becoming insolvent. Great Western, etc. Co. *v.* Harris' Estate, 111 Fed. Rep. 38 (1901). Unless the title to property is vested in a receiver he cannot sue in courts of a foreign jurisdiction, upon the order of the court appointing him, to recover property. Neither can he bring suit in the name of the corporation, where, if he succeeds, the property would be turned over to him as receiver. His right to sue in a foreign jurisdiction is not recognized on the principle of comity, because every court is entitled to appoint its own receiver to distribute the property within the jurisdiction. Great Western, etc. Co. *v.* Harris, 198 U. S. 561 (1905). Even though a stock dividend is declared without a proper basis therefor, yet the stockholders receiving the same are not liable thereon to corporate creditors except to subsequent creditors. Anglo-American, etc. Co. *v.* Lombard, 132 Fed. Rep. 721 (1904).

2 *Re* Owen, etc. Co., 21 Ont. Rep. (Can.) 349 (1891).

In some of the states stock dividends are prohibited by constitutional or statutory provisions.[1]

The decided tendency of the law, however, is to sustain and even encourage stock dividends, where they are regularly and legally made by adding to the property representing the capital stock further property to represent the stock dividend. By such an act the responsibility of the corporation is increased, creditors are more secure, inasmuch as there is more property to respond to their claims, and the stockholders have increased their investment by adding the profits to the capital stock instead of distributing them by a cash dividend.

§ 51*a*. *Fourth method: Issue by consolidation of two or more companies or by sale of one company to another.*—A fourth method of issuing watered stock is by the consolidation of two or more corporations or by the sale of all the property and assets of one corporation to another. The latter method, the sale of one company's assets to another company in consideration of the full-paid stock of the latter, is but a method of issuing stock for property, a subject already fully treated.[2] A dissenting stockholder in a solvent corporation may object to the sale of all the corporate property to another corporation in exchange for the stock of the latter.[3] Where, however, all the stockholders consent to such a sale, and corporate creditors are not injured, such a sale is legal

1 Ill. Const., art. XI, § 13. In Wisconsin by statute. R. S. 1878, § 1753, amended by ch. 93, Laws 1881. In Massachusetts railway corporations are by statute prohibited from declaring a stock dividend except by authority of the general court. Mass. Pub. Stat., ch. 112, § 61. It has been held not a violation of this statute for a railway company to distribute among its stockholders, without the assent of the general court, shares of its own stock which it had purchased from the commonwealth, when it had legislative authority for such purchase and distribution. Commonwealth *v.* Boston, etc. R. R., 142 Mass. 146 (1886). See § 287, *infra*. In Massachusetts a stock dividend is practically declared by a large cash dividend and simultaneously the issue of new stock for cash at par. Jones *v.* Brown, 171 Mass. 318 (1898). In Massachusetts, by statute, telegraph, telephone, gas, electric light, steam railroad, street railway, aqueduct and water companies are prohibited from declaring stock dividends or scrip dividends, or dividends of cash derived from the sale of stock or scrip. Laws 1894, p. 374, ch. 350.

If the tangible property of the corporation is actually in excess of the par value of the capital stock, then a stock dividend to the extent of that excess would, it seems, be legal; but the proceedings to declare the stock dividend must show these facts, or the dividend will be enjoined. Fitzpatrick *v.* Dispatch Pub. Co., 83 Ala. 604 (1887). The court changed the reasoning of its opinion as reported in 2 So. Rep. 727.

2 See §§ 35–50, *supra*.

3 See § 670, *infra*.

without express legislative authority therefor, if the corporation is a private corporation, and such a sale is legal, even if the corporation is a *quasi*-public corporation, such as a railroad, if there is express legislative authority for the sale. In making the sale, it is quite usual for the buying corporation to issue to the selling corporation full-paid stock of the former to an amount several times larger than the outstanding capital stock of the latter. This stock is then distributed among the stockholders of the selling corporation. Sometimes the stock is issued by the buying corporation directly to the stockholders of the selling corporation, in exchange for the old stock, the property at the same time being transferred to the buying corporation. Such a mode of sale is legal and has been held to be substantially equivalent to a consolidation.[1]

A consolidation differs from a sale in that by a consolidation the old corporations are dissolved and a new corporation comes into existence, whereas in a sale one corporation buys the property of another. A consolidation, from one point of view, is a sale of the assets of two or more existing corporations to a new corporation. A consolidation is often resorted to in the case of railroads, street railways, gas companies, electric light companies, water-works companies and similar companies, under legislative authority, as a means of watering the stock of the corporations which are consolidated. Such a watering of stock is legal and is rarely attacked. There are instances in which by such a consolidation stock has been increased fourteen-fold, and yet the legality of the consolidation not questioned.[2]

1 Chicago, etc. Ry. *v.* Ashling, 160 Ill. 373 (1895). Where a corporation sells its assets for stock in another corporation, such stock going to the selling corporation itself, this is a sale and not a consolidation. Hiles *v.* Hiles & Co., 120 Ill. App. Rep. 617 (1905), distinguishing Chicago, etc. Ry. *v.* Ashling, *supra*.

2 See instances in the notes to § 892, *infra*.

In the case of City of Allegheny *v.* Pittsburg, etc. Ry. Co., 179 Pa. St. 414 (1897), it appears that upon the consolidation of street railways involved in that case eight shares of the stock of the consolidated company were issued for one share of stock of the constituent companies. The court held that such an issue of stock was not such a dividend as entitled the state to levy a tax thereon.

In the case of City of Allegheny *v.* Federal Street, etc. Ry. Co., 179 Pa. St. 424 (1896), upon the consolidation of three street railway companies the consolidated company issued ten shares of its stock for each share in one of the constituent companies, and two shares for each share of another of the constituent companies, and one share for each share in the third constituent company. The court held in this case also that such issue of consolidated stock was not a dividend subject to taxation under the Pennsylvania law.

In the case of Trenton, etc. Ry. Co. *v.* Wilson, 55 N. J. Eq. 273 (1897), upon a consolidation of street rail-

The subject of the sale, lease or consolidation of railroads is fully considered elsewhere.[1]

ways involved in that case fourteen shares of the consolidated stock were issued for each share of stock in one of the constituent companies. The court did not question the legality of the transaction, but passed merely upon the question whether certain old stockholders were entitled to anything more than the fourteen shares for one.

A minority stockholder in a street railway cannot cause to be set aside a sale of its property to another company for stock of the latter, where such sale is authorized by statute, even though the statute was passed subsequently to the incorporation of the street railway, and even though the purchasing company had issued bonds and stocks to the amount of $90,000,000 in payment for street railways, the capital stock and bonded indebtedness of which was only $33,255,000, and even though in making the sale the majority stockholders voted that the stock was worth $170 a share, and that that price should be paid to minority stockholders, and the vendee company thereupon agreed to pay the same. The remedy of the dissenting stockholder, if any, is at law for the market value of the stock or a proportionate share of the proceeds. Tanner *v.* Lindell Ry., 180 Mo. 1 (1904).

A stockholder in one of the constituent companies may maintain a bill to have the consolidation declared illegal, if he can show that the majority were interested in the other company and that his company has been treated unfairly, and that the other company had been grossly overcapitalized. Jones *v.* Missouri, etc. Co., 144 Fed. Rep. 765 (1906); rev'g 135 Fed. Rep. 153. See also § 662, *infra*.

A consolidated company may maintain a suit against a director of one of the constituent companies for fraudulently, at the time of consolidation, causing an issue of a large amount of stock to him out of the treasury stock for past services, which stock was thereupon exchanged for stock in the constituent company, especially where such director as trustee of the treasury stock of both companies controlled them and voted such stock for the consolidation, and also voted proxies obtained on a notice of the meeting, which did not state that his compensation was to be voted upon. United, etc. Co. *v.* Smith, 44 N. Y. Misc. Rep. 567 (1904).

Where the statute authorizing consolidation specifies that the consolidated capital stock shall not be more than the "fair aggregate value" of the property, a stockholder may enjoin a consolidation whose capital stock is far in excess of a fair value of the property. Langan *v.* Franckyln, 20 N. Y. Supp. 404 (1892).

[1] See §§ 892–897, *infra*.

CHAPTER IV.

METHOD OF SUBSCRIBING—PARTIES TO SUBSCRIPTIONS—ACTION TO ENFORCE SUBSCRIPTIONS.

A. METHODS OF SUBSCRIBING.

§ 52. Generally no formalities necessary.
53. Informalities, irregularities, and mistakes in subscriptions.
54. Various defenses to subscriptions.
55. Proof of subscription.
56. The English rule.
57. Subscriptions taken by commissioners.
58. Subscriptions in excess of the capital stock.
59. Subscriptions and organization where there is a special charter and no commissioners are provided for.
60. Subscriptions delivered in escrow.
61. Liability of corporation for refusal to issue a certificate of stock.
62. Substitution of subscribers before the incorporation, change in the proposed enterprise, and alterations in subscription paper.
63. Right to recover money advanced on shares upon a failure to organize the company.

B. WHO IS COMPETENT TO SUBSCRIBE FOR STOCK.

64. Corporations generally not.
65. Commissioners, directors, partners, etc., as subscribers.
§ 66. Married women as subscribers.
67. Infant as subscriber.
68. Agent as subscriber.
69. Subscriptions taken by an unauthorized agent of corporation.
70. Unissued or increased capital stock — Right to subscribe therefor.

C. AN ACTION LIES TO COLLECT SUBSCRIPTIONS.

71. A subscription implies a promise to pay, which is enforceable without proof of any particular consideration.
72. Such is the rule for subscriptions before incorporation as well as those after—Acceptance of the subscription—Withdrawal—Subscription for the benefit of contractors.
73. The New York rule.
74. In New England an express promise or express statute is necessary to support an action to collect subscriptions.
75. Professor Collin's rules on this subject.
76. Stockholders' agreements to guarantee company debts and stockholders' contracts for the benefit of the corporation.

§ 52. *Generally no formalities necessary.*—A contract of subscription for shares of stock in an incorporated company may be entered into in various ways. Whenever an intent to become a subscriber is manifested, the courts incline, without particular reference to formality, to hold that the contract of subscription subsists. It is, as in the case of other contracts, very much a question of intent. Formal rules are for the most part disregarded.[1] And

1 Quoted and approved in Ventura, etc. Ry. *v.* Collins, 46 Pac. Rep. 287 (Cal. 1896), and Nebraska, etc. Co. *v.* Lednicky, 113 N. W. Rep. 245 (Neb. 1907).

in general a contract of subscription may be made in any way in which other contracts may be made.[1] Any agreement by which a person shows an intention to become a stockholder is sufficient to bind both him and the corporation.[2] When one accepts or assumes the position and duties and claims the right and privileges and emoluments of a stockholder, and the corporation accepts or acquiesces therein, such person is estopped to deny that he is a subscriber, even though there may have been something irregular or defective in the form or manner of his subscription, or there may have been no formal subscription at all.[3]

1 Blunt *v.* Walker, 11 Wis. 334, 349 (1860).

2 Quoted and approved in Nebraska, etc. Co. *v.* Lednicky, 113 N. W. Rep. 245 (Neb. 1907); Planters', etc. Co. *v.* Webb, 144 Ala. 666 (1905), and Greenbrier, etc. Exposition *v.* Ocheltree, 44 W. Va. 626 (1898); Fry *v.* Lexington, etc. R. R., 2 Metc. (Ky.) 314 (1859); Wellersburg, etc. Co. *v.* Young, 12 Md. 476 (1858); Gill *v.* Kentucky, etc. Co., 7 Bush (Ky.) 635 (1870); Oler *v.* Baltimore, etc. R. R., 41 Md. 583 (1874); Schaeffer *v.* Missouri, etc. Co., 46 Mo. 248 (1870). A director who authorizes and consents to the entry of his name as a subscriber to stock for a certain amount cannot thereafter avoid the liability on the ground that he did not actually sign the subscription. Jackson, etc. Co. *v.* Walle, 105 La. 89 (1900).

An agreement between one person and another by which the former is to exchange his stock in one corporation for stock in another, does not render him liable as a subscriber in the latter where the stock had never been finally delivered. Ecuadorian Assoc. *v.* Ecuador Co., 70 N. J. Eq. 277 (1905).

A subscription payable to whomsoever might lease premises, free of rent, to a stock exchange, may be enforced by a corporation thereafter organized for that purpose, and the delivery of the subscription to the person obtaining the same is a sufficient delivery. A separate contract with the then owners of the building which was afterwards acquired by the corporation does not affect such subscription, the corporation having no notice thereof. Merchants', etc. Co. *v.* Chicago, etc. Co., 210 Ill. 26 (1904).

3 Sanger *v.* Upton, 91 U. S. 56 (1875); Upton *v.* Tribilcock, 91 U. S. 45 (1875); Wheeler *v.* Millar, 90 N. Y. 353 (1882); Hamilton, etc. Co. *v.* Rice, 7 Barb. 157 (1849); Dorris *v.* French, 4 Hun, 292 (1875); Boston, etc. R. R. *v.* Wellington, 113 Mass. 79 (1873); *Ex parte* Besley, 2 Mac. & G. 176 (1850); Clark *v.* Farrington, 11 Wis. 306 (1860); Jewell *v.* Rock River Paper Co., 101 Ill. 57 (1881); Haynes *v.* Brown, 36 N. H. 545 (1858); Chaffin *v.* Cummings, 37 Me. 76 (1853); Chester Glass Co. *v.* Dewey, 16 Mass. 94 (1819); Griswold *v.* Seligman, 72 Mo. 110 (1880); Boggs *v.* Olcott, 40 Ill. 303 (1866); Musgrave *v.* Morrison, 54 Md. 161 (1880); Phœnix, etc. Co. *v.* Badger, 67 N. Y. 294 (1876); s. c., 6 Hun, 293 (1875); Palmer *v.* Lawrence, 3 Sandf. 161 (1849); Philadelphia, etc. R. R. *v.* Cowell, 28 Pa. St. 329 (1857); Cheltenham, etc. Ry. *v.* Daniel, 2 Q. B. 281 (1841); West Cornwall Ry. *v.* Mowatt, 15 Q. B. 521 (1850). And see the dissenting opinion of Lord St. Leonards in Spackman *v.* Evans, L. R. 3 H. L. Cas. 171, 197 (1868); Harrison *v.* Heathorn, 6 Man. & G. 81 (1843); Ness *v.* Angas, 3 Exch. 805 (1849); Ness *v.*

Merely accepting and holding a certificate of stock is sufficient to constitute one a stockholder.[1]

There have been various *dicta* to the effect that a subscription cannot be entered into by parol,[2] but the later and better opinion

Armstrong, 4 Exch. 21 (1849); Moss *v.* Steam Gondola Co., 17 C. B. 180 (1855); Bailey *v.* Universal, etc. Assoc., 1 C. B. (N. S.) 557 (1857). The mere acts of interested parties by which certain leases in lands are turned in to the corporation, it being understood that payment for the property and services was to be a certain amount of stock, may constitute stockholdership, although no formal record is made of the transaction and agreement, and although no certificates of stock are issued to anybody. Holland *v.* Duluth, etc. Co., 65 Minn. 324 (1896). Where stock is taken and paid for, it is immaterial that there was no formal subscription therefor. Anderson *v.* Scott, 70 N. H. 534 (1901). The absence of records being sufficiently accounted for to make parol evidence admissible, defendant's attendance at meetings of the corporation and his acting as president were accounted competent proof of his being a stockholder. Haynes *v.* Brown, 36 N. H. 545 (1858). Where the stockholders formally increase the capital stock and certify that it has been increased and issue mortgage bonds to the full amount of such increased capital stock, under a statute which prohibits the issue of bonds in excess of the capital stock, they will be held to have subscribed *pro rata* to such increased capital stock. Kreisser *v.* Ashtabula, etc. Co., Ohio Circuits (1903), p. 313.

1 Quoted and approved in Walter *v.* Merced, etc. Assoc., 126 Cal. 582 (1899); Upton *v.* Tribilcock, 91 U. S. 45 (1875); McLaughlin *v.* Detroit, etc. Ry., 8 Mich. 100 (1860); Barron *v.* Burrill, 86 Me. 66, 72 (1893). See also McHose *v.* Wheeler, 45 Pa. St. 32 (1863); Clark *v.* Continental Imp. Co., 57 Ind. 135 (1877); Kentucky, etc. *v.* Schaefer, 120 Ky. 227 (1905). The issue of a certificate of stock is a sufficient subscription for it. Clevenger *v.* Moore, 71 N. J. L. 148 (1904). A person taking stock from a corporation on its original issue is liable without subscription. Shickle *v.* Watts, 94 Mo. 410 (1888). A person who receives a certificate of stock from a company in order to enable it to organize, and immediately transfers it back to the company, is not liable on such stock as an offset to claims which he has as a creditor of the corporation. Parberry *v.* Woodson Sheep Co., 18 Mont. 317 (1896). A person is liable on stock which he accepts from a corporation in Maine, even though he did not actually subscribe therefor. Dunn *v.* Howe, 96 Fed. Rep. 160 (1899); rev'd on another point in 107 Fed. Rep. 849.

2 Pittsburgh, etc. R. R. *v.* Gazzam, 32 Pa. St. 340 (1858). In this case an attempt was made to make defendant liable upon his signature to a paper by which the signers agreed to subscribe for stock in a railroad company, but the signatures were shown to have been copies and not originals. Vreeland *v.* New Jersey Stone Co., 29 N. J. Eq. 188 (1878). The decision was on the question of fraud in inducing defendant to take the stock. Thames Tunnel Co. *v.* Sheldon, 6 B. & C. 341 (1827), holding that one who had subscribed a preliminary paper and had paid the sum required in advance, but who had not signed the contract referred to in an act of parliament, was not a subscriber within the meaning of that act. See also § 339, *infra*.

Fanning *v.* Insurance Co., 37 Ohio St. 339 (1881), was a suit upon a

is that such a subscription is valid and binding.[1] It has been held that, where a director is required to be a stockholder, the act of serving as a director is an implied subscription for stock to the amount required in order to be a director.[2] But a contrary rule now

note secured by a mortgage claimed to have been given in payment for stock. The proof showed that defendant verbally agreed with a canvasser to take the stock, but did not sign any subscription book or other contract, and never received certificates of stock. *Held*, that there was no subscription and no sufficient consideration for the note.

Galveston Hotel *v.* Bolton, 46 Tex. 633 (1877). In this case defendant had signed an informal paper as a subscription for stock, and had offered excuses for not paying the first call, asking for time, etc. The informal paper was lost, and defendant's name did not appear on the company's books in any capacity. After the organization of the company he acknowledged to its secretary his obligation to pay the call. *Held*, that he was not a stockholder liable to calls.

The oral statement of the stockholder that he would take a certain amount of stock is not sufficient authority to a corporation to enter his name for that amount. Ingersoll, etc. Co. *v.* McCarthy, 16 Q. B. Rep. (Can.) 162 (1858).

1 Quoted and approved in Somerset, etc. Co.'s Receiver *v.* Adams, 72 S. W. Rep. 1125 (Ky. 1903); Perkiomen, etc. Co. *v.* Dyer, 187 Pa. St. 470 (1898); Liberty, etc. Bank *v.* Otter View, etc. Co., 96 Va. 352 (1898); Rogers *v.* Burr, 105 Ga. 432 (1898). An oral subscription is not void by the statute of frauds. Reed *v.* Gold, 102 Va. 37 (1903). The oral agreement of a creditor to take increased stock in payment of his debt is binding on him. Reid *v.* Detroit, etc. Co., 132 Mich. 528 (1903). Stock issued to a corporate creditor may be shown to have been issued in payment of the debt. Iserman *v.* International, etc. Co., 66 Atl. Rep. 605 (N. J. 1907). Where a person offers to take preferred stock and thereupon the company amends its charter and authorizes the stock and he is made a director, he is liable on the stock. Person, etc. Co. *v.* Lipps, 67 Atl. Rep. 1081 (Pa. 1907). Where a person present at a corporate meeting directed the secretary to subscribe certain stock, and the secretary did so on a loose sheet of paper, the court held the subscriber bound; also that the corporate records reciting the facts were competent to show acceptance, though recorded subsequently. Colfax Hotel Co. *v.* Lyon, 69 Iowa, 683 (1886). A verbal subscription suffices. The statute of frauds does not apply. Bullock *v.* Falmouth, etc. Co., 85 Ky. 184 (1887). A verbal subscription for stock was upheld in Tabler *v.* Anglo-American Assoc., 32 S. W. Rep. 602 (Ky. 1895); Shellenberger *v.* Patterson, 168 Pa. St. 30 (1895), and York Park Bldg. Assoc. *v.* Barnes, 39 Neb. 834 (1894). Where a person orally tells a director that he will subscribe a specified amount of stock, and gives a check in part payment, he is liable as a stockholder. Cookney's Case, 3 De G. & J. 170 (1858). And see also various cases in the notes herein, involving somewhat similar facts.

2 See Harward's Case, L. R. 13 Eq. 30 (1871); Stephenson's Case, 45 L. J. (Ch.) 488 (1876); *Re* British & A. Tel. Co., L. R. 14 Eq. 316 (1872); *Re* Empire Ass. Corp., L. R. 6 Ch. App. 469 (1871).

Where one accepts the office of di-

exists.[1] A subscription in a small pocket memorandum book has been held sufficient to bind the subscriber.[2] So, a subscription on a single sheet of paper may be binding,[3] even though the charter provides for the opening of books.[4] A signature to the certificate required by statute to be filed in order to obtain the charter of incorporation, with the number of shares placed opposite to the signature, is a sufficient subscription to bind both the corporation and the subscriber.[5] But the assignee of a corporation cannot sue its incor-

rector without owning the required number of shares of stock, and is in consequence under obligation to qualify himself by taking stock, he is not obliged to take the stock from the company, but may purchase or procure the shares as he is able in the open market or at private sale. Brown's Case, L. R. 9 Ch. App. 102 (1873); Karuth's Case, L. R. 20 Eq. 506 (1875).

Where shares are allotted to a director in order to qualify him, he is liable upon said shares upon the winding up, even though he did not know of the allotment, and even though he had acquired other qualification shares. *Re* Portuguese, etc. Mines, [1891] 3 Ch. 28.

[1] *Re* Moore Bros. & Co., [1899] 1 Ch. 627; Onslow's Case, 55 L. T. Rep. 612 (1881); aff'd, 58 L. T. Rep. 824 (1887), and cases cited; *Ex parte* Cammell, [1894] 1 Ch. 528. And see summary in Healey's Company Law and Pr. 135, 139. But a director is liable upon qualification shares upon a winding up of the company, even though he has never held any shares, where the charter provides that serving as a director shall constitute a contract to pay for qualification shares. *Re* Anglo-Austrian, etc. Union, [1892] 2 Ch. 158.

The common-law rule that a director is not liable to the amount of qualification shares which he is required by statute to have, but which he does not have, is not applicable to directors in national banks. Finn *v.* Brown, 142 U. S. 56 (1891).

Hamley's Case, L. R. 5 Ch. D. 705 (1877), holds that a director who was not qualified did not by acting render himself liable to creditors to the amount of qualification stock. The court, in a *dictum*, said: "He never was a director, and he never will be a director, as far as that election is concerned," although of course his acts as a director may bind the company as to third persons. See also *Ex parte* Stock, 33 L. J. (Ch.) 731 (1864).

Resignation releases the liability. *Re* Self-Acting, etc. Co., 54 L. T. Rep. 676 (1886); Marquis of Abercorn's Case, 4 De G., F. & J. 78 (1862); *Re* Wheal Buller Consols, L. R. 38 Ch. D. 42 (1888). See also ch. XXXVII, *infra*.

"Can a director part with his qualification shares?" See on this subject 8 Ry. & Corp. L. J. 99.

[2] Buffalo, etc. R. R. *v.* Gifford, 87 N. Y. 294 (1882); Brownlee *v.* Ohio, etc. R. R., 18 Ind. 68 (1862). *Contra*, McClelland *v.* Whiteley, 15 Fed. Rep. 322 (1883). The full christian name need not be subscribed. State *v.* Beck, 81 Ind. 501 (1882).

[3] Iowa, etc. R. R. *v.* Perkins, 28 Iowa, 281 (1869); Hamilton, etc. Co. *v.* Rice, 7 Barb. 157 (1849). *Cf.* Bucher *v.* Dillsburg, etc. R. R., 76 Pa. St. 306 (1874); Hawley *v.* Upton, 102 U. S. 314 (1880).

[4] Mexican Gulf Ry. *v.* Viavant, 6 Rob. (La.) 305 (1843); Ashtabula, etc. R. R. *v.* Smith, 15 Ohio St. 328 (1864).

[5] Phœnix, etc. Co. *v.* Badger, 67 N.

porators for ten per cent. of the capital stock on the ground that they had sworn that ten per cent. had been paid in in order to obtain the charter, when in fact it had not been paid in.[1]

Where an "underwriter" agrees to subscribe for whatever the public do not take, and authorizes another to make the subscription for him, he is bound by the subscription.[2]

A company may give a person an option to subscribe for shares of

Y. 294 (1876); s. c., 6 Hun, 293; Nulton *v.* Clayton, 54 Iowa, 425 (1880); Herries *v.* Wesley, 13 Hun, 492 (1878). The certificate of incorporation signed by an individual with the words "250 shares" is a subscription if so intended. Dupee *v.* Chicago, etc. Co., 117 Fed. Rep. 40 (1902).

Where the statute provides that the persons signing the articles of incorporation shall set opposite their names the amount of their subscription, a subscriber who complies therewith, but does not acknowledge the articles as required by the statute, is not bound by his subscription so far at least as the articles are concerned. Coppage *v.* Hutton, 124 Ind. 401 (1890). It is not necessary that the subscription be to the articles of incorporation. San Joaquin, etc. Co. *v.* Beecher, 101 Cal. 70 (1894). A failure to acknowledge the articles of incorporation is a good defense to a subscriber to them who is sued upon his subscription. Greenbrier Ind. Exposition *v.* Rodes, 37 W. Va. 738 (1893). An incorporator is liable for the number of shares specified in the certificate of incorporation as being the number which he agrees to take. Rathbone *v.* Ayer, 121 N. Y. App. Div. 355 (1907). A person who signs the certificate of incorporation which recites a subscription for stock by him is liable, even though he takes no further part. McCarter *v.* Ketcham, 67 Atl. Rep. 610 (N. J. 1907).

1 Patterson *v.* Franklin, 176 Pa. St. 612 (1896).

2 Shaw *v.* Bentley, 68 L. T. Rep. 812 (1893); also *Re* Henry Bentley, 69 L. T. Rep. 204 (1893). An underwriters' agreement to subscribe if called upon so to do does not render them liable on a winding up if they were not so called upon. *Re* Harvey's Oyster Co., [1894] 2 Ch. 474. The offer of a party to take such stock as may not be taken by the public when offered for subscription may be accepted after the public subscriptions are closed. Especially is this the case where the underwriter afterwards practically accepted the stock. *Re* Hemp, etc. Co., [1896] 2 Ch. 121. An underwriter's contract is given in full in *Re* Hannan's, etc. Co., 75 L. T. Rep. 45 (1896); s. c., [1896] 2 Ch. 643. An offer to underwrite such stock as is not subscribed for by the public must be accepted by the company prior to the offer to the public in order to be binding upon the person making the offer. *Re* Consort, etc. Mines, [1897] 1 Ch. 575. A pledgee of an underwriter's agreement may have difficulty in tendering performance to the underwriters. Litchfield, etc. Society *v.* Dibble, 67 Atl. Rep. 476 (Conn. 1907). The agreement of individuals with a promoter to underwrite shares of stock of a company cannot necessarily be enforced by the company, and may be modified without the consent of the company, but if shares are allotted to the underwriters, and they do not object, they are liable as shareholders by English law, and if the corporation was an English corporation such liability may be enforced in the United States. Electric, etc. Co. *v.* Prince, 81 N. E. Rep. 306 (Mass. 1907). See also § 14, *supra.*

stock in the company. If the company sells its assets before such option is exercised, the party holding the option may exercise it and sue for damages. The price at which the company sold its assets is the basis of the damage.[1]

§ 53. *Informalities, irregularities and mistakes in subscriptions.* —But a subscription to an incomplete copy of the articles of association will not bind the subscriber;[2] and again, a subscription paper in which the names of directors were left blank has been held not enforceable against a subscriber after the blank has been filled without his consent or concurrence.[3] Equity will not, however, in the absence of fraud, relieve a subscriber merely upon the ground that he by mistake subscribed for more stock than he intended, in a case where he suffered the corporation to act upon the faith of his subscription.[4] But if one signs an agreement to subscribe, on a sub-

1 *Re* South African, etc. Co., 74 L. T. Rep. 769 (1896); aff'd, 77 L. T. Rep. 377. Instead of subscribing for stock a party may make a contract with a corporation to take the stock with the right to return it and receive back the purchase price within a certain time. Such a contract is legal, and the stock may be returned and the money recovered if corporate creditors' rights do not intervene. Vent *v.* Duluth, etc. Co., 64 Minn. 307 (1896). In the case of Brown *v.* St. Paul, etc. Works, 62 Minn. 90 (1895), an agreement of a corporation with a subscriber for stock to take back the stock at a certain time and refund the money if the subscriber so wished was upheld.

2 Dutchess, etc. R. R. *v.* Mabbett, 58 N. Y. 397 (1874).

3 Dutchess, etc. R. R. *v.* Mabbett, 58 N. Y. 397 (1874), the court saying: "A signature to an incomplete paper, wanting in any substantial particular, when no delegation of authority is conferred to supply the defect, does not bind the signer without further assent on his part to the completion of the instrument." To same effect, Consols Ins. Assoc. *v.* Newall, 3 Fost. & F. 130 (1862), where the number of shares was left in blank. See also Eakright *v.* Logansport, etc., 13 Ind. 404 (1859). In this case the charter required that directors should be named in the articles of association. The adoption of the articles at the time of electing directors was held to be a substantial compliance with the charter, the requirement being considered as only directory.

But where an actual subscription is made, with a view of influencing other subscriptions, but the number of shares to be taken is left blank, so that the subscription itself might be subsequently withdrawn, it was held that the corporate agents might fill up the blank, and thereby bind the subscriber. Jewell *v.* Rock River, etc. Co., 101 Ill. 57 (1881).

The case of Clark *v.* Continental Imp. Co., 57 Ind. 135 (1877), held that an agreement to pay in installments a certain sum to a contractor as the work progressed, in consideration of stocks to be delivered by the corporation, after full payment has been made in this way, was not a subscription to capital stock, and that the maker of such an agreement was not a subscriber.

4 Diman *v.* Providence, etc. R. R., 5 R. I. 130 (1858). Where, with a view to organizing a corporation, various parties sign a subscription

scription paper, entirely misunderstanding the nature of the contract he is entering into, his subscription must, on general principles, be treated as null and void for want of mutual consent. Cases of this nature may arise without involving the question of fraud.[1] Questions relative to the withdrawal of a subscriber, after subscription, are considered elsewhere.[2]

If the business of the incorporation is illegal, the subscription, of course, cannot be enforced.[3]

Many cases are given in the notes which will throw some light on the various principles of law as applicable to the facts in actions to collect subscriptions.[4]

list on the oral agreement that they might change the amount of their subscriptions, and one who signed for $5,000 notified the chief promoter that he wanted but $2,500, and the corporation, when organized, made calls on him for only $2,500, a corporate creditor cannot hold him for more. White *v.* Kahn, 103 Ala. 308 (1894).

1 Jackson *v.* Hayner, 12 Johns. 469 (1815); Thoroughgood's Case, 2 Coke, Rep. 9 (1584); Foster *v.* Mackinnon, L. R. 4 C. P. 704 (1869); Rockford, etc. R. R. *v.* Schunick, 65 Ill. 223 (1872),—not stock cases, but sustaining the general principle.

Reed *v.* Richmond Street R. R., 50 Ind. 342 (1875). In this case the statute authorizing the organization of street railway companies required that the articles of association should, among other things, state the number of directors and their names. Neither of these requirements was observed; and in an action to recover a subscription the court held the subscription void, saying: "If one of these requirements can be dispensed with, or held to be directory merely, we do not see where we are to stop. The case of Eakright *v.* Logansport, etc. R. R., 13 Ind. 404 (1859), went as far in this direction as we are willing to go."

2 See § 169, *infra*. A subscriber may show that he was assured that he might withdraw from the subscription if he wished after consulting with another person, and that he actually did so withdraw. Ada, etc. Assoc. *v.* Mears, 123 Mich. 470 (1900). Even though two persons signed the articles of incorporation as incorporators and as subscribers of stock, on condition that the articles would not be used unless a certain other party signed, and even though the latter party did not sign and the articles were filed and the stock subsequently tendered to such signers, which they refused, yet if they took no steps to remove their names as subscribers from the books they are liable as stockholders to corporate creditors on a statutory liability. Rehbein *v.* Rahr, 109 Wis. 136 (1901).

3 See ch. XIII.

Notes given in the purchase of stock in a corporation whose sole business is to carry on an infringing telephone business are without consideration and void. Clemshire *v.* Boone County Bank, 53 Ark. 512 (1890).

4 Boggs *v.* Olcott, 40 Ill. 303 (1866), holding that the payment of calls by one whose name appears to a subscription to the stock of a corporation is an admission that his signature and subscription were authorized and binding upon him. To same effect is Musgrave *v.* Morrison, 54 Md. 161 (1880); Rhey *v.* Ebensburg, etc. Co., 27 Pa. St. 261 (1856), in which a promise to subscribe for

§ 54. *Various defenses to subscriptions.*—There are various defenses to the validity and enforceability of a subscription which have been treated of elsewhere. Thus, a subscriber to the capital stock of an incorporated company is, in general, bound to

a certain amount of stock for the purpose of inducing the company to adopt a certain route was held enforceable, though no formal subscription ever was made; Hawley *v.* Upton, 102 U. S. 314 (1880), where, the paper issued being a bond in consideration of shares received, but which were in fact never issued, the signer was held to be a stockholder. In Cayuga Lake R. R. *v.* Kyle, 64 N. Y. 185 (1876), where the articles of association were defective in not distinctly stating the termini of the road nor the counties through which it passed, it was held that such defect could not avail the defendant in an action for a balance of an unpaid subscription. Gorrissen's Case, L. R. 8 Ch. App. 507 (1873), in which the person agreeing to place stock was held not liable as a stockholder. Boston, etc. R. R. *v.* Wellington, 113 Mass. 79 (1873), in which the railroad was not divided into sections as contemplated by the subscription paper, the change, however, being a merely formal irregularity. In an old case in Massachusetts it was held that a statement, made at a public meeting of the corporation, by one of the stockholders, that he would spend half his estate, or enough of it to make the enterprise undertaken by the corporation a success, did not render him liable for a failure to do so. Andover, etc. Corp. *v.* Hay, 7 Mass. 102 (1810).

A subscription by various parties to a cheese factory to be incorporated, the number of shares being placed opposite the names, binds the subscribers only to the extent of the shares so placed opposite their names. Davis, etc. Co. *v.* Jones, 66 Fed. Rep. 124 (1895). A subscription contract prior to incorporation may be such that the subscribers are liable severally to the amount of their subscriptions. Davis *v.* Ravenna Creamery Co., 48 Neb. 471 (1896). A subscription prior to incorporation will not be construed as rendering each subscriber liable for the whole, even though the subscription speaks of a joint liability, it being clear that such was not the intent of the subscribers. Chicago, etc. Co. *v.* Graham, 78 Fed. Rep. 83 (1896). A subscriber who places opposite his signature the figures $1,000 is bound, although he does not write the number of shares taken. Columbus Land Co. *v.* McNally, 172 Pa. St. 158 (1895). An agreement to buy stock was held to be a subscription to stock in Lincoln, etc. Co. *v.* Sheldon, 44 Neb. 279 (1895). An indefinite agreement to subscribe, running to trustees, is not enforceable, no corporate name, capital stock, or incorporators being named. Loutsenhizer *v.* Farmers', etc. Co., 5 Colo. App. 479 (1895).

The validity of a subscription depends upon the law of the state creating the corporation, unless payment is to be made elsewhere. Penobscot, etc. Co. *v.* Bartlett, 78 Mass. 244 (1858).

Burlington, etc. Ry. *v.* Palmer, 42 Iowa, 222 (1875), was an action upon a subscription note to a railroad, which, by agreement, was not to be delivered until a right of way had been secured, when a contract should be executed by the railroad to construct an extension upon certain conditions. *Held*, that the fact that the contract last referred to did not contain one of the conditions which had, however, been complied with, did not constitute a defense to the action.

know the legal effect of his subscription; and false and even fraudulent representations made to him at the time of taking his sub-

In Lane *v.* Brainerd, 30 Conn. 565 (1862), one who had subscribed in an irregular way, but had acted as a stockholder and accepted the office of director, was held to have waived all objection to the form of his subscription. To same effect, Danbury, etc. R. R. *v.* Wilson, 22 Conn. 435 (1853).

The fact that a subscription paper does not correctly designate the termini of a railroad already built is no defense to a subscriber. Cayuga Lake R. R. *v.* Kyle, 64 N. Y. 185 (1876). The legislature cannot make a person a subscriber in opposition to his will. Richmond, etc. Assoc. *v.* Clarke, 61 Me. 351 (1873).

One who never subscribes in writing for stock, nor assumes the position or rights of a stockholder, but gives a bond to repay the subscription price, which is loaned to him, is not liable on the bond. Butler University *v.* Scoonover, 114 Ind. 381 (1888).

It is a question of fact and of contract whether a party loaned money to the company or was a subscriber to the stock. McComb *v.* Barcelona, etc. Assoc., 134 N. Y. 598 (1892), aff'g 10 N. Y. Supp. 546.

Where the corporation contracts with the subscriber to give him indefinite time in which to pay for his stock the subscription is void. McComb *v.* Credit Mobilier, etc. Co., 13 Phila. 468 (1878); Van Allen *v.* Illinois Cent. R. R., 7 Bosw. 515 (1861). It is otherwise when only a reasonable credit is given. Mitchell *v.* Beckman, 64 Cal. 117 (1883).

The fact that the subscriptions to various subscription lists of the same character are cut off from the headings and pasted under one heading does not release the subscribers. It is not a mutilation. Sodus Bay, etc. R. R. *v.* Hamlin, 24 Hun, 390 (1881). Subscriptions need not be on one paper, but may be on various papers. Anderson *v.* Scott, 70 N. H. 534 (1901).

Charlotte, etc. *v.* Blakely, 3 Strobh. (S. C.) 245 (1848). In this case one who subscribed a paper agreeing to take certain railroad stock "provided the road comes to Columbia," but did not sign the subscription books when opened, was held not to be a stockholder.

Erie, etc. R. R. *v.* Owen, 32 Barb. 616 (1860). In this case it is said that there are two modes in which a person, under the general railroad act of the state of New York, may become a stockholder in a railroad corporation, viz.: by subscribing the articles of association, and becoming a member of the corporation as the act provides (§§ 1 and 2), or by subscribing to the capital stock, in the book opened by the directors, after the corporation is in existence; and that no one who has only signed the articles of association, before the corporation came into being, is a corporator or member of the corporation, unless the articles so signed by him have been duly filed in the office of the secretary of state, as required by the statute. It is doubtful whether this can be considered good law. This case is distinguished in Buffalo, etc. R. R. *v.* Clark, 22 Hun, 359, 362 (1880); aff'd, 87 N. Y. 294, and Sodus, etc R. R. *v.* Hamlin, 24 Hun, 390, 394 (1881).

Although the statute provides for subscription books, yet a subscription on a subscription paper will be valid. Ashtabula, etc. R. R. *v.* Smith, 15 Ohio St. 328 (1864); Brownlee *v.* Ohio, etc. R. R., 18 Ind. 68 (1862); Buffalo, etc. R. R. *v.* Gifford, 87 N. Y. 294 (1882); Hamilton, etc. Co. *v.* Rice, 7 Barb. 157 (1849); People *v.* Stockton, etc. R. R., 45 Cal. 306

scription as to the legal effect of his contract of subscription are not sufficient to release him.[1] Parol conditions or agreements in reference to subscriptions which are absolute on their face are generally not sustained.[2] Where the certificate of incorporation varies materially from the preliminary subscription agreement, the subscriber is released.[3] The right of a stockholder to withdraw from

(1873); Stuart *v.* Valley R. R., 32 Gratt. 146 (1879). Especially where a loose sheet is subsequently put into a volume and made part of the records of the corporation. Woodruff *v.* McDonald, 33 Ark. 97 (1878).

Ex parte Besley, 2 Mac. & G. 176 (1850), in which the defendant was held to be a subscriber and liable to creditors of a railway, although he had not signed any subscription paper or book, but had attended meetings of the provisional committee as a member thereof, and had paid small assessments ordered by it.

Carlisle *v.* Saginaw, etc. R. R., 27 Mich. 315 (1873). Where the law required subscriptions to be made "in the manner to be provided by its by-laws," a subscription made before such by-laws were adopted was declared to be void.

New Brunswick, etc. Co. *v.* Muggeridge, 4 Hurl. & N. 160 (1859). Defendant had agreed in writing *to accept* shares he desired to subscribe for, and had paid the sum required in advance, but he did not sign the articles of association subsequently sent to him for his signature. In an action for calls he was held not to be a shareholder, although his name had been placed as such upon the company's register. The decision rested upon a clause in the Joint-Stock Companies Act, 1856, to the effect that no person shall be deemed to have accepted any share unless his acceptance be in writing.

Tilsonburg, etc. Co. *v.* Goodrich, 8 Ont. 565 (1885), which was an action for calls on shares. "The defendant" (although one of the projectors and original subscribers) "was not a party to the petition, and he is not by the terms of the [general] statute a member of the company, and he has done nothing since the patent, by attending meetings or otherwise, which can have relation to his agreement to take stock." The court with regret held that he was not a stockholder.

1 See § 196, *infra.*

2 See ch. IX, *infra.* A defendant, it is said, however, who is sued on a subscription absolute, may show that he agreed orally to subscribe conditionally, and placed his name on blank paper, and that the secretary of the corporation subsequently, without his knowledge, subscribed the name unconditionally to a subscription paper. See § 137, *infra.* And it is held that when a corporation invites and accepts subscriptions as a loan, to be repaid in full and the subscription canceled, it cannot repudiate such a contract and treat the subscription so induced as absolute. See § 247, n., *infra.* A party sued upon a subscription for stock may show that a letter accompanied the subscription to the effect that he would pay a certain part in cash, which had been done, and pay the balance out of his monthly accounts with the corporation. Elliott *v.* New York, etc. Co., 73 Hun, 519 (1893); aff'd, 148 N. Y. 752.

3 Greenbrier, etc. Exposition *v.* Rodes, 37 W. Va. 738 (1893). A subscription to a corporation to be organized for dealing in a specified article cannot be enforced by a corporation subsequently organized for manufacturing and dealing in that article. Woods, etc. Co. *v.* Brady,

his subscription is discussed elsewhere in this volume.[1] And many other defenses which have been raised to defeat actions for the collection of subscriptions are considered elsewhere.[2]

§ 55. *Proof of subscription.*—It is presumptive evidence that one is a subscriber or stockholder when his name appears on the books of the company in either of these capacities.[3] And so also

181 N. Y., 145 (1905). A change in the plan of organization so as to have a larger capital stock than was originally intended releases a subscriber. Norwich, etc. Co. *v.* Hockaday, 89 Va. 557 (1893). See also §§ 62 and 194, *infra.*

1 See §§ 167–170, *infra.*

2 See ch. X.

3 Quoted and approved in Torras *v.* Raeburn, 108 Ga. 345 (1899). The appearance of a person's name as a stockholder on the corporate books is *prima facie* evidence that he owns the stock. Sherwood *v.* Illinois, etc. Bank, 195 Ill. 112 (1902). An entry in the stock book of a national bank is evidence of stockholdership in an action to enforce the statutory liability. Brown *v.* Ellis, 103 Fed. Rep. 834 (1900). The corporate stock book, containing a list of the stockholders, the number of shares owned by each, the amounts paid and due, and containing defendant's name among others, is sufficient evidence of a balance due on unpaid subscription. Glenn *v.* Orr, 96 N. C. 413 (1887); Turnbull *v.* Payson, 95 U. S. 418 (1877); Hoagland *v.* Bell, 36 Barb. 57 (1861); Hamilton, etc. Co. *v.* Rice, 7 Barb. 157 (1849); Pittsburgh, etc. R. R. *v.* Applegate, 21 W. Va. 172 (1882); Taylor *v.* Hughes, 2 Jones & Lat. (Ir. Ch.) 24, 55 (1844); McHose *v.* Wheeler, 45 Pa. St. 32 (1863). *Cf.* Coffin *v.* Collins, 17 Me. 440 (1840); Whitman *v.* Granite Church, 24 Me. 236 (1844); Rockville, etc. Turnp. *v.* Van Ness, 2 Cranch, C. C. 449 (1824); s. c., 20 Fed. Cas. 1080; Mudgett *v.* Horrell, 33 Cal. 25 (1867). Or when a certificate has been issued to him, which he produces. Boardman *v.* Lake Shore, etc. R. R., 84 N. Y. 157 (1881); Agricultural Bank *v.* Burr, 24 Me. 256 (1844); Vanderwerken *v.* Glenn, 85 Va. 9 (1888); Lewis *v.* Glenn, 84 Va. 947 (1888). The appearance of a person's name on the stock book of a corporation raises a presumption that he subscribed. South Branch Ry. *v.* Long's Adm'r, 43 W. Va. 131 (1897).

The stock book and a subscription list are sufficient to prove stockholdership in the absence of rebuttal testimony. Glenn *v.* Liggett, 47 Fed. Rep. 472 (1891). But entries in the cash book are not admissible, nor the report of the treasurer of the corporation. Glenn *v.* Liggett, 47 Fed. Rep. 472 (1891).

Where the name of an individual appears upon the stock book of a corporation as a stockholder, the presumption is that he is regularly and lawfully the holder and owner of the stock, and, in the absence of evidence that the stock has come to him by transfer, that he was regularly a subscriber. Turnbull *v.* Payson, 95 U. S. 418 (1877).

If a person appears upon the books as a stockholder, the presumption is raised that he is a stockholder, and entries in the stock book are admissible to raise such presumption. Holland *v.* Duluth, etc. Co., 65 Minn. 324 (1896).

The stock books are sufficient to prove stockholdership if the name contained therein is the same as defendant's and was entered as his name. Liggett *v.* Glenn, 51 Fed. Rep. 381 (1892). *Cf.* Howard *v.* Glenn, 85 Ga. 238 (1890).

it is said that the commissioners' books are *prima facie* evidence of the subscriptions found in them,[1] and likewise as to the original subscription paper.[2] And again, entries in the proper books by commissioners duly appointed to take subscriptions are evidence against the subscribers.[3] So corporate books to which a subscription has been transferred by authority of the subscriber are evidence of the subscription,[4] and also the books that contain the original subscriptions.[5] Entries on the stock ledger and corporate

The books of the corporation are *prima facie* evidence of stockholdership. Lehman *v.* Glenn, 87 Ala. 618 (1889).

A mistake in entering the name of the subscriber on the corporate books may be fatal to proving stockholdership by the books. Where the subscription is denied, the best evidence is the subscription itself; and until it is accounted for, the stock ledger is inadmissible in evidence. If the action is on the written subscription, recovery can be on that alone. Taussig *v.* Glenn, 51 Fed. Rep. 409 (1892).

Where there is no law authorizing a paper containing the subscriptions to the capital stock of a corporation to be filed in the office of the secretary of state, a copy thereof, certified under the seal of the secretary of state, is not admissible as evidence in a suit by the corporation to charge the defendant as stockholder. Troy, etc. R. R. *v.* Kerr, 17 Barb. 581, 600 (1854); Tilsonburg, etc. Co. *v.* Goodrich, 8 Ont. 565 (1885). *Cf.* Bouchaud *v.* Dias, 3 Denio, 238 (1846); Dick *v.* Balch, 8 Peters, 30 (1834).

Stockholdership is proved by the stockholders' book which by statute is made presumptive evidence of the facts therein stated, and by the testimony of a corporate officer that the persons therein named are stockholders and that they took part in stockholders' meetings. Zang *v.* Wyant, 25 Colo. 551 (1898). Where it is proved that the defendant is a stockholder, the books of the company may be used to prove the amount of stock he held, but such books are not sufficient to prove that he was a stockholder. The law of the forum governs as to this. National Express, etc. Co. *v.* Morris, 15 App. Cas. Dist. of Col. 262 (1899).

The stock ledger supported by the evidence of the bank officials may prove who were the stockholders. Adams *v.* Clark, 36 Col. 65 (1906). The corporate books are sufficient to prove that the whole capital stock of the corporation has been subscribed, as required by statute, before condemnation proceedings of land is taken, even though some of the stock is subscribed by one as trustee. State *v.* Superior Court, etc., 87 Pac. Rep. 40 (Wash. 1906). The stock book is admissible but is not conclusive. Willoughby *v.* Kelly, 91 Pac. Rep. 874 (Okl. 1907).

1 Rockville, etc. Co. *v.* Van Ness, 2 Cranch, C. C. 449 (1824); s. c., 20 Fed. Cas. 1080; Wood *v.* Coosa, etc. R. R., 32 Ga. 273 (1861).

2 Partridge *v.* Badger, 25 Barb. 146 (1857).

3 Wood *v.* Coosa, etc. R. R., 32 Ga. 273 (1861).

4 Iowa, etc. R. R. *v.* Perkins, 28 Iowa, 281 (1869); Hawley *v.* Upton, 102 U. S. 314 (1880), a case where the party had no knowledge of the transfer, but was held liable. *Cf.* Whitman *v.* Granite Church, 24 Me. 236 (1844).

5 Marlborough Branch R. R. *v.* Arnold, 75 Mass. 159 (1858). *Cf.* Mudgett *v.* Horrell, 33 Cal. 25 (1867).

The subscription books are *prima*

books are competent evidence of an issue of stock to a person.[1] There are recent decisions, however, to the contrary, and it has been held that the fact that the name of a person appears as a stockholder on the stock book of a corporation is not sufficient to raise a presumption that he is a stockholder, in a suit against him by a judgment creditor of the corporation to enforce a statutory liability.[2] It has also been held that entries in the books of a corporation showing the transfer of stock to a certain person, and payments by him thereon, are not *prima facie* evidence that he is a stockholder in a suit to charge him as a stockholder of the corporation.[3] The presumption that one is a stockholder, arising from the fact of his name being found in the stock and transfer book, may be met by proof to the contrary.[4] Creditors of a corporation are presumed to have relied upon the books as to who are stockholders.[5] In order to let in secondary evidence of a subscription, there must

facie evidence of stockholdership. Semple *v.* Glenn, 91 Ala. 245 (1891).

In enforcing a subscription, stockholdership may be proven by showing the name on the subscription list and proving payment of several assessments. Glenn *v.* McAllister, 46 Fed. Rep. 883 (1891).

Stockholdership may be proved by admissions of the stockholder and the testimony of the treasurer, and by the record book purporting to contain copies of the original minutes, where the stock book could not be found. Congdon *v.* Winsor, 17 R. I. 236 (1891).

1 Chapman *v.* Porter, 69 N. Y. 276 (1877).

2 Foote *v.* Anderson, 123 Fed. Rep. 659 (1903). Third parties are not bound by entries in the books of a corporation, and hence stockholdership cannot be proved by such books, unless such stockholders knew thereof and assented thereto. Harrison *v.* Remington, etc. Co., 140 Fed. Rep. 385 (1905). The mere fact that a man's name is entered in the books as a stockholder does not prove that fact. Proof must be given that he authorized, assented, or knew of and acquiesced in the subscription. Girard, etc. Co. *v.* Loving, 71 Kan. 558 (1905).

3 Carey *v.* Williams, 79 Fed. Rep. 906 (1897), the court reviewing the authorities. The fact that a person's name appears on the books of a corporation as a stockholder is not sufficient evidence upon which to charge him as a stockholder, and he may show that the stock was transferred to him before it should have been transferred under his contract of purchase. Sigua, etc. Co. *v.* Greene, 104 Fed. Rep. 854 (1900). Stockholdership cannot be proved by books of the corporation other than the stock subscription book signed by the subscriber. Hinsdale Sav. Bank *v.* New Hampshire Bkg. Co., 59 Kan. 716 (1898).

4 Mudgett *v.* Horrell, 33 Cal. 25 (1867). *Cf.* Brewers', etc. Ins. Co. *v.* Burger, 10 Hun, 56 (1877). The mere fact that a party is registered on corporate books as a subscriber for stock is insufficient where it is shown that the party did not subscribe and never authorized any subscription. Chapman *v.* Virginia, etc. Co., 96 Va. 177 (1898).

5 United States, etc. Co. *v.* Davies, 2 Kan. App. 611 (1895). *Cf.* Mud-

be proof of an original subscription and of the loss of the book or paper, or the absence of the original paper satisfactorily accounted for.[1] Where a person is shown to be a stockholder, the books of the company are admissible to prove how much has been paid on his stock.[2]

The books of the corporation are evidence in a suit against a stockholder on a call, even though the entries are not proved to be correct by the person actually making them.[3]

As against the officers of the company it may be proved by the books of the company that they had converted to their own use the funds of the company illegally.[4]

§ 56. *The English rule.*—In England the contract of a subscription for shares is entered into in a somewhat more technical or formal manner. An application, in the first instance, is made in writing for a specified number of shares, which application is held to be a mere offer, open for acceptance by the corporation for only a limited time.[5] If the application be accepted, the corporation for-

gett *v.* Horrell, 33 Cal. 25 (1867), and § 260, *infra.*

1 Pittsburgh, etc. R. R. *v.* Gazzam, 32 Pa. St. 340 (1858); Graff *v.* Pittsburgh, etc. R. R., 31 Pa. St. 489 (1858). See also Hays *v.* Pittsburgh, etc. R. R., 38 Pa. St. 81 (1860). A contract between the defendant, who is sued as a stockholder, and his attorney, relative to defending the action, is inadmissible to prove stockholdership. Liggett *v.* Glenn, 51 Fed. Rep. 381 (1892); Dorsheimer *v.* Glenn, 51 Fed. Rep. 404 (1892). A corporation may, by suit, compel its agents to deliver up subscription lists, or in lieu thereof be liable themselves on the subscriptions. People's Brewing Co. *v.* Bœbinger, 40 La. Ann. 277 (1888).

2 Fish *v.* Smith, 73 Conn. 377 (1900).

3 Sigua, etc. Co. *v.* Brown, 171 N. Y. 488 (1902). In a suit by a receiver of a national bank to recover back dividends illegally paid, the books of the bank are competent evidence to prove the acts of the corporation and its financial condition, except as to dealings between the corporation and the defendant. Hayden *v.* Williams, 96 Fed. Rep. 279 (1899).

4 Saranac, etc. R. R. *v.* Arnold, 167 N. Y. 368 (1901). A director may be proved to be such by the minute book of the corporation, but general entries upon the ledger of the corporation do not charge a director with notice thereof, unless it is proved that he had access to the ledger or control over it. Leonard *v.* Faber, 52 N. Y. App. Div. 495 (1900), the court stating that corporate books, such as the stock book and minute books containing records, in which third parties are not interested, are evidence of the facts set forth in them both in favor and against the corporation, but that account books showing transactions between the corporation and third persons are similar to account books of other parties and are admissible only as admissions by the corporation. See also § 727, *infra.*

5 Ramsgate, etc. Co. *v.* Montefiore, L. R. 1 Exch. 109 (1886); *Re* Bowron, L. R. 5 Eq. 428 (1868), and the cases generally cited, *infra*, in this section.

mally allots to the applicant the desired number of shares, and gives him a notice of the allotment. The notice is of the essence of the contract. An allotment without notice is not sufficient to bind the applicant as a contributory or a stockholder.[1] If the notice of allotment is sent by mail, the allottee becomes bound from the time of posting the letter, whether he received it or not.[2] And if the allottee knew of the fact of the allotment, and especially if he acted or suffered others to act upon the assumption that he was a shareholder, a formal notification may be unnecessary to bind him.[3] The application being in the nature of an offer or a proposition may be withdrawn at any time before it has been regularly accepted, and it must be accepted within a reasonable time, or the party making it cannot be held bound;[4] and although the application should be in

A subscriber may withdraw before allotment by a legally convened meeting of the directors. *Re* Portuguese, etc. Mines, L. R. 42 Ch. D. 160 (1889). But not where the allotment is made irregularly before, but regularly confirmed after, the withdrawal. *Re* Portuguese, etc. Mines, L. R. 45 Ch. D. 16 (1890).

1 Hebbs's Case, L. R. 4 Eq. 9 (1867); Gunn's Case, L. R. 3 Ch. App. 40 (1867); *Re* Peruvian Rys. Co., L. R. 4 Ch. App. 322 (1869); Pellatt's Case, L. R. 2 Ch. App. 527 (1867); Ward's Case, L. R. 10 Eq. 659 (1870); Harris's Case, L. R. 7 Ch. App. 587 (1872); Household, etc. Co. *v.* Grant, L. R. 4 Exch. D. 216 (1879). The mere act of signing the memorandum of association does not make one a stockholder. Mackley's Case, L. R. 1 Ch. D. 247 (1875). A mere allotment without an entry of the name on the stock register does not render the person liable as a stockholder. Nicol's Case, L. R. 29 Ch. D. 421 (1885). Nor is one a stockholder unless he signs the deed of settlement. Irish Peat Co. *v.* Phillips, 1 Best & S. 598 (1861). Nor will a certificate be issued till then. Wilkinson *v.* Anglo-Californian, etc. Co., 18 Q. B. 728 (1852).

Although an allotment of stock may be illegal by reason of notice not having been given of a directors' meeting, yet the allotment may be confirmed by a subsequent legally called meeting. *Re* Portuguese, etc. Mines, L. R. 45 Ch. D. 16 (1890).

2 Harris's Case, L. R. 7 Ch. App. 587 (1872); Household, etc. Co. *v.* Grant, L. R. 4 Exch. D. 216 (1879); Townsend's Case, L. R. 13 Eq. 148 (1871). But see Hebbs's Case, L. R. 4 Eq. 9 (1867). *Contra*, British, etc. Tel. Co. *v.* Colson, L. R. 6 Exch. 108 (1871); *Re* Constantinople, etc. Co., L. R. 11 Eq. 86 (1870). Where the party to whom the stock is allotted does not reply to the letter informing him of the allotment, he is not bound. *Re* Staffordshire Gas, etc. Co., 66 L. T. Rep. 48 (1891).

3 Levita's Case, L. R. 3 Ch. App. 36 (1867); *Re* Peruvian Rys. Co., L. R. 4 Ch. App. 322 (1869); Richards *v.* Home, etc. Assoc., L. R. 6 C. P. 591 (1871).

4 Ward's Case, L. R. 10 Eq. 659 (1870); Best's Case, 2 De G., J. & S. 650 (1865); Ramsgate, etc. Co. *v.* Montefiore, L. R. 1 Exch. 109 (1866); Chapman's Case, L. R. 2 Eq. 567 (1866); Ritso's Case, L. R. 4 Ch. D. 774 (1877); Wilson's Case, 20 L. T. (N. S.) 962 (1869); Pellatt's Case, L. R. 2 Ch. App. 527 (1867). A notice of withdrawal of an application for stock is effective when received

writing, the withdrawal of it may be oral.[1] It seems to be well settled in England, that, in order to make the contract to take up shares completely binding, there must be the application in writing, the allotment of the shares to the applicant, and a communication to him of notice of the allotment.[2]

§ 57. *Subscriptions taken by commissioners.*—Although the statute provides for subscription either by an original subscription to the articles of association, or, after the incorporation, by a subscription in books to be opened by commissioners, nevertheless it has been held that a subscription in some other way is binding.[3] The

by the secretary at the company's office. *Re* London, etc. Bank, Ltd., [1900] 1 Ch. 220.

1 Wilson's Case, 20 L. T. (N. S.) 962 (1869). An application for shares in a company may be verbally withdrawn before allotment. *Re* Brewery Assets Corp., [1894] 3 Ch. 272.

2 Adams's Case, L. R. 13 Eq. 474 (1872); Hebbs's Case, L. R. 4 Eq. 9 (1867); Pellatt's Case, L. R. 2 Ch. App. 527 (1867); Roger's Case, L. R. 3 Ch. App. 633, 637 (1868); Tucker's Case, 41 L. J. Ch. 157 (1871). *Cf.* Bloxam's Case, 33 Beav. 529 (1864), distinguished in Pellatt's Case, *supra*. But under the Companies Act of 1862, § 23, the decisions are uniform that whenever one signs the memorandum of association he becomes a stockholder, and must be put on the list of contributories, although no shares may have been allotted to him. *Re* London, etc. Co., L. R. 5 Ch. D. 525 (1877); Evans's Case, L. R. 2 Ch. App. 427 (1867); Sidney's Case, L. R. 13 Eq. 228 (1871); Levick's Case, 40 L. J. (Ch.) 180 (1870); Hall's Case, L. R. 5 Ch. App. 707 (1870), distinguishing Snell's Case, L. R. 5 Ch. App. 22 (1869). An allotment to a person who has not applied for shares is not binding. *Re* Northern, etc. Co., 63 L. T. Rep. 369 (1890).

3 Buffalo, etc. R. R. *v.* Gifford, 87 N. Y. 294 (1882); Stuart *v.* Valley R. R., 32 Gratt. (Va.) 146 (1879). *Contra*, Troy, etc. R. R. *v.* Tibbits, 18 Barb. 297 (1854); Parker *v.* Northern, etc. R. R., 33 Mich. 23 (1875); Unity Ins. Co. *v.* Cram, 43 N. H. 636 (1862); Shurtz *v.* Schoolcraft, etc. R. R., 9 Mich. 269 (1861). But when the statutes provide for commissioners, it is said they must all be present in order to do legally the judicial duties assigned to them. Crocker *v.* Crane, 21 Wend. 211 (1839). It is said that in the taking of subscriptions the commissioners act ministerially, but in the distribution or allotment of shares they act judicially; and that a distribution of shares by commissioners not sufficient in number to constitute a legal board is void. Crocker *v.* Crane, 21 Wend. 211 (1839).

It has been held that the commissioners may limit the amount of stock which any one subscriber may take, and will, in a proper case, be sustained therein on grounds of public policy, although the power so to act is not specifically conferred upon them by statute. Brower *v.* Passenger Ry., 3 Phila. 161 (1858). And accordingly fictitious subscriptions for the purpose of evading such a limitation of the amount of stock to be taken by a single subscriber are illegal and void. Perkins *v.* Savage, 15 Wend. 412 (1836). Commissioners to take subscriptions may refuse to allow one person to subscribe for half of the stock, and may refuse

commissioners may themselves be subscribers to the stock,[1] but they can have no priority of right to subscribe over others, and no subscriptions can lawfully be taken with closed doors. The books must be open, and the public must have an opportunity to subscribe.[2] The commissioners have only such general powers as are necessary to validate the subscriptions to the stock. Their authority and functions cease upon the organization of the corporation.[3]

§ 58. *Subscriptions in excess of the capital stock.*—In general, after the full amount of stock provided for in the act of incorporation has been subscribed, any further subscriptions are void.[4] Where, by statute, the commissioners do not properly apportion stock, in cases involving an excess of subscriptions, an aggrieved subscriber may apply to a court of equity for relief.[5]

to accept a subscription from a person as trustee. Thomas *v.* Citizens', etc. Ry., 1 Am. St. Ry. Dec. 299 (Pa. 1858).

1 Walker *v.* Devereaux, 4 Paige, 229 (1833).

2 Brower *v.* Passenger Ry., 3 Phila. 161 (1858). When the amount of the subscription is not limited, the commissioners, in the absence of other express provision, may usually decide when enough stock has been subscribed, and their decision is practically conclusive as an exercise of discretion. Saugatuck Bridge Co. *v.* Westport, 39 Conn. 337, 348 (1872). Their failure to take the statutory oath will not invalidate the subscriptions taken by them, if they are in other essential respects regular. Hollman *v.* Williamsport, etc. Co., 9 G. & J. (Md.) 462 (1838).

3 James *v.* Cincinnati, etc. R. R., 2 Disney (Cin. Super. Ct.), 261 (1858); Peninsular Ry. *v.* Duncan, 28 Mich. 130 (1873); Hardenburgh *v.* Farmers', etc. Bank, 3 N. J. Eq. 68 (1834); Walker *v.* Devereaux, 4 Paige, 229 (1833); Crocker *v.* Crane, 21 Wend. 211 (1839); Wellersburg, etc. Co. *v.* Hoffman, 9 Md. 559 (1856); Smith *v.* Bangs, 15 Ill. 399 (1854); State *v.* Lehre, 7 Rich. L. (S. C.) 234 (1854).

The corporation may by suit set aside illegal subscriptions—the subscribers not being qualified. Union Bank *v.* McDonough, 5 La. 63 (1833).

4 Lathrop *v.* Kneeland, 46 Barb. 432 (1866); Mackley's Case, L. R. 1 Ch. D. 247 (1875).

Where a few persons subscribe for all the stock for the benefit of such other persons as may care to take the same, and another person takes a portion thereof by a new direct subscription, he cannot avoid payment on the ground that there was an overissue. Somerset, etc. Co.'s Receiver *v.* Adams, 72 S. W. Rep. 1125 (Ky. 1903).

5 Walker *v.* Devereaux, 4 Paige, 229 (1833); Meads *v.* Walker, Hopk. Ch. 587 (1825). *Cf.* Haight *v.* Day, 1 Johns. Ch. 18 (1814).

Where an apportionment is provided for in the event of an excess of subscriptions, it is said that the contract of subscription is not complete until the apportionment is made; that there can be neither stockholders nor corporation prior to the apportionment. Walker *v.* Devereaux, 4 Paige, 229 (1833); Crocker *v.* Crane, 21 Wend. 211 (1839); Burrows *v.* Smith, 10 N. Y. 550 (1853). *Cf.* Buffalo, etc. R. R. *v.* Dudley, 14 N. Y. 336, 346 (1856).

Where a resolution was passed by a board of directors, entitling a promoter to have a certain number of shares allotted to him, and the available

But, after the organization of the corporation, the duty to apportion the stock, if there has been an oversubscription, belongs to the corporation and not to the commissioners.[1] And, in the absence of statutory authority, the commissioners, even before organization, have no general power, if they receive excessive subscriptions, to reduce proportionally all the subscriptions and apportion the stock. It is their only duty to take subscriptions up to the full amount of the prescribed capital, and to refuse anything beyond that.[2] Neither can the corporation, if it has issued the full amount of the stock, recover on subscriptions in excess. The subscriber acquires no title by such a subscription, and corporate creditors can enforce no liability thereon.[3] Where a corporation takes subscriptions for more

shares had been disposed of before his bill for specific performance was filed, *held*, he had no ground for coming into equity. Ferguson *v.* Wilson, L. R. 2 Ch. App. 77, 87 (1866).

Even though promoters send to a person a printed form of application for stock, and he signs and returns the same, this does not obligate them to allot to him such stock or any part thereof. Feitel *v.* Dreyfous, 117 La. 756 (1906).

1 State *v.* Lehre, 7 Rich. L. (S. C.) 234 (1854), where an application for *mandamus* to compel commissioners to reapportion stock agreeably to the charter of a company, and for *quo warranto* against officers claimed to have been illegally elected, was refused, the appellate court holding that the commissioners had no power to reapportion stock after the subscribers had become a body corporate. In Smith *v.* Bangs, 15 Ill. 399 (1854), after the commissioners had closed the subscription books and called a meeting, at which directors were chosen, they reopened the books to receive further subscriptions. On the application of one of the directors they were restrained by injunction, the court holding that their powers were at an end.

2 Van Dyke *v.* Stout, 8 N. J. Eq. 333 (1850).

3 Burrows *v.* Smith, 10 N. Y. 550 (1853); Oler *v.* Baltimore, etc. R. R., 41 Md. 583 (1874). See also § 192, *infra*. When the corporation has accepted the subscriptions in excess of the capital stock, corporate officers cannot buy in shares of the stock at a discount and then reissue them to provide for the oversubscription, charging the corporation par for the stock bought in, and thereby realizing a profit to themselves individually on the transaction. East New York, etc. R. R. *v.* Elmore, 5 Hun, 214 (1875). A subscriber for stock who has given his note in payment may file a bill in equity to compel the corporation to recognize him as a stockholder, where the corporation denies that he is a stockholder and has issued all its stock to other parties who took with notice. It is unnecessary to bring into the suit the other parties who actually have the stock, the stock having been held by the company as collateral security. Morey *v.* Fish, etc. Co., 108 Wis. 520 (1901). Where, after a subscription for stock is made, the company contracts to issue all its stock to a contractor in payment for work, and thereupon the subscriber gives up his stock to the company and it is issued to the contractor, the subscriber is not liable on such stock, even though the contractor does not fulfill, and even though the subscriber caused the contract with the contractor to be made. Riverton Water Co. *v.* Hummel, 175 Pa. St. 575 (1896). See also §§ 168, 169, 766*c*, *infra*.

stock than it can issue, it cannot make calls on the stock until after the stock has been apportioned.[1] A subscriber for stock cannot be compelled to accept shares previously and lawfully issued to another subscriber.[2] Where a person has subscribed for stock, but the corporation finds it has issued all of its stock, it cannot compel such subscriber to take preferred stock instead.[3] If a corporation has already issued its entire stock to other parties, it cannot collect on a subscription made before such issue of the entire stock to other parties.[4] It is no defense that the stock of a proposed corporation was oversubscribed.[5]

§ 59. *Subscriptions and organization where there is a special charter and no commissioners are provided for.*—This subject is considered elsewhere.[6]

§ 60. *Subscriptions delivered in escrow.*—Subscriptions for shares may be made and delivered in escrow to an agent of the corporation who is engaged in taking subscriptions,[7] or to a director of the corporation,[8] or to a commissioner.[9] The depositary can deliver it up only on performance of the condition.[10] So, also, a subscriber may show by parol an agreement with an agent of the corporation that his subscription to blank paper should not be a sub-

1 Bristol, etc. Co. *v.* Tilton, 70 N. H. 239 (1900).

2 Knoxville, etc. R. R. *v.* Mayor, 98 Tenn. 1 (1896). A subscriber for stock is not released by the fact that in organizing, in order to make up the full capital stock, one of the subscribers subscribed for the balance which he supposed was not taken, but which it turned out had been taken. Tulare, etc. Bank *v.* Talbot, 131 Cal. 45 (1900).

3 Knoxville, etc. R. R. *v.* Mayor, 98 Tenn. 1 (1896).

4 Level Land Co. *v.* Hayward, 95 Wis. 109 (1896).

5 Shick *v.* Citizens' Enterprise Co., 15 Ind. App. 329 (1896).

6 See ch. XXXVI, *infra.*

7 Cass *v.* Pittsburg, etc. Ry., 80 Pa. St. 31 (1875). It is a good defense, even as against a receiver, that the subscriber delivered the subscription to the canvasser to hold until the former investigated, and that he at once investigated and forbade the delivery of the subscription. Great Western T. Co. *v.* Loewenthal, 154 Ill. 261 (1894).

8 Ottawa, etc. R. R. *v.* Hall, 1 Ill. App. 612 (1878).

9 Cass *v.* Pittsburg, etc. Ry., 80 Pa. St. 31 (1875); Ottawa, etc. R. R. *v.* Hall, 1 Bradw. (Ill.) 612 (1878). *Cf.* Price *v.* Pittsburg, etc. R. R., 34 Ill. 13, 36 (1864). *Contra*, Wight *v.* Shelby R. R., 16 B. Mon. (Ky.) 4 (1855).

10 Ottawa, etc. R. R. *v.* Hall, 1 Bradw. (Ill.) 612 (1878). It is competent to show by parol that a subscription was delivered in escrow. Ottawa, etc. R. R. *v.* Hall, 1 Bradw. (Ill.) 612 (1878). *Cf.* Tonica, etc. R. R. *v.* Stein, 21 Ill. 96 (1859). A subscription for stock may be delivered in escrow, and is not enforceable unless the conditions of such delivery are complied with. Gilman *v.* Gross, 97 Wis. 224 (1897). A subscription to be delivered to the company in case the subscriber became a director is not enforceable if he was not made a director. Turner's Case, 7 Ont. Rep.

scription until he had seen and approved the heading of the subscription paper.[1]

§ 61. *Liability of the corporation for refusal to issue a certificate of stock.*—The corporation is bound, upon demand, to deliver to a stockholder a certificate of stock representing his interests in the corporation.[2] If it refuses to issue the certificate the stockholder

(Can.) 448 (1884). An oral condition that the subscription list was not to be delivered except by the defendant's consent was upheld in Davis *v.* Kneale, 97 Mich. 72 (1893).

1 Bucher *v.* Dillsburg, etc. R. R., 76 Pa. St. 306 (1874). A subscriber cannot defend against a note to pay the subscription on the ground that he delivered it to an agent of the corporation with instructions not to deliver it to the corporation until other stockholders gave similar notes. Hardin *v.* Sweeney, 14 Wash. 129 (1896).

2 The subscriber may compel the corporation to issue a certificate to him. Buffalo, etc. R. R. *v.* Dudley, 14 N. Y. 336, 347 (1856); Mitchell *v.* Beckman, 64 Cal. 117 (1883); National Bank *v.* Watsontown Bank, 105 U. S. 217 (1881); Fletcher *v.* McGill, 110 Ind. 395 (1887); Rio Grande Cattle Co. *v.* Burns, 82 Tex. 50 (1891).

A valid certificate may be issued out of the state in which the corporation exists. Courtright *v.* Deeds, 37 Iowa, 503 (1873).

The failure of the corporation to issue a certificate is no defense to an action to collect the subscription. See § 192, *infra*.

As to whether a company is obliged at common law to issue certificates of stock, see an article in 6 Juridical Review (Eng.), 58.

It has been held in Maryland that a subscriber to the increased capital stock of the company is not entitled to a certificate until he has paid for the stock in full, and such subscriber is not entitled to the rights of a stockholder until he has paid in full. The court stated that such stockholders are not entitled to dividends equally with other stockholders. The basis of the decision was the difference between original stock and increased stock. The court refused to compel the corporation to issue a certificate. Baltimore, etc. Ry. *v.* Hambleton, 77 Md. 341 (1893). A statute authorizing the issue of certificates of stock when it is fully paid up does not prevent the issue of such certificates before it is fully paid up. Green *v.* Abietine Med. Co., 96 Cal. 322 (1892). It has been held in Tennessee that where stock is only partly paid, and the corporation issues a certificate reciting on its face how much is still due, and the holder pledges it, and no transfer to the pledgee is made on the corporate books, the corporation can have a sale of the stock for non-payment of the balance remaining due, but such proportion of the proceeds will be paid to the pledgee as the amount already paid on the stock bears to the par value of the stock. Ingles, etc. Co. *v.* Knoxville, etc. Co., 53 S. W. Rep. 1111 (Tenn. 1899).

Where a prospective corporate officer issues certificates of stock in the prospective corporation, a person who loans money on such stock as collateral security may hold such officer liable for issuing the stock before the corporation was organized. Merchants' Nat. Bank *v.* Robison, 8 Utah, 256 (1892).

A corporation in selling its stock may do so on condition that the certificates therefor are not to be issued for five years, the purpose being to

may bring suit in equity to compel its issuance,[1] or he may recover of the corporation in *assumpsit* the value of the stock at the time of the demand.[2] Where a corporation refuses to issue the stock to a subscriber, he may file a bill in the alternative to compel the issue

pool the stock for that length of time. Williams *v.* Ashurst Oil, etc. Co., 144 Cal. 619 (1904).

1 Quoted and approved in Lacaff *v.* Dutch, etc. Co., 31 Wash. 566 (1903); Rowley's Appeal, 115 Pa. St. 150 (1887). Specific performance will be granted to compel a corporation to issue common stock in payment for property in accordance with a contract of the corporation, where the stock has no market value, and it appears that there have never been any sales of such stock. Selover *v.* Isle, etc. Co., 91 Minn. 451 (1904). Where underwriters have agreed to purchase the bonds of the corporation at a certain price with a bonus of seventy-five per cent. in stock, the corporation may pledge the bonds and assign the underwriting agreement to the pledgee, and the pledgee in order to enforce the underwriting agreement may compel the corporation to furnish the seventy-five per cent. in stock for that purpose. Kirkpatrick *v.* Eastern, etc. Co., 135 Fed. Rep. 146 (1904); aff'd, 137 Fed. Rep. 387. A South Carolina corporation may be sued in New Hampshire by a purchaser of a certificate of stock to compel a transfer thereof on the books of the company. Westminster Nat. Bank *v.* New England, etc., 73 N. H. 465 (1906). Mandamus will not issue to compel a corporation to issue to a purchaser treasury stock which he has purchased, even though he has paid for the same, unless the stock has some peculiar and special value different from other similar stock in that company, or unless the control of the corporation is at issue. The legal right to the stock must also be clear. State *v.* Jumbo, etc. Min. Co., 94 Pac. Rep. 74 (Neb. 1908). See also §§ 337, 338, 391, *infra*. *Cf.* Thorp *v.* Woodhull, 1 Sandf. Ch. 411 (1844). A stockholder in a natural-gas company whose stockholdership is denied, and who is excluded from the benefit of free gas as given to other stockholders, may maintain a suit in equity to establish her rights as a stockholder, and if she subscribed for the stock and was recognized by the corporation as a stockholder, her rights cannot be denied, although no certificate was ever issued to her and she never paid for the stock. Gowdy, etc. Co. *v.* Pattison, 29 Ind. App. 261 (1902).

If in organizing and issuing the stock the amount to be issued for the property is not what the contract calls for, the vendor may compel a specific performance. Bailey *v.* Champlain, etc. Co., 77 Wis. 453 (1890). A suit in equity lies against a corporation to compel it to issue a certificate of stock to a subscriber upon tender of the sum subscribed. Arbuckle *v.* Spice Co., 11 Ohio Circuits, 726 (1901). See also § 24, *supra*.

2 "A subscriber for shares of stock, in case the contract of subscription was regularly entered into, may, if the corporation refuse to issue him a certificate, have his action in equity for specific performance, or he may recover of the corporation, in *assumpsit*, the value of the shares at the time of the demand." Birmingham Nat. Bank *v.* Roden, 97 Ala. 404 (1892), quoting the text.

Wyman *v.* American Powder Co., 62 Mass. 168 (1851); Chester Glass Co. *v.* Dewey, 16 Mass. 94 (1819). But to entitle one to recover back money advanced to a corporation for shares, upon the ground of a failure to issue the certificate, the subscriber must,

of the stock or the payment of its value with damages.[1] A subscriber to the increased capital stock who has actually paid part of the price cannot recover back the money, upon corporate insolvency, on the ground that no certificate was issued.[2]

The fact that the corporation has not issued a certificate to a stockholder for thirty years, and that he has not insisted on his right as such, is no bar to his suit to establish his stockholdership.[3]

In case the full capital stock has been issued, then, of course, specific performance of an agreement to issue more stock cannot be had.[4] A person to whom a corporation issues full-paid stock in

before suit, rescind the contract and demand the money. Swazey *v.* Choate Mfg. Co., 48 N. H. 200 (1868). See also Pacific Nat. Bank *v.* Eaton, 141 U. S. 227 (1891).

1 And if, during the pendency of the suit, the company becomes insolvent, the court can give him damages payable *pro rata* out of the assets of the corporation. *Re* Reading Iron Works, 149 Pa. St. 182 (1892).

In an action by a subscriber for stock to compel the corporation to deliver stock, the directors are proper but not necessary parties. Wells *v.* Green Bay, etc. Co., 90 Wis. 442 (1895).

In England it seems that directors are not individually liable to subscribers for the breach by the corporation of its agreement to issue stock. Ferguson *v.* Wilson, L. R. 2 Ch. App. 77 (1866). But see also Swift *v.* Jewsbury, L. R. 9 Q. B. 301 (1874); Betts *v.* De Vitre, L. R. 3 Ch. 429, 441 (1868); Henderson *v.* Lacon, L. R. 5 Eq. 249 (1867); Eaglesfield *v.* Londonderry, L. R. 4 Ch. D. 693 (1876); aff'd (H. L.), 26 W. R. 540.

2 Pacific Nat. Bank *v.* Eaton, 141 U. S. 227 (1891); Thayer *v.* Butler, 141 U. S. 234 (1891); Butler *v.* Eaton, 141 U. S. 240 (1891). A subscriber cannot rescind his subscription on the ground that the certificates had never been issued to him. Cotter *v.* Butte, etc. Co., 31 Mont. 129 (1904).

3 Bedford County *v.* Nashville, etc. Ry., 14 Lea (Tenn.), 525 (1884); Kobogum *v.* Jackson Iron Co., 76 Mich. 498 (1889).

An incorporator, who subscribes for eleven shares of stock, but does not pay for them nor claim them for ten years, and in the meantime they have been issued to the real parties in interest, cannot then claim them. Taylor *v.* Johnson, 99 S. W. Rep. 320 (Ky. 1907).

Where for fifty years a claimant of stock takes no proceedings to obtain it, and during that time other persons claim the stock and have possession of it and have received dividends upon it, laches is a bar to a suit by the former to recover the stock. Livingston *v.* Proprietors', etc., 15 Fed. Cas. 691 (1879); s. c., 16 Blatch. 549.

4 Finley, etc. Co. *v.* Kurtz, 34 Mich. 89 (1876); Ferguson *v.* Wilson, L. R. 2 Ch. App. 77 (1866). Where a person sells property to a corporation to be paid for in stock and the corporation issues all its stock to other parties, he may hold the corporation liable in damages. Pendery *v.* Carleton, 87 Fed. Rep. 41 (1898). Where a bank contracted to give a person a certain amount of stock if he would do business with it, and he did so, the bank is liable in damages for refusal to deliver the stock. Rich *v.* State Nat. Bank, 7 Neb. 201 (1878). In a suit against a corporation to compel it to issue stock to the plaintiff or else pay the value thereof,

settlement of a claim is not bound by any prior contracts of the corporation in regard to that stock where he took the stock without notice of the contracts.[1] The liability of a corporation to issue stock to the subscribers thereof does not necessarily devolve upon another corporation which succeeds to its debts, liabilities and franchises.[2]

§ 62. *Substitution of stockholders before the incorporation—Change in the proposed enterprise—Alteration of the subscription paper.*—There has been some controversy as to the legality of one person being substituted for another as a subscriber before the incorporation and issue of the stock. If the facts are such that a cancellation of the subscription is legal, then doubtless the substitution is legal.[3] But where such is not the case, then it would

the proper form in judgment is an order to issue the stock. A money judgment should be entered only after proof of the corporation's failure to comply with the main order. Consolidated, etc. Co. *v.* Huff, 62 Kan. 405 (1901). For the refusal of the corporation to issue original stock to a subscriber, the measure of damages is the difference between the price contracted for and the market value on the day when the issue ought to have been made. Van Allen *v.* Illinois Cent. R. R., 7 Bosw. 515 (1861). For another rule as to the measure of damages, and one more in favor of the plaintiff, see Baltimore, etc. Ry. *v.* Sewell, 35 Md. 238 (1872); and also ch. XXXV, *infra*. In Louisiana, the universal legatee may pay for, and demand, the certificate of stock subscribed for by his ancestor. The executor has no power to cancel the subscription, and the stock cannot be appropriated by a subsequent subscriber, who subscribed for it by consent of the executor. State *v.* Crescent City, etc. Co., 24 La. Ann. 318 (1872). *Cf.* Wallace *v.* Townsend, 43 Ohio St. 537 (1885). If a mistake has been made by which the certicates and stock have been issued to the wrong person, a court of equity will remedy it. O'Meara *v.* North American Min. Co., 2 Nev. 112 (1866). A subscriber for stock who has given his note in payment may file a bill in equity to compel the corporation to recognize him as a stockholder, where the corporation denies that he is a stockholder and has issued all its stock to other parties who took with notice, and it is unnecessary to bring into the suit other parties who actually have the stock, the stock having been held by the company as collateral security. Morey *v.* Fish, etc. Co., 108 Wis. 520 (1901).

1 Angle *v.* Chicago, etc. Ry., 94 Fed. Rep. 717 (1899). See also § 766*c*, *infra*.

2 Conant *v.* National Ice Co., 40 N. Y. Sup. Ct. 83 (1875). A subscriber for stock who has paid ten per cent. cannot sue a consolidated company, into which his company has been merged, for a certificate, even though the articles of consolidation provide for the issue of one share of the latter company for every two shares of the old company, unless he has first demanded the certificate and has offered to pay the remaining ninety per cent. or asks for a certificate of stock not paid up. Babcock *v.* Schuylkill, etc. R. R., 133 N. Y. 420 (1892). *Cf.* § 671, *infra*.

3 See §§ 167–170, *infra*, on cancellation. See also Burke *v.* Smith, 16 Wall. 390 (1872), and *dictum* in Ryder *v.* Alton, etc. R. R., 13 Ill. 516, 521 (1851). *Cf.* Selma, etc. R. R. *v.* Tipton, 5 Ala. 787 (1843), to the effect that a subscriber cannot with-

seem that the substitution is merely a transfer of the stock, and the transferrer, in that case, should be liable, but only to the same extent as in other cases of transfer of stock.[1] Where the subscriber causes the stock to be issued to another person, and the latter pays the corporation therefor, the former's liability is discharged.[2]

In California it is held that no substitution of stockholders is legal; but the weight of authority clearly sustains a contrary rule.[3] If the corporation is duly formed, the vendor may compel the vendee to pay for the subscription transferred, and may collect a note given in payment.[4]

A material change in the character of the enterprise, the capital

draw. Subscribers to stock may make a contract by which they divide their subscriptions with others and agree that no person should hold more than a certain amount of stock. Hladovec *v.* Paul, 222 Ill. 254 (1906).

A corporation which for a long time was abandoned and which is unable to tell who its stockholders are may file a bill in equity to ascertain who its stockholders are and to cancel illegal certificates and determine the rights of conflicting claims to the stock. Geneva, etc. Co. *v.* Steele, 111 N. Y. App. Div. 706 (1906).

1 See ch. XV.

2 *Re* Glory Paper Mills, [1894] 3 Ch. 473. See also § 50, *supra*.

3 Valentine *v.* Berrien, etc. Co., 128 Mich. 280 (1901); Baltimore, etc. Ry. *v.* Sewell, 35 Md. 238 (1872); Tempest *v.* Kilner, 3 C. B. 249 (1846); Hunt *v.* Gunn, 13 C. B. (N. S.) 226 (1862); Merrimac Minn. Co. *v.* Levy, 54 Pa. St. 227 (1867). *Contra*, Hawkins *v.* Mansfield, etc. Co., 52 Cal. 513 (1877); Morrison *v.* Gold Mountain, etc. Co., 52 Cal. 306 (1877); Coleman *v.* Spencer, 5 Blackf. (Ind.) 197 (1839). See also Chater *v.* San Francisco, etc. Co., 19 Cal. 219 (1861). A sale of stock in a company to be organized is legal. Van Dam *v.* Tapscott, 40 N. Y. App. Div. 36 (1899).

A substitution of stockholders after organization by canceling some subscriptions and filling in others is illegal. There should be a transfer. Cartwright *v.* Dickinson, 88 Tenn. 476 (1890).

Even though a party subscribes for stock, but with his consent the corporation issues it directly to others on their original subscriptions, this is not a transfer from the original subscriber, and hence the stock cannot be attached as his stock. Scott *v.* Houpt, 73 Ark. 78 (1904).

A suit lies to compel a corporation to issue stock in accordance with a contract for construction work. Citizens', etc. Assoc. *v.* Belleville, etc. R. R., 117 Fed. Rep. 109 (1902). See also on this subject, § 169 and § 50.

4 Mahan *v.* Wood, 44 Cal. 462 (1872). Where an insolvent corporation which has never issued any certificates of stock resolves by a vote of its stockholders to apply its assets to the extent of their value to the payment of the debts and that new stock be issued to the stockholders upon their paying therefor in full, and one stockholder sells his interest in the original stock and the purchaser for seven years does not complain, he cannot, after the corporation has become prosperous, claim that he is entitled to the old stock or any interest in the corporation. Stoddard *v.* Decatur, etc. Co., 184 Ill. 53 (1900).

stock, or purpose of the proposed company releases those who do not assent thereto.[1]

Where articles are materially altered without the consent of all the subscribers, after their subscription and before the complete organization of the company, such articles are not binding upon the non-consenting subscribers.[2] But it is no defense that the subscriptions of other parties were erased and that such parties were released by the board of directors.[3] A subscription to be paid for when the directors find other parties who will agree to purchase the stock from the subscriber is illegal as an attempt to release a subscriber.[4] The mere erasure of a subscription will not of itself prevent a recovery upon it.[5]

§ 63. *Right to recover back money advanced on shares upon a failure to organize the company.*—Where one has advanced money

1 See § 54, *supra*, and §§ 194, 502, *infra*.

2 Burrows *v.* Smith, 10 N. Y. 550 (1853); Norwich Lock Mfg. Co. *v.* Hockaday, 89 Va. 557 (1893); Greenbrier Ind. Exposition *v.* Rodes, 37 W. Va. 738 (1893). An alteration in the subscription articles is no defense unless fraudulently made or to the injury of defendant. Armstrong *v.* Danahy, 75 Hun, 405 (1894). See also § 197, *infra*.

An alteration of a subscription list by a subscription being changed and another name substituted releases other subscribers who signed before the alteration. Texas Printing, etc. Co. *v.* Smith, 14 S. W. Rep. 1074 (Tex., 1889).

A change in the subscription by several of the subscribers, but not increasing the liability of the others, does not release the others. An increase in the capital upon incorporation does not release. Gibbons *v.* Grinsel, 79 Wis. 365 (1891).

3 Bristol, etc. Co. *v.* Selliez, 175 Pa. St. 18 (1896). See also § 191, *infra*.

4 McNulta *v.* Corn, etc. Bank, 164 Ill. 427 (1897).

5 Johnson *v.* Wabash, etc. Co., 16 Ind. 389 (1861). And where one took a book for subscriptions from an agent of the corporation, and subscribed himself and persuaded others to subscribe, and kept the book some months, but finally, because of a difference with the agent about the payment for his services, cut his name out of the book and returned it to the company, it was held, in an action by the company for the amount of his subscription, that he was bound thereon just as though he had left his name on the list of subscribers. Greer *v.* Chartiers Ry., 96 Pa. St. 391 (1880); Railroad Co. *v.* White, 10 S. C. 155 (1878).

It has been held, however, in New York, that where the statutory certificate required by law to be filed in order to obtain incorporation remains in the hands of a subscriber, a subscriber may erase or modify his subscription as he sees fit, even though he had previously induced others to subscribe. Burt *v.* Farrar, 24 Barb. 518 (1857).

A stockholder who erases his signature from a subscription list without authority cannot, as a corporate creditor, enforce such subscription list against other stockholders, he having illegally altered the agreement. Jackson *v.* Cherokee Medicine Co., 47 S. C. 215 (1896).

in good faith to the promoters of a company, as a deposit or assessment upon stock subscribed for to be subsequently issued, and the enterprise contemplated by the proposed incorporation is abandoned, or the company for any reason fails to be incorporated, such subscriber may recover back the money so advanced.[1] A note given for stock in a company to be formed, but which never is formed, cannot be collected, except by a *bona fide* purchaser.[2] Where several owners of riparian rights and lands agree to organize a company and transfer their property to it for stock, and a few of them make such transfer and the others refuse to do so, the former may have the transfers made by them canceled.[3] Where a corporation receives money in payment for increased capital stock to be issued and never increases its stock, and the money has been used in the business and the corporation becomes insolvent, the subscriber is

1 Nockels *v.* Crosby, 3 Barn. & C. 814 (1825); Ward *v.* Londesborough, 12 C. B. 252 (1852); Ashpitel *v.* Sercombe, 5 Exch. 147 (1850); Williams *v.* Salmond, 2 Kay & J. 463 (1856); Chaplin *v.* Clarke, 4 Exch. 403 (1849). *Cf.* Vollans *v.* Fletcher, 1 Exch. 20 (1847); Grand Trunk, etc. Ry. *v.* Brodie, 9 Hare, 823 (1852); Kemson *v.* Saunders, 4 Bing. 5 (1826), where a vendee recovered from his vendor money paid for stock in a company which was never organized. And see also Williams *v.* Page, 24 Beav. 654 (1857). "A bill in equity lies to recover back money paid on a 'bubble.'" Colt *v.* Woollaston, 2 P. Wms. 154 (1723); Green *v.* Barrett, 1 Sim. 45 (1826). See also the "Bubble Act," 6 Geo. I., ch. 18; also § 705, etc., *infra*. and 95 Pac. Rep. 67.

Where a subscriber for stock pays for the stock before the company is organized, he may recover back the money if the company is not organized. Bradford *v.* Harris, 77 Md. 153 (1893).

Where promoters agree to sell stock in a proposed corporation upon a tender of the price by a certain day, such tender need not be made if the company is not organized. The proposed purchaser may recover back the consideration. Manistee Lumber Co. *v.* Union Nat. Bank, 143 Ill. 490 (1892).

A person who loans money to a corporation organized to bring about a consolidation of other corporations cannot complain that the stock issued in exchange for stock of other corporations was returned upon the failure of the plan, and he cannot hold the directors liable under a statute making them liable for distributing the capital stock, where it appears that he was partially responsible for the failure. Audenreid *v.* East, etc. Co., 68 N. J. Eq. 450 (1904).

Where subscribers to the stock of a proposed telephone corporation authorize a committee of nine to purchase material and incorporate, and five of the committee in opposition to four do purchase and incorporate the minority are not bound by their action. Mt. Carmel, etc. Co. *v.* Mt. Carmel, etc. Co., 119 Ky. 461 (1905).

2 Howe *v.* Raymond, 74 Conn. 63 (1901). A note given to pay for stock in a corporation to be organized cannot be enforced by the payee where the corporation has not been formed. Northwestern, etc. Co. *v.* Lanning, 83 Minn. 19 (1901).

3 Mack *v.* Consolidated, etc. Co., 101 Fed. Rep. 869 (1900).

not entitled to repayment in preference to other creditors.[1] There is a difference of opinion as to whether a subscriber is obliged to submit to the deduction of any part of the amount paid in by him for the payment of the expenses incurred by the promoters in attempting the incorporation. In Pennsylvania it is held that a person who advances money for stock in a corporation to be organized by the defendants may recover it back if the corporation is not organized within a reasonable time, and it is no defense that the defendants used the money in developing patents and endeavoring to form the corporation.[2] In California, on the other hand, it is held that a party to a plan to form a corporation, who pays in money before incorporation, with full knowledge of the fact that it is to be spent, cannot recover it back on the ground that the company was finally not incorporated,[3] and the other cases seem to be to the same effect.[4]

Questions relative to the liability of promoters for debts incurred prior to incorporation,[5] and the validity of contracts with irregularly or incompletely incorporated or organized companies,[6] are considered elsewhere.

B. WHO IS COMPETENT TO SUBSCRIBE FOR STOCK.

§ 64. *Corporations generally not.*—Upon general common-law principles, any one who is competent to enter into ordinary contracts may make a valid subscription for stock in an incorporated company. A subscription for stock is a contract; and, in general, any one who may contract may subscribe. The corporation itself, however, cannot be a subscriber to its own stock.[7] Where such a sub-

1 Bircher *v.* Walther, 163 Mo. 461 (1901).

2 Hudson *v.* West, 189 Pa. St. 491 (1899).

3 Meyer *v.* Bishop, 129 Cal. 204 (1900).

4 Williams *v.* Salmond, 2 Kay & J. 463 (1856); Ashpitel *v.* Sercombe, 5 Exch. 147 (1850). The subscriber is liable for his proportion of the necessary expenses, preliminary to the incorporation and organization of the company. Salem Mill-dam Corp. *v.* Ropes, 23 Mass. 23 (1827). *Contra*, Nockels *v.* Crosby, 3 Barn. & C. 814 (1825).

5 See §§ 705–707, *infra*.

6 See § 637, *infra*.

7 Thus, where a number of individuals attempted to organize a corporation with a capital stock of 72,500 shares, of the par value of $100 each, and six different persons subscribed for one share each, and one person then subscribed for the corporation as follows: "Oregon Central Railroad Company, by G. L. Woods, Chairman, seventy thousand shares, seven million dollars," it was held that this subscription was void, and that the corporation could not be created by such subscriptions. Holladay *v.* Elliott, 8 Oreg. 84 (1879). See also § 251, *infra*. And again it has been held that where the directors of a company, in order to make up the required amount of capital stock, subscribed as trustees for the corporation itself, they are liable for calls on the amount so subscribed. In the same case a bill by a member of the corporation on behalf of himself and

scription is made in the name of a trustee for the corporation, the trustee is personally liable thereon to corporate creditors.[1] Municipal corporations may lawfully subscribe for the stock of private corporations when authorized by statute so to do.[2] Where a municipality has subscribed for stock illegally, any other stockholder may bring suit to have the subscription canceled.[3]

It is not equally clear that one private corporation may subscribe for the stock in another such corporation. On the contrary, such subscriptions are *ultra vires* and void unless clearly within the ordinary objects and business of the subscribing corporation. A bank cannot lawfully subscribe for stock in a railroad corporation.[4] A railroad

all the other members except the defendants, praying that this transaction, although it had been sanctioned unanimously at a meeting of the company, might be declared fraudulent and void, was sustained, although some of the members, on behalf of whom the bill was filed, had been present and voted at that meeting. Preston *v.* Grand Collier Dock Co., 11 Sim. 327 (1840).

Where the unissued stock of a company (upon its reorganization on the expiration of its charter) is issued to the president as trustees to sell from time to time and to turn over the proceeds of the sales to the company, the fact that he gives the company a note for the same signed by him as "Trustee for Bank" does not render him liable on such note upon the bank becoming insolvent. Neptune *v.* Paxton, 15 Ind. App. 284 (1896).

Stockholders cannot defeat their liability on stock by setting up that they subscribed on behalf of the corporation itself, and on the secret agreement that they should not be held liable. Barto *v.* Nix, 15 Wash. 563 (1896); Denny Hotel Co. *v.* Schram, 6 Wash. 134 (1893).

In Allibone *v.* Hager, 46 Pa. St. 48 (1863), the court held it no defense to an action by a creditor of a corporation that defendants had subscribed for stock in their own names, but really as agents for the corporation itself.

1 Johnston *v.* Allia, 71 Conn. 207 (1898).

2 Sharpless *v.* Mayor, etc., 21 Pa. St. 147 (1853), and the long train of decisions following. The matter of municipal subscriptions is fully considered in chapter VI.

3 Stebbins *v.* Perry County, 167 Ill. 567 (1897).

4 Nassau Bank *v.* Jones, 95 N. Y. 115 (1884), holding that the bank could not recover the profits on such subscription which was made in the name of its agent; nor for stock in any other corporation, the business of which is wholly other than banking. Franklin Co. *v.* Lewiston Sav. Inst., 68 Me. 43 (1877); Mechanics', etc. Bank *v.* Meriden Agency Co., 24 Conn. 159 (1855); Talmage *v.* Pell, 7 N. Y. 328 (1852). *Cf.* First Nat. Bank *v.* National Exch. Bank, 92 U. S. 122 (1875); and see Royal Bank of India's Case, L. R. 4 Ch. App. 252 (1869); Joint-stock Dist. Co. *v.* Brown, L. R. 8 Eq. 381 (1869); Berry *v.* Yates, 24 Barb. 199 (1857), holding that one insurance company cannot subscribe to another. For a failure of proof to show that a corporation was a subscriber for stock, see McMillan *v.* Carson Hill, etc. Co., 12 Phila. 404 (1878). An owner of land cannot defeat its condemnation by showing that a corporation subscribed to part of the capital of the corporation seeking to obtain the land. *Re* Rochester, etc. R. R., 110 N. Y. 119

corporation cannot subscribe for shares of stock in another railroad company,[1] or land company,[2] nor can a dry-dock company be held liable upon a subscription for stock in a steamship company;[3] nor can a manufacturing company legally subscribe to the stock of a bank for the purpose of carrying on the banking business.[4] A fire insurance company has no power to subscribe for stock in a projected bank, not yet organized, even though the statute gives it power to invest in stocks.[5] A furniture manufacturing company is not liable on a statutory liability on stock which it has subscribed and paid for in a hotel company.[6] A land improvement company has no power to subscribe for stock in other companies and such a subscription cannot be enforced.[7] An improvement company owning lands may subscribe to the stock of a railroad company in order to bring about the construction of the railroad running through such lands.[8] Where a corporation owning land becomes a stockholder in a building association and gives a mortgage in connection therewith, the mortgage is valid, even though the corporation was not authorized to subscribe for stock.[9] All such contracts are, in general, *ultra vires* and not enforceable.[10] A construction company, however, is presumed to have power to subscribe for the stock of a railroad which it is building.[11] A railroad company has no power to donate its

(1888); Union Hotel Co. *v.* Hersee, 79 N. Y. 454 (1880). See also §§ 314–317, *infra*.

1 Maunsell *v.* Midland, etc. Ry., 1 Hem. & M. 130 (1863). One railroad company has no implied power to subscribe to the capital of another, and cannot do so indirectly by having individuals subscribe and then indemnifying the individuals. Logan *v.* Courtown, 13 Beav. 22 (1850); and see ch. XIX.

2 A railroad company has no legal power to subscribe for the stock of a land company nor become accommodation endorser of the latter's note, even though all the stockholders assent thereto, but a stockholder cannot complain where the owner of his stock at the time of the act consented thereto, excepting that a mere authorization prior to his purchase of his stock will not sustain acts done after suit commenced by him objecting to the same. McCampbell *v.* Fountain, etc. R. R., 111 Tenn. 55 (1903).

3 New Orleans, etc. Steamship Co. *v.* Ocean Dry Dock Co., 28 La. Ann. 173 (1876). Subscription by one corporation to the stock of another. Mulqueeney *v.* Shaw, 50 La. Ann. 1060 (1898).

4 Sumner *v.* Marcy, 3 Woodb. & M. 105 (1847); s. c., 23 Fed. Cas. 384.

5 Commercial F. Ins. Co. *v.* Board of Revenue, 99 Ala. 1 (1892).

6 Knowles *v.* Sandercock, 107 Cal. 629 (1895). See ch. XIV on this subject.

7 McAlester Mfg. Co. *v.* Florence, etc. Co. 128 Ala. 240 (1901).

8 Watt's Appeal, 78 Pa. St. 370 (1875).

9 Meares *v.* Monroe, etc. Co., 126 N. C. 662; s. c., 127 N. C. 580.

10 See Part IV, on *ultra vires* contracts in general.

11 *Re* Rochester, etc. Ry., 45 Hun, 126 (1887); aff'd 110 N. Y. 119. In

funds to a fair.[1] A hotel company may subscribe to a military encampment enterprise.[2] It is no defense to an action on a subscription that a part of the subscriptions were made by corporations and were not enforceable. Only the state can raise that objection.[3] Where one corporation subscribes for stock in another corporation and pays for such stock, and dividends are declared by the latter, it cannot refuse to pay the dividends to the former on the ground that the former had no power to subscribe for the stock.[4]

§ 65. *Commissioners, directors, partners, etc., as subscribers.*— Commissioners may be subscribers to the capital stock.[5] So, also, may directors and corporate officers subscribe; and it has been held that a director, in the absence of fraud or fraudulent intent, may subscribe for the whole of the unsubscribed stock in his own name and for his own benefit.[6] But a stockholder who was not present at a stockholders' meeting is not bound by the ratification by such meeting of the issue of a large amount of the original capital stock to the directors themselves, who were illegally elected, but who thereby acquire control of the company.[7] A partner, if the act be within

a suit by the receiver of an insolvent street railway company to hold a construction company liable on stock which, together with bonds, was issued for the construction of a street railway, the claim being that there was no consideration received for the stock, the bill in equity must allege that the construction company had power to acquire such stock. Doak *v.* Stahlman, 58 S. W. Rep. 741 (Tenn. 1899).

1 See §§ 681, 775, 909, *infra*. A railroad company has no power to subscribe to the stock of a military association. Military, etc. *v.* Savannah, etc. Ry., 105 Ga. 420 (1898).

2 Richelieu Hotel Co. *v.* International, etc. Co., 140 Ill. 248 (1892). A subscription of a manufacturing corporation to the stock of an exposition corporation is not collectible. Nebraska, etc. Co. *v.* Horton, 93 N. W. Rep. 225 (Neb. 1903).

3 U. S. Vinegar Co. *v.* Fœhrenbach, 148 N. Y. 58 (1895). The fact that corporations subscribed for stock of an exposition company without charter authority so to do is no defense to another stockholder who stood by without objecting and who does not prove that such subscriptions were not paid. McCoy *v.* World's, etc. Exposition, 186 Ill. 356 (1900).

4 Bigbee, etc. Co. *v.* Moore, 121 Ala. 379 (1899).

5 Walker *v.* Devereaux, 4 Paige, 229 (1833).

6 Sims *v.* Street R. R., 37 Ohio St. 566 (1882). But see §§ 70, 286, 614. But neither the commissioners (Brower *v.* Passenger Ry., 3 Phila. 161—1858), nor any original stockholder (Curry *v.* Scott, 54 Pa. St. 270—1867), have any priority of right over the other subscribers, or the public generally, in the matter of subscription for stock.

7 Morris *v.* Stevens, 178 Pa. St. 563 (1897). Where the stockholders are present and only one objects to the issue of unissued stock to a director, whereby he acquires control, such issue is legal. Christopher *v.* Noxon, 4 Ont. Rep. (Can.) 672 (1883). In *Re* London, etc. Ltd., 77 L. T. Rep. 146 (1897), there were one hundred and twenty founders' shares of

the scope of the partnership business, may bind his firm by a subscription in the firm name.[1] But if it is not within the scope of the partnership business, the person so signing is liable personally; and whether or not the subscription was within the scope of the partnership business may be a question for the jury.[2] Even though stock is issued in the name of two persons who are partners, yet if it had nothing to do with the partnership, each is liable for one-half of the subscription, that being their proportionate interest.[3] Trustees of an estate, and having express power to sell the same, may transfer the property to a corporation in exchange for the stock of the latter.[4] A person who subscribes for stock as trustee is personally liable if he was not trustee.[5] A corporation which takes a subscription from the trustee as trustee is chargeable with notice of the fact that trust funds are being used.[6] An executor may take part in and personally subscribe for stock in a corporation formed to take over an embarrassed and unprofitable partnership in which the estate is interested.[7]

£10 each and twelve thousand ordinary shares of £10 each. The founders' shares were entitled to half of any dividend which might remain after paying ten per cent. on the ordinary shares. The directors allotted to themselves eighty of these founders' shares, and the court upheld the allotment. The prospectus stated that each person taking fifty ordinary shares would be entitled to take one of the founders' shares. The directors caused the fifty ordinary shares for each of the eighty founders' shares to be taken by others.

1 Maltby *v.* Northwestern, etc. R. R., 16 Md. 422 (1860); Ogdensburgh, etc. R. R. *v.* Frost, 21 Barb. 541 (1856); Union Hotel Co. *v.* Hersee, 79 N. Y. 545 (1880). Otherwise if it is not within the partnership business. Livingston *v.* Pittsburgh, etc. R. R., 2 Grant's Cas. (Pa.) 219 (1858). Where partners are stockholders, and all stockholders join as sureties to notes to aid the corporation, one partner may bind the firm by signing its name also as surety. Morse *v.* Hagenah, 68 Wis. 603 (1887). A member of a mercantile firm cannot bind the firm by a subscription to the capital stock of a milling corporation. Patty *v.* Hillsboro, etc. Co., 4 Tex. Civ. App. 224 (1893).

2 Morse *v.* Hagenah, 68 Wis. 603 (1887). Even though persons subscribe for stock on the understanding that it is for a firm in which they are members, yet if the firm is not bound they are personally bound. Rehbein *v.* Rahr, 109 Wis. 136 (1901).

3 Morse *v.* Pacific Ry., 191 Ill. 356 (1901); aff'd, 191 Ill. 371. Where a firm or partnership becomes a subscriber in the copartnership name, corporate creditors may have execution against any one of the partners. The partnership subscription is not a defense of which any single partner can avail himself to escape liability. Bray *v.* Seligman, 75 Mo. 31 (1881).

4 *In re* Sprague, 22 R. I. 413 (1901). See N. Y. Real Prop. Law, § 94.

5 Boatmen's Bank *v.* Gillespie, 108 S. W. Rep. 74 (Mo. 1908).

6 Harrison *v.* Fleischman, 70 N. J. Eq. 301 (1905); see also § 322, *infra*.

7 Houghteling *v.* Stockbridge, 138 Mich. 544 (1904).

§ 66. *Married women as subscribers.*—At common law a married woman could not subscribe for stock, and any person subscribing in her name was himself personally liable on the subscription.[1] But now, in England, and generally in the United States by statute, a married woman may bind her separate estate by such subscription;[2] and when it appears that the contract was with the wife, having been made directly and solely with her, the husband is not bound.[3] The recourse of the corporation or the corporate creditors is, in such a case, to her separate estate only.[4] At common law a married woman, even though she owned a majority of the stock of a corporation, could not bind herself to pay its debts, and even under the New Jersey statute she does not obtain anything for the use of her separate estate, sufficient to sustain such a promise.[5] A married woman is bound under the statutes of Kentucky on a note which she signs, even though the money goes to a corporation in which she is a stockholder.[6]

In England a husband has been held liable on his wife's subscription to the capital stock of an incorporated company, the subscription having been made before marriage.[7]

1 Pugh & Sharman's Case, L. R. 13 Eq. 566 (1872).

2 Witters *v.* Sowles, 32 Fed. Rep. 767 (1887); Matthewman's Case, L. R. 3 Eq. 781 (1866); Luard's Case, 1 De G., F. & J. 533 (1860); Butler *v.* Cumpston, L. R. 7 Eq. 16 (1868); *Re* Reciprocity Bank, 22 N. Y. 9 (1860). See §§ 250, 319, *infra.* A married woman may be an incorporator. Good Land Co. *v.* Cole, 110 N. W. Rep. 895 (Wis. 1907).

3 Angas's Case, 1 De G. & Sm. 560 (1849); Dalton *v.* Midland, etc. Ry., 13 C. B. 474 (1853); Ness *v.* Angas, 3 Exch. 805 (1849). See also Luard's Case, 1 De G., F. & J. 533 (1860).

4 Biggart *v.* City of Glasgow Bank, 6 Scotch Ct. of Sess. Cas. (4th ser.) 470 (1879); Matthewman's Case, L. R. 3 Eq. 781 (1866).

5 Allen *v.* Beebe, 63 N. J. L. 477 (1899).

6 Williams *v.* Farmers' & Drovers' Bank, 49 S. W. Rep. 183 (Ky. 1899).

7 Burlinson's Case, 3 De G. & Sm. 18 (1849), where the husband was held liable, although he had not fulfilled the conditions of the deed of settlement entitling him to become a member, but had only received dividends on the wife's shares.

Luard's Case, 1 De G., F. & J. 533 (1860), holding that where a woman, being a registered owner of stocks before marriage, attempted to deed them in trust so as to exclude the husband, but the trustees did not accept, and they continued in her name until the liquidation of the company, the husband should be placed with the wife on the list of contributories.

White's Case, 3 De G. & Sm. 157 (1850), was decided on special facts under the terms of a deed of settlement which regulated the rights of the husband and wife to shares in her name. In this case a restricted liability for a limited time was imposed upon the husband, he having done some acts in relation to the shares, but not sufficient to constitute an entire acceptance.

Sadler's Case, 3 De G. & Sm. 36 (1849), holding the husband liable when the shares came to the wife

§ 67. *Infant as subscriber.*—A subscription for stock by an infant is a contract to be governed by the general rules of law that apply to the contracts of infants generally. In general, the subscription of an infant is voidable rather than void. He may repudiate it at majority, and thereby entirely escape liability; or he may ratify it, and thereby become as fully bound as though the subscription had been made after majority.[1] Accordingly it is a

by legacy before marriage, although neither she nor the husband paid the covenanted calls, received any dividends, or otherwise acted as members.

Kluht's Case, 3 De G. & Sm. 210 (1850), where the husband was held liable for losses during, but not for losses before and after, the coverture. He had not complied with necessary preliminaries for becoming a member, although he had done some acts in relation to the shares of the wife.

A husband is liable upon a legacy of stock to the wife during coverture, where it appeared that the stock had been transferred to her, and the transfer duly accepted by her and her husband, and that she only had signed the dividend warrants and drawn the dividends, the proceeds being applied to ordinary household expenses. Thomas *v.* City of Glasgow Bank, 6 Scotch Ct. of Sess. Cas. (4th ser.) 607 (1879).

1 Lumsden's Case, L. R. 4 Ch. App. 31 (1868), where an infant transferred shares after coming of age, and did not attempt to repudiate his remaining shares until four months after the winding-up order, being nine months after his majority. He was held to have affirmed his holding.

Ebbett's Case, L. R. 5 Ch. App. 302 (1870), where a holding for fourteen months after majority without repudiating the shares was held to be an acquiescence, though the shareholder had never acted as such.

Baker's Case, L. R. 7 Ch. App. 115 (1871), where a company was in process of being wound up, when an infant, holding shares as trustee, attained his majority, and he promptly repudiated the shares when the notice of a call was sent him four months afterwards. Subsequently he, by letter, authorized the official liquidator to use his name in proceedings against the *cestui que* trust. *Held*, that by the letter he had not retracted his repudiation of the shares.

In Mitchell's Case, L. R. 9 Eq. 363 (1870), an infant holding shares as trustee, who took no steps to repudiate them for two years after coming of age, was held to be a contributory.

In Wilson's Case, L. R. 8 Eq. 240 (1869), an infant holding shares in a bank, who came of age after the winding-up order was made, was held not to be a contributory, though he had made no formal repudiation, but had not done any act of acquiescence, except that his solicitors, acting for him and others, had opposed an order for a call.

In Hart's Case, L. R. 6 Eq. 512 (1868), where notice of intention to put the name of a female infant upon the list of contributories of a corporation in process of being wound up was served during infancy, and more than two years after her majority a summons for a call was made, when she applied to have her name removed from the list, it was held she was not precluded by the delay.

In Pim's Case, 3 De G. & Sm. 11 (1849), where a son, who, after the death of his father, discovered that shares had been taken in his own name, was held not to be a contribu-

settled rule that, where one subscribes for shares in the name of an infant, he is liable personally to the corporation or the corporate creditors on the subscription.[1] An infant's subscription must be repudiated within a reasonable time after coming of age or he will be held to have ratified it.[2] A minor who has subscribed and paid for stock in a corporation, which corporation was afterwards merged in another corporation for stock of the latter, cannot recover back his money from the second corporation.[3] Even though by the terms of a subscription agreement it is to be binding only upon so much money being subscribed and some of the money subscribed is by minors, this is no defense to the adult subscribers, since the minors subscribing are bound after their majority, unless they plead infancy as a defense.[4]

§ 68. *Subscription by agent.*—A valid subscription may, of course, be made through an agent.[5] Where a person subscribes for

tory, although, at the request of an officer of the company, he had surrendered the shares for exchange for others. A minor who subscribes and pays for stock may disaffirm the same upon becoming of age. Seeley *v.* Seeley, etc. Co., 128 Iowa 294 (1905).

See §§ 250, 318, *infra.*

1 Weston's Case, L. R. 5 Ch. App. 614 (1870); Richardson's Case, L. R. 19 Eq. 588 (1875); Reaveley's Case, 1 De G. & Sm. 550 (1848); Reid's Case, 24 Beav. 318 (1857); *Ex parte* Reavely, 1 Hall & Tw. 118 (1849). So also a person is liable who transfers stock to an infant. Capper's Case, L. R. 3 Ch. App. 458 (1868); Castello's Case, L. R. 8 Eq. 504 (1869); Symons's Case, L. R. 5 Ch. App. 298 (1870); Curtis's Case, L. R. 6 Eq. 455 (1868).

2 Dublin, etc. Ry. *v.* Black, 7 Railw. & Can. Cas. 434 (1852); s. c., 8 Exch. 181. Infancy is a personal defense. Beardsley *v.* Hotchkiss, 96 N. Y. 201 (1884). Where an infant allows his name to remain on the register after he becomes of age, he thereby ratifies his subscription. Cork, etc. Ry. *v.* Cazenove, 10 Q. B. 935 (1847). A court will not presume that an infant subscriber has avoided his contract; and hence a defense of infancy, in an action on a subscription, without allegation of avoidance, is ineffectual, and the plaintiff may have judgment. Leeds, etc. Ry. *v.* Fearnley, 4 Exch. 26 (1849). But it has been held that repudiation before coming of age avoids the contract of subscription *ab initio;* and hence a plea of infancy and of repudiation while an infant, and of notice to the company that the stock was at their disposal, is a good defense to an action on a subscription. Newry, etc. Ry. *v.* Coombe, 3 Exch. 565 (1849). See also Parsons's Case, L. R. 8 Eq. 656 (1869).

3 White *v.* Mount Pleasant Mills Corp., 172 Mass. 462 (1899).

4 Chicago, etc. Co. *v.* Higginbotham, 29 S. Rep. 79 (Miss. 1901).

5 Musgrave *v.* Morrison, 54 Md. 161 (1880); Burr *v.* Wilcox, 22 N. Y. 561 (1860); Rhey *v.* Ebensburg, etc. Co., 27 Pa. St. 261 (1856); *Re* New York, etc. Ry., 99 N. Y. 12 (1885), aff'g 35 Hun, 220; *Re* Whitley Partners, L. R. 32 Ch. D. 337 (1886). Where bonds are purchased by one for several, they are liable to contribute therefor. Musgrave *v.* Buckley, 114 N. Y. 506 (1889).

If both the principal and agent are incorporators, and the agent sub-

stock in the name of another as trustee, he may maintain an action to compel the trustee to account for the subscription and to turn it

scribes, in his own name, the principal cannot claim the stock, inasmuch as he has sworn in the articles of incorporation that all the incorporators were *bona fide* subscribers. Rowley's Appeal, 115 Pa. St. 150 (1887).

A subscription by one of several heirs in the name of the "estate" is not binding on any of the heirs where a statute requires such subscription to be several. Troy, etc. R. R. *v.* Warren, 18 Barb. 310 (1854).

Davidson *v.* Grange, 4 Grant's Ch. (U. Can.) 377 (1854). In this case a subscription by an agent in his own name was held to constitute him a trustee for his principals.

State *v.* Lehre, 7 Rich. L. (S. C.) 234 (1854), holding that a statute forbidding any person from subscribing for shares in the name of another person did not exclude a subscription by an agent for his principal.

Cox's Case, 4 De G., J. & S. 53 (1863), s. c., 33 L. J. (ch.) 145, was decided under the Companies Act, but the court was inclined to think the result would have been the same independent of that statute. It was there held that where a subscriber, in addition to his own shares, had caused a large number to be registered in the names of mere nominees for him, in order to delude the public as to the number of members, he was rightly placed on the list of contributories for all the shares when the company was wound up. This case was distinguished in King's Case, L. R. 6 Ch. App. 196 (1871). In a condemnation proceeding where it is denied that the capital stock had been properly subscribed, a subscription by a person as trustee for an undisclosed principal is to be counted. State *v.* Superior Court, 88 Pac. Rep. 332 (Wash. 1907).

On this question of "dummies," see ch. XIV. See also brief in 15 Ohio St. 332.

If such subscriptions are prohibited by the corporate charter, the principal cannot recover back money which he has given to the agent to subscribe. Perkins *v.* Savage, 15 Wend. 412 (1836).

Mere authority to an agent to subscribe is not a subscription in itself. Grangers' Market Co. *v.* Vinson, 6 Oreg. 172 (1876). Also, New Brunswick, etc. Co. *v.* Muggeridge, 4 Hurl. & N. 160 (1859).

In New York it is a penal offense for a person to subscribe for another who does not intend to pay, or to subscribe in the name of a fictitious person. N. Y. Penal Code, § 590.

Where one subscribes for stock in his own name, in pursuance of a verbal agreement between himself and another that the stock should belong to them jointly, and that he should hold it on joint account, and, the company subsequently becoming insolvent, the stockholders are called on to contribute an amount equal to their stock, it was held, in New York, that the nominal owner of the stock might have contribution from the joint owner. Stover *v.* Flack, 30 N. Y. 64 (1864). In Orr *v.* Bigelow, 14 N. Y. 556 (1856), the parties had covenanted that plaintiffs should subscribe for stock, pay ten per cent. thereon, and then assign it to defendant, who engaged to indemnify them from further liability. Defendant refused to take the shares, and the corporation recovered judgment against plaintiffs for the balance of the subscription. In this action plaintiffs had judgment against defendant upon the covenant, the measure of damages being held to be the balance paid by them, and not that sum less the market value of the stock. A state subscribing through its officers

over upon payment being made.[1] A claim that a person who took stock did so as trustee or agent for the benefit of another person is a claim which can be proved by oral testimony, but must be clearly proved and must be founded on a sufficient consideration. "Loose, vague, and indefinite expressions are insufficient to create such a trust. The intention must be evinced with clearness and certainty."[2] The subscriptions of the original incorporators may be made by an agent.[3] But no person can be made a subscriber to the capital stock of a corporation, and be subjected to the liabilities of a subscriber, by a subscription in his name, made by another without authority, but assuming to act as his agent. Such a subscription is not binding on the principal.[4] Such an unauthorized subscription, however, may be adopted and ratified by the person in whose name it was made without warrant of authority, in such a way as to make it valid and binding.[5] A person subscribing for stock as agent for another,

is bound by their acts as directors. State *v.* Jefferson Turnp. Co., 3 Humph. (Tenn.) 305 (1842).

1 McComb *v.* Frink, 149 U. S. 629 (1893). In Colt *v.* Clapp, 127 Mass. 476 (1879), where one who had verbally agreed to purchase stock for the joint benefit of himself and others refused to divide the stock, he was held accountable to the others for their respective shares of dividends paid thereon in actions for money had and received. See also § 321, *infra.*

2 Levi *v.* Evans, 57 Fed. Rep. 677 (1893).

3 *Re* New York, etc. Ry., 99 N. Y. 12 (1885).

4 Ticonic, etc. Co. *v.* Lang, 63 Me. 480 (1874); Pim's Case, 3 De G. & Sm. 11 (1849); Henessey's Case, 3 De G. & Sm. 191 (1850); *Ex parte* Hall, 1 Macn. & G. 307 (1849).

Drover *v.* Evans, 59 Ind. 454 (1877), holding that where an agent to make a subscription exceeds his authority the principal is not bound by it.

Cf. Chapman & Barker's Case, L. R. 3 Eq. 361 (1867). And this is equally the rule when it is sought to charge one by such a subscription, not in his individual capacity, but only in the capacity of trustee for another. *Ex parte* Hall, 1 Macn. & G. 307 (1849).

5 Musgrave *v.* Morrison, 54 Md. 161 (1880); Mississippi, etc. R. R. *v.* Harris, 36 Miss. 17 (1858), where the defendant promised to pay; Jones *v.* Milton, etc. Co., 7 Ind. 547 (1856), where the principal subscribed over again; Philadelphia, etc. R. R. *v.* Cowell, 28 Pa. St. 329 (1857), where the defendant acquiesced for seven years; Putnam *v.* New Albany, 4 Biss. 365 (1869); s. c., 20 Fed. Cas. 79, where the city ratified.

What acts or omissions, short of express ratification, will in law suffice to bind one upon such a subscription, is, in general, a question for the jury. Philadelphia, etc. R. R. *v.* Cowell, 28 Pa. St. 329 (1857). *Cf.* Fox *v.* Clifton, 6 Bing. 776 (1830). A new trial was granted in 9 Bing. 115. It is held that silence or failure to object to the subscription for a considerable time after knowledge of it is brought to the subscriber is evidence of a ratification. McHose *v.* Wheeler, 45 Pa. St. 32 (1863); Thompson *v.* Reno Sav. Bank, 19 Nev. 103, 171, 242, 291, 293 (1885); Sanger *v.* Upton, 91 U. S. 56 (1875). *Contra* Hume *v.* Commercial Bank, 9 Lea (Tenn.), 728 (1882). And giving a proxy to vote the stock may be sufficient to ratify such a subscription. McCully *v.* Pitts-

and in that other's name, but without authority, thereby becomes himself a subscriber in place of the person whose name he signs, or his unauthorized subscription may subject him to an action for damages.[1] A person who subscribes for stock as trustee is personally liable if he was not trustee.[2] But where one corporation has no power to subscribe for stock in another, an agent making the subscription is not personally liable, the facts being known to all the parties.[3] A person who subscribes for stock through another as agent may be held liable as an original subscriber, the subscription having been made in his name.[4] The real subscriber for stock is liable on a note given by his agent in payment therefor.[5] A person, who by writing has subscribed for stock, cannot set up that he agreed with the president that he was acting merely as agent for others.[6] Where a bank desires to subscribe to the stock of a trust company,

burgh, etc. R. R., 32 Pa. St. 25 (1858). *Contra*, McClelland *v.* Whiteley, 11 Biss. 444 (1883). But a mere declaration to strangers, by the person in whose name the subscription had been made, that he had taken that amount of stock, is not a ratification of the subscription. Rutland, etc. R. R. *v.* Lincoln, 29 Vt. 206 (1857). And even the fact that one whose name had been in this way put down as a subscriber was a director in the corporation was held not to imply knowledge that his name was on the books as a subscriber. Hallmark's Case, L. R. 9 Ch. D. 329 (1878). *Cf.* Fox *v.* Clifton, 6 Bing. 776 (1830). A new trial was granted in 9 Bing. 115. But as a rule it is believed that accepting the office of a director would, in this country, be held a sufficient ratification of such a subscription, in the absence of any other. This is expressly declared to be the rule in Tennessee and elsewhere. Moses *v.* Ocoee Bank, 1 Lea (Tenn.), 398 (1878); Danbury, etc. R. R. *v.* Wilson, 22 Conn. 435 (1853). *Cf.* Fry *v.* Lexington, etc. R. R., 2 Metc. (Ky.) 314 (1859). *Contra*, Hume *v.* Commercial Bank, 9 Lea (Tenn.), 723 (1882).

But where an agent takes stock as agent, on condition that it is to be submitted to the principal, and, "if approved, to be taken out in the purchase of thread," the principal is not bound where he declines to accept, even though he did not notify the corporation of his refusal. Merrick Thread Co. *v.* Philadelphia, etc. Co., 115 Pa. St. 314 (1887).

1 Salem Mill-dam Corp. *v.* Ropes, 26 Mass. 187 (1829). In some jurisdictions it is held that by such a subscription the subscriber makes himself personally liable as a subscriber. Union Hotel Co. *v.* Hersee, 79 N. Y. 454 (1880); State *v.* Smith, 48 Vt. 266 (1876). See also Troy, etc. R. R. *v.* Warren, 18 Barb. 310 (1854); Pugh & Sharman's Case, L. R. 13 Eq. 566 (1872); McHose *v.* Wheeler, 45 Pa. St. 32; Thompson *v.* Reno, etc. Bank, 19 Nev. 103, 171, 242, 291, 293 (1885); § 249, *infra*.

2 Boatmen's Bank *v.* Gillespie, 108 S. W. Rep. 74 (Mo. 1908).

3 Merchants', etc. Co. *v.* Streuby, 44 S. Rep. 791 (Miss. 1907).

4 Evans *v.* Texas, etc. Co., 4 Tex. Civ. App. 326 (1893), 71 Pac. Rep. 1101.

5 Wheeler *v.* Mineral, etc. Co., 31 Colo. 110 (1903).

6 American, etc. Co. *v.* Bean, 125 Fed. Rep. 823 (1903); rev'd on another point in 134 Fed. Rep. 57.

but cannot legally do so, and its directors give their note in payment, they are liable on the note to the receiver of the trust company.[1] An unauthorized signature of a name to a subscription list may be forgery.[2]

§ 69. *Subscriptions taken by an unauthorized agent of the corporation.*—A subscription taken by a person who has no authority from the corporation to take subscriptions is not in general enforceable.[3] But it has been held that such a subscription may, by acceptance and ratification on the part of the corporation, be validated, and the subscriber made liable as though the subscription had been regularly taken.[4]

§ 70. *Unissued or increased capital stock—Right to subscribe therefor.*—Where the whole capital stock or a part of the authorized capital stock is offered for subscription, and a part only of the amount so offered is subscribed for, the remainder of the stock so offered may be offered by the directors to any person, at a fair price not less than par, even though that person is a director in the company. But where only a part of the authorized capital stock has been offered and issued, and subsequently it is resolved to issue more of the authorized capital, or where the capital stock is increased under the statutes, and the increase is about to be issued, then a different rule prevails. Every existing stockholder then has the right to subscribe at par for such a proportion of the stock to be issued as his old holdings bear to the amount of stock then outstanding.[5] Any other rule would enable the parties in control to seize the new stock, in some cases for gain because the stock is worth more than par, and in other cases so as to acquire increased votes at a coming election. In either case this would work a fraud on the other stockholders.[6]

1 Adams *v.* Kennedy, 34 Atl. Rep. 659 (Pa. 1896).

2 State *v.* Hazzard, 80 N. E. Rep. 149 (Ind. 1907).

3 Essex Turp. Corp. *v.* Collins, 8 Mass. 292 (1811); Shurtz *v.* Schoolcraft, etc. R. R., 9 Mich. 269 (1861); Carlisle *v.* Saginaw, etc. R. R., 27 Mich. 315 (1873). *Contra*, Northeastern R. R. *v.* Rodrigues, 10 Rich. L. (S. C.) 278 (1857).

4 Walker *v.* Mobile, etc. R. R., 34 Miss. 245 (1857); Mobile, etc. R. R. *v.* Yandal, 5 Sneed (Tenn.), 294 (1858); Judah *v.* American, etc. Co., 4 Ind. 333 (1853).

5 See §§ 286, 614, 653, *infra*.

6 See § 286, *infra*, and § 65, *supra*. Where *de facto* directors, immediately after the election, order an issue of a large amount of the original unissued capital stock of the company, and most of it is taken by one of their number, who thereby acquires a majority of the stock of the company, and subsequently the election is declared illegal, such directors may be enjoined from voting the stock so issued, and, if they have sold it, may be enjoined from voting other stock equal in amount to the stock so sold by them. The existing stockholders are entitled to subscribe for their proportion of the unissued origi-

It is legal for a company in taking a subscription to stock to give the subscriber an option to take other shares within a certain time at par.[1] Sometimes a portion of the new stock is sold at the same price to parties who agree to take such stock as the stockholders do not take, but this is often only an ingenious device to deprive the stockholders of their right to subscribe for their full proportion of the new stock and is illegal.[2] Where directors have issued stock to themselves at a price less than the market price they may be held liable, at the instance of a stockholder suing for the benefit of the corporation, for the difference between the price they paid and the price of the stock when it was issued to them.[3] Where the directors cause treasury stock to be sold to themselves at less than its real value and for the purpose of carrying an election, the court will set the transfer aside as fraudulent.[4]

C. AN ACTION LIES TO COLLECT SUBSCRIPTIONS.

§ 71. *A subscription for shares implies a promise to pay for them, and this promise sustains an action to collect, without proof of any particular consideration.*[5]—This rule of law is sustained by the

nal capital stock. Morris *v.* Stevens, 178 Pa. St. 563 (1897).

Where, long after the company has commenced to do business, it has disposed of its property and is ready to declare a five hundred per cent. dividend, the directors issue to themselves at par that part of the original capital stock which never had been issued, it is a fraud on the remaining stockholders. Arkansas, etc. Soc. *v.* Eichholtz, 45 Kan. 164 (1891).

1 Hilder *v.* Dexter, [1902] A. C. 474.

2 See § 286, *infra.* Where unissued shares of the par value of 1*l.* each are worth about 4*l.* each, and a portion thereof are offered to the stockholders at 2*l.* 10*s.* each, and an option on the balance is given to underwriters at the same price in consideration of the underwriters agreeing to take such of the stock as is offered to the stockholders and is not taken by the latter, a minority stockholder may enjoin the carrying out of such option to the underwriters, it being in violation of the English statute prohibiting the payment of a commission for underwriting subscriptions. Burrows *v.* Matabele, etc. Co., [1901] 2 Ch. 23.

3 The highest market price since that day for small amounts of stock is no basis for the measure of damages. Shaw *v.* Holland, [1900] 2 Ch. 305.

4 Hilles *v.* Parrish, 14 N. J. Eq. 380 (1862).

5 Quoted and approved in Ventura, etc. Ry. *v.* Collins, 46 Pac. Rep. 287 (Cal. 1896); San Joaquin, etc. Co. *v.* Beecher, 101 Cal. 70 (1894); Succession of Thomson, 46 La. Ann. 1074 (1894), and Puget Sound, etc. R. R. *v.* Ouellette, 7 Wash. 265 (1893). See also § 203, *infra;* Pittsburg, etc. Assoc. *v.* Swan, 51 Pac. Rep. 583 (Kan. 1897). An express promise to pay is not necessary in an English corporation, the statutes providing that the subscription shall be a debt due from

great weight of authority. The signing of the subscription paper is an implied promise to pay the subscription.[1]

the subscriber. Nashua Sav. Bank *v.* Anglo-American, etc. Co., 189 U. S. 221 (1903), citing § 71.

1 Quoted and approved in Planters', etc. Co. *v.* Webb, 144 Ala. 666 (1905); Upton *v.* Tribilcock, 91 U. S. 45 (1875); Hawley *v.* Upton, 102 U. S. 314 (1880); Webster *v.* Upton, 91 U. S. 65 (1875); American Alkali Co. *v.* Campbell, 113 Fed. Rep. 398 (1902); Carnahan *v.* Campbell, 158 Ind. 226 (1902); Waukon, etc. R. R. *v.* Dwyer, 49 Iowa, 121 (1878); Nulton *v.* Clayton, 54 Iowa, 425 (1880); Miller *v.* Wild Cat, etc. Co., 52 Ind. 51 (1875); Mitchell *v.* Beckman, 64 Cal. 117 (1883); Merrimac Min. Co. *v.* Levy, 54 Pa. St. 227 (1867); Beene *v.* Cahawba, etc. R. R., 3 Ala. 660 (1842); Fry *v.* Lexington, etc. R. R., 2 Metc. (Ky.) 314 (1859); Gill *v.* Kentucky, etc. Co., 7 Bush. (Ky.), 635 (1870); Mount Sterling, etc. Co. *v.* Little, 14 Bush (Ky.), 429 (1879); Chase *v.* East Tenn. R. R., 5 Lea (Tenn.), 415 (1880). Even though the corporation has the power to forfeit the shares for non-payment. Hughes *v.* Antietam Mfg. Co., 34 Md. 316 (1870); Dexter, etc. Co. *v.* Millerd, 3 Mich. 91 (1854). Where a subscriber agrees in writing to pay, suit may be brought without first selling his stock to pay the assessment. Shattuck *v.* Robbins, 68 N. H. 565 (1896). It is sufficient to allege that the defendant holds stock which has never been paid up. The defense that the defendant did not subscribe for the stock or did not agree to pay for it or that he is not liable must be set up in the answer. Atlantic T. Co. *v.* Osgood, 116 Fed. Rep. 1019 (1902).

As to enforceability of subscriptions, not for stock, but as a gift to enterprises, see Rogers *v.* Galloway F. College, 64 Ark. 627 (1898); Smith *v.* Burton, 59 Vt. 408 (1887); McCabe *v.* O'Connor, 69 Iowa, 134 (1886); Broadbent *v.* Johnson, 2 Idaho, 300 (1887), where subscription was to a railroad; Gans *v.* Reimensnyder, 2 Atl. Rep. (Pa.) 425, note; Grand Lodge *v.* Farnham, 70 Cal. 158 (1886); Roberts *v.* Cobb, 103 N. Y. 600 (1886); Utica, etc. R. R. *v.* Brinckerhoff, 21 Wend. 139 (1839); Watkins *v.* Eames, 63 Mass. 537 (1852). See also Davis *v.* Smith Am. Organ Co., 117 Mass. 456 (1875); Presbyterian Church *v.* Cooper, 112 N. Y. 517 (1889); Cottage, etc. Church *v.* Kendall, 121 Mass. 529 (1877); Livingston *v.* Rogers, 1 Caines' T. R. 583 (1804); Hamilton College *v.* Stewart, 1 N. Y. 581 (1848); Van Rensselaer *v.* Aiken, 44 N. Y. 126 (1870); Presbyterian Soc. *v.* Beach, 74 N. Y. 72 (1878); Hutchins *v.* Smith, 46 Barb. 235 (1865); Amherst Academy *v.* Cowls, 23 Mass. 427 (1828).

Although a note given as a contribution for the founding of a college is not enforceable merely on the ground that others had contributed, yet it is enforceable if certain acts or services are to be performed and they are performed. Keuka College *v.* Ray, 167 N. Y. 96 (1901). Subscription to a church. Waters *v.* Union T. Co., 129 Mich. 640 (1902). A promise to contribute towards the purchase of a site for a church is binding and may be enforced. First, etc. Church *v.* Pungs, 126 Mich. 670 (1901). A subscription to build a church cannot be withdrawn after it is delivered, but any conditions in such subscription must be complied with. Rothenberger *v.* Glick, 22 Ind. App. 288 (1899). A church subscription payable to a committee may be enforced by a part of the subscribers suing for the benefit of all, under the Wisconsin statute. Hodges *v.* Nalty, 104 Wis. 464 (1899). A subscriber to a

There have been various opinions of the courts as to the consideration supporting this implied promise which sustains an action to collect the subscription. It has been held that the right to membership in the proposed corporation, and the probable advantages

gratuitous fund may withdraw at any time before it is accepted or any expense incurred. American, etc. Co. *v.* Melcher, 132 Iowa, 324 (1906). A voluntary subscription may be withdrawn prior to acceptance. Doherty *v.* Arkansas, etc. R. R., 142 Fed. Rep. 104 (1905). Donations on condition, but collected before the condition was performed, still belong to the subscribers. Larrimer *v.* Murphy, 72 Ark. 552 (1904). A corporation organized for the purpose of furnishing facilities to public exchanges and owning a building for that purpose may accept a subscription as a bonus payable to it, on condition that a stock exchange locates in such building. Merchants', etc. Co. *v.* Chicago, etc. Co., 210 Ill. 26 (1904).

A subscriber or donator of money to a factory cannot prevent its moving away if it is a losing enterprise. Ayres *v.* Dutton, 87 Mich. 528 (1891).

A subscription to a church may be enforced by the bishop in whose name the title is taken, he being one of those to whom it is payable. Egan *v.* Bonacum, 38 Neb. 577 (1894). A subscription for stock may be changed to a donation. Lake Manawa Ry. *v.* Squire, 89 Iowa, 576 (1894).

Difficulty was experienced in the form of contract for subscriptions for a proposed World's Fair corporation in 1889. The form adopted was as follows:

"The undersigned, in consideration of the advantages which will result to us respectively from concert of action, and of other good causes and considerations, and the efforts to be made by Samuel D. Babcock [giving names], to procure the subscriptions hereinafter provided for, and the organization of a corporation to control and manage such exposition, do agree, each for himself, to pay to the said Samuel D. Babcock and his associates hereinabove named, or at their request, to said corporation, the respective amounts set opposite our names upon the following terms and conditions, to wit:

"Such subscription shall not be binding until such corporation shall be organized.

"No subscription shall be binding until the said Samuel D. Babcock and his associates above named shall have succeeded in obtaining subscriptions hereto to the amount of at least $5,000,000.

"Such subscription shall be a preliminary or guarantee fund to be paid in instalments of not more than one-fourth of their respective amounts at any one time, upon calls for the same, made at intervals of not less than three months by the said Samuel D. Babcock and his associates, or, if they shall so determine, by the said corporation; and when such subscriptions shall be fully paid, certificates shall be issued entitling each subscriber to share ratably with all other subscribers to the capital stock of such corporation in all assets and funds that remain after the conclusion of the exposition, the closing of all its accounts, the payment of all its liabilities of every nature, and the liquidation of all its expenses.

"In no event shall the subscribers to this fund be liable for any debts or obligations growing out of this subscription or of said exposition, except to the extent of their several subscriptions, and the certificates to be issued shall be in such form as to avoid any claim for personal liability.

"The money paid by said subscribers shall be expended by said corporation only for the purposes of said exposition.

"Calls for payment of subscriptions shall be on not less than ten days' notice to be sent by mail to the address given opposite the name of each subscriber, any other notice being hereby expressly waived.

"Samuel D. Babcock and his associates hereinabove named having been thus contracted with by the subscribers because of their having been selected as a finance committee aforesaid in aid of the aforesaid exposition, it is hereby further agreed that all stipulations in the agreement made dependent upon the action of said Babcock and his associates shall be considered as fully met by the action of the majority of them; and in case of vacancy by death, resignation, or otherwise, such vacancy may be filled by their survivors."

to be derived from membership in the company, constitute the consideration.[1]

It has been held, also, that the stock to be received and the probable dividends thereon constitute the consideration.[2]

And, again, it has been held that a consideration is conclusively implied from the fact of subscription itself; that it is implied by law; and that the law thereby creates a duty and liability to pay for the stock.[3]

The particular motive of a subscriber inducing him to subscribe is immaterial. The consideration which exists in law cannot be allowed to be governed by the ideas of the subscriber.[4] The assignee of a subscription may enforce it.[5] The remedy of a corporation to collect subscriptions is not in equity, even though the defense will be that the board of directors released the subscription

1 Lake Ontario, etc. R. R. *v.* Mason, 16 N. Y. 451 (1857); Osborn *v.* Crosby, 63 N. H. 583 (1885); Bullock *v.* Falmouth, etc. Co., 85 Ky. 184 (1887). In another case it is said that "the advantages to be derived from being a member of such a company, and of the consequent right to participate in the pecuniary dividends, is a positive benefit; and where the agreement secures that advantage to the subscriber, on the organization of the company, the objection of a want of consideration cannot be made with success." Hamilton, etc. Co. *v.* Rice, 7 Barb. 157 (1849), adopted by Brown, J., in Lake Ontario, etc. R. R. *v.* Mason, 16 N. Y. 451, 463 (1857).

2 Schenectady, etc. Co. *v.* Thatcher, 11 N. Y. 102, 107 (1854); Bish *v.* Bradford, 17 Ind. 490 (1861); New Albany, etc. R. R. *v.* Fields, 10 Ind. 187 (1858); Fry *v.* Lexington, etc. R. R., 2 Metc. (Ky.) 314 (1859); Selma, etc. R. R. *v.* Tipton, 5 Ala. 787 (1843); Danbury, etc. R. R. *v.* Wilson, 22 Conn. 435 (1853); East Tennessee, etc. R. R. *v.* Gammon, 5 Sneed (Tenn.), 567 (1858). And again, that the prior proceedings and acts of the parties are a legal basis for the promise to pay; also that the partial execution of the purpose designed by the charter is a sufficient consideration. Kennebec, etc. R. R. *v.* Palmer, 34 Me. 366 (1852); Amherst Academy *v.* Cowls, 23 Mass. 427 (1828); Ohio, etc. College *v.* Higgins, 16 Ohio St. 20 (1864). *Cf.* McCully *v.* Pittsburgh, etc. R. R., 32 Pa. St. 25 (1858). In Minnesota the implied promise to issue the stock is declared to be the consideration for the promise to pay for it. St. Paul, etc. R. R. *v.* Robbins, 23 Minn. 439 (1877). And in Kentucky it is held that the promise by each of the subscribers is a sufficient consideration for the promises of the others. Twin Creek, etc. Co. *v.* Lancaster, 79 Ky. 552 (1881).

3 East Tennessee, etc. R. R. *v.* Gammon, 5 Sneed (Tenn.), 567 (1858).

4 Illinois River R. R. *v.* Zimmer, 20 Ill. 654 (1858); Miller *v.* Wild Cat, etc. Co., 52 Ind. 51, 64 (1875); Andover, etc. Corp. *v.* Gould, 6 Mass. 40, 44 (1809); Parker *v.* Northern Central, etc. R. R., 33 Mich. 23 (1875).

5 See § 111, *infra*. In Pennsylvania a statute which authorized a corporation to transfer a subscription from one enterprise to another has been held unconstitutional. Pittsburgh, etc. R. R. *v.* Gazzam, 32 Pa. St. 340 (1858).

and the company claims that such release was fraudulent.[1] In a suit by an alien corporation to collect unpaid calls, the statutes under which the corporation is formed may be proved by the testimony of an English solicitor who produces copies of such statutes.[2]

§ 72. *Such is the rule for subscriptions before incorporation as well as those after—Acceptance of the subscription—Withdrawal—Subscriptions for the benefit of contractors.*—That a subscription for stock implies a promise to pay for it, even though the subscription was before incorporation, is the rule sustained by the great weight of authority.[3] It has been held, also, that the corporation

1 Sigua Iron Co. *v.* Clark, 77 Fed. Rep. 496 (1896).

2 Nashua, etc. Bank *v.* Anglo-American, etc. Co., 189 U. S. 221 (1903). As to the various facts which should be proved in a suit to collect an unpaid call, see Nashua, etc. Bank *v.* Anglo-American, etc. Co., 108 Fed. Rep. 764 (1901), and especially the dissenting opinion. See also § 120, *infra.* In suing on a subscription to a foreign corporation, the statutes governing such foreign corporation may be proved by a copy testified to by a witness who has examined and compared the copy with the original. Anglo-American, etc. Co. *v.* Dyer, 181 Mass. 593 (1902). See also § 753, *infra.*

3 Quoted and approved in Planters', etc. Co. *v.* Webb, 144 Ala. 666 (1905), and Nebraska, etc. Co. *v.* Lednicky, 113 N. W. Rep. 245 (Neb. 1907). Richelieu Hotel Co. *v.* International, etc. Co., 140 Ill. 248 (1892); San Joaquin, etc. Co. *v.* Beecher, 101 Cal. 70 (1894); Branch *v.* Augusta Glass Works, 95 Ga. 573 (1895); Nickum *v.* Burckhardt, 30 Oreg. 464 (1897); Succession of Thomson, 46 La. Ann. 1074 (1894); West *v.* Crawford, 80 Cal. 19 (1889); Marysville, etc. Co. *v.* Johnson, 93 Cal. 538 (1892); San Joaquin, etc. Co. *v.* West, 94 Cal. 399 (1892); McCormick *v.* Great Bend, etc. Co., 48 Kan. 614 (1892); Minneapolis, etc. Co. *v.* Crevier, 39 Minn. 417 (1888); Penobscot R. R. *v.* Dummer, 40 Me. 172 (1855); Athol, etc. Co. *v.* Carey, 116 Mass. 471 (1875); Ashuelot, etc. Co. *v.* Hoit, 56 N. H. 548 (1876); Cross *v.* Pinckneyville Mill Co., 17 Ill. 54 (1855); Griswold *v.* Peoria University, 26 Ill. 41 (1861); Stone *v.* Great Western Oil Co., 41 Ill. 85 (1866); City Hotel *v.* Dickinson, 72 Mass. 586 (1856); Heaston *v.* Cincinnati, etc. R. R., 16 Ind. 275 (1861); Miller *v.* Wild Cat, etc. Co., 52 Ind. 51 (1875); Peninsular R. R. *v.* Duncan, 28 Mich. 130 (1873); Essex Bridge Co. *v.* Tuttle, 2 Vt. 393 (1830); Kirksey *v.* Florida, etc. Co., 7 Fla. 23 (1857); Beene *v.* Cahawba, etc. R. R., 3 Ala. 660 (1842); Selma, etc. R. R. *v.* Tipton, 5 Ala. 787 (1843); Hartford, etc. R. R. *v.* Kennedy, 12 Conn. 499 (1838); Thigpen *v.* Mississippi Cent. R. R., 32 Miss. 347 (1856); Gill *v.* Kentucky, etc. Co., 7 Bush (Ky.), 635 (1870); Instone *v.* Frankfort Bridge Co., 2 Bibb (Ky.), 576 (1812); Cucullu *v.* Union Ins. Co., 2 Rob. (La.) 571, 573 (1842); Nulton *v.* Clayton, 54 Iowa, 425 (1880); Worcester Turnp. Co. *v.* Willard, 5 Mass. 80 (1809); Twin Creek, etc. Co. *v.* Lancaster, 79 Ky. 552 (1881); Minneapolis, etc. Co. *v.* Davis, 40 Minn. 110 (1889). *Cf.* Thompson *v.* Page, 42 Mass. 565 (1840); Ives *v.* Sterling, 47 Mass. 310 (1843); Robinson *v.* Edinboro' Academy, 3 Grant's Cas. (Pa.) 107 (1861); Edinboro' Academy *v.* Robinson, 37 Pa. St. 210 (1860); People's Ferry Co. *v.* Balch, 74 Mass. 303 (1857); Chater *v.* San Francisco,

may bring an action at law for damages against a subscriber to a preliminary subscription list who refuses to take and pay for the stock;[1] and that the measure of damages for such a breach of contract to subscribe for stock is the difference between the par and market value of the stock involved.[2] It has been held that a corporation may defeat a subscriber's action for stock by proving that it never accepted his subscription.[3] But no formal acceptance by the corporation is necessary in order to enforce a subscription.[4]

etc. Co., 19 Cal. 219 (1861); Tar River Nav. Co. *v.* Neal, 3 Hawks (N. C.), 520 (1825); Klein *v.* Alton, etc. R. R., 13 Ill. 514 (1851); Banet *v.* Alton, etc. R. R., 13 Ill. 504 (1851); Sanger *v.* Upton, 91 U. S. 56 (1875); Kidwelly Canal Co. *v.* Raby, 2 Price, 93 (1816); Weiss *v.* Mauch Chunk Iron Co., 58 Pa. St. 295 (1868). A corporation upon accepting a subscription made before its incorporation may collect such subscription. McNaught *v.* Fisher, 96 Fed. Rep. 168 (1899). A subscription to a corporation to be organized is enforceable by the corporation. Auburn, etc. Assoc. *v.* Hill, 113 Cal. 382 (1896), aff'g 32 Pac. Rep. 587 (Cal. 1893). The corporation may collect a subscription to its stock obtained prior to the incorporation, the subscriber having attended meetings and acquiesced in expenditures. International Fair Assoc. *v.* Walker, 83 Mich. 386 (1890). A subscription before incorporation is enforceable, where defendant paid for one or more shares after incorporation. Bell's Appeal, 115 Pa. St. 88 (1887). A secret agreement that a subscriber for stock prior to incorporation shall not be required to take the stock is no defense as against the corporation. Greater, etc. Co. *v.* Riley, 210 Pa. St. 283 (1904). Where a subscriber before incorporation is offered the stock by the corporation on certain conditions which he refuses, he is not liable as a stockholder. Medler *v.* Albuquerque, etc. Co., 6 New Mex. 331 (1892). A subscription with an express promise to pay to an agent specified upon the incorporation of the company is collectible by him. West *v.* Crawford, 80 Cal. 19 (1889). A corporation may sue on a subscription made before incorporation; and where parties "agreed to subscribe" certain stock and pay for the same, this is a sufficient subscription. Jeanette, etc. Works *v.* Schall, 13 Penn. Sup. Ct. 96 (1900). The agreement of individuals with a promoter to underwrite shares of stock of a company cannot necessarily be enforced by the company, and may be modified without the consent of the company, but if shares are allotted to the underwriters, and they do not object, they are liable as shareholders by English law, and if the corporation was an English corporation such liability may be enforced in the United States. Electric, etc. Co. *v.* Prince, 81 N. E. Rep. 306 (Mass. 1907).

1 Quick *v.* Lemon, 105 Ill. 578 (1883); Thrasher *v.* Pike County R. R., 25 Ill. 393 (1861); Rhey *v.* Ebensburg, etc. Co., 27 Pa. St. 261 (1856); Mt. Sterling, etc. Co. *v.* Little, 14 Bush (Ky.) 429 (1879).

2 Thrasher *v.* Pike Co. etc. R. R., 25 Ill. 393 (1861).

3 A subscriber for stock is not a stockholder until the company accepts the subscription. Badger Paper Co. *v.* Rose, 95 Wis. 145 (1897); Starrett *v.* Rockland F. & M. Ins. Co., 65 Me. 374 (1876).

4 Strasburg R. R. *v.* Echternacht, 21 Pa. St. 220 (1853); Miller *v.* Wild Cat, etc. Co., 52 Ind. 51 (1875); Thrasher *v.* Pike County R. R., 25 Ill.

The right of a subscriber to withdraw from his subscription is considered elsewhere.[1] A subscription by various parties to a cheese factory to be incorporated, the number of shares being placed opposite the names, binds the subscribers only to the extent of the shares so placed opposite their names.[2] A subscription before incorporation, such subscription being for the benefit of a contractor who was building the plant, may be enforced by the latter.[3]

393 (1861); Mount Sterling, etc. Co. *v.* Little, 14 Bush (Ky.), 429 (1879); California, etc. Co. *v.* Schafer, 57 Cal. 396 (1881); Charlotte, etc. R. R. *v.* Blakely, 3 Strobh. L. (S. C.) 245 (1848); Pittsburgh, etc. R. R. *v.* Gazzam, 32 Pa. St. 340 (1858); Wallingford Mfg. Co. *v.* Fox, 12 Vt. 304 (1840); Stowe *v.* Flagg, 72 Ill. 397 (1874); Goff *v.* Winchester College, 6 Bush (Ky.), 443 (1869); Perkins *v.* Union, etc. Co., 94 Mass. 273 (1866); Dayton, etc. Co. *v.* Coy, 13 Ohio St. 84 (1861). See also various cases in the first part of this chapter, and Brownlee *v.* Ohio, etc. R. R., 18 Ind. 68 (1862); Kelner *v.* Baxter, L. R. 2 C. P. 174 (1866). A person is not a stockholder where he offers to sell land for stock, and the corporation accepts the offer, but does not notify him. Cozart *v.* Herndon, 114 N. C. 252 (1894). Delivery of the subscription is necessary in Texas. White *v.* Crosby, 51 S. W. Rep. 350 (Tex. 1899). As to the defense that the enterprise was abandoned, see § 189, *infra*.

1 See § 169, *infra*.

2 Davis, etc. Co. *v.* Jones, 66 Fed. Rep. 124 (1895). A subscription contract prior to incorporation may be such that the subscribers are liable severally to the amount of their subscriptions. Davis *v.* Ravenna Creamery Co., 48 Neb. 471 (1896). A subscription prior to incorporation will not be construed as rendering each subscriber liable for the whole, even though the subscription speaks of a joint liability, it being clear that such was not the intent of the subscribers. Chicago, etc. Co. *v.* Graham, 78 Fed. Rep. 83 (1896). Where a subscription list states that each subscriber shall be liable only for the amount subscribed by him, the contract is several and not joint. Waddy, etc. Co. *v.* Davis, etc. Co., 103 Ky. 579 (1898). A subscription agreement signed by various parties to pay the amount set opposite their respective names towards a creamery is several and not joint. Cornish *v.* West, 82 Minn. 107 (1901).

3 Davis, etc. Co. *v.* Dickson, 53 S. W. Rep. 237 (Tenn. 1899). And no tender of the stock need be made before suit. Davis, etc. Co. *v.* Caigle, 53 S. W. Rep. 240 (Tenn. 1899). A preliminary subscription may be payable to individuals, who are to do certain work, until incorporation, when payment for the work is to be made by the corporation. Norcross, etc. Co. *v.* Summerour, 114 Ga. 156 (1901). A subscription agreement prior to incorporation, in which the parties state the number of shares taken, and in which they agree to pay the contractors, who are parties to the contract, a specified sum, is a joint undertaking on the subscribers' part. The contractors may hold them liable as partners, the agreement not limiting their liability to the number of shares taken by each. An immaterial alteration after a part have signed does not release any one. The agreement of the contractors to hold each subscriber liable only on his subscription if he would pay that is without consideration and void. Any subscriber could expressly limit his liability to his subscription. Davis *v.* Shafer, 50 Fed. Rep. 764 (1892).

§ 73. *The New York rule.*—New York presents decisions on various sides of this subject. In that state the rule is rigidly applied that liability is enforced only when a contract to pay is proved. This contract may be express or implied. New York, however, is not inclined to imply the contract. Thus, a purchaser of bonds from the company who takes a bonus of stock without paying for it is not under any implied contract to pay for it.[1] A person who receives stock from the corporation at less than par, without any written agreement whatsoever in regard thereto, is not liable at common law for any further sums. "The liability is everywhere made to depend upon contract."[2] A person to whom stock is transferred without his knowledge is not liable thereon.[3] An agreement of various persons with each other to subscribe for stock cannot be enforced by the corporation.[4] And where the statute prescribes the method of

1 Even though a corporation in selling its mortgage bonds makes a gift to the purchaser of a bonus of stock which has not been paid up, yet neither the corporation nor a judgment creditor of the corporation can claim subsequently that a person receiving such stock is liable thereon. There is no contract imposing any such liability. Christensen *v.* Eno, 106 N. Y. 97 (1887). Compare § 42, *supra.*

2 Seymour *v.* Sturgess, 26 N. Y. 134 (1862).

3 A stockholder's liability on stock rests solely upon a promise to pay, express or implied. If no express promise is claimed, and it appears that the party never accepted the position of stockholder, but that it was put upon him without authority and against his will, and that upon learning of it he repudiated it, he cannot be held liable. So held where stock was transferred to a party. Glenn *v.* Garth, 133 N. Y. 18 (1892). A promise, express or implied, must be proved in order to enforce a subscription. Rochester, etc. Co. *v.* Roe, 7 N. Y. App. Div. 366 (1896).

4 A person signed the following agreement: "We, the undersigned, citizens of Unionville and vicinity, pledge ourselves to subscribe for and take stock in and for the construction of the Lake Ontario Shore Railroad to the amount set opposite our names respectively, on condition said road be located and built through or north of the village of Unionville in Parma." It seems that the railroad company was in existence at the time of the subscription. The company became insolvent and its property was sold and the purchaser built the road. The court held that the insolvent company could not enforce the above subscription, inasmuch as it was not a party to it, and that as to the company the contract was without consideration and there was no proof that the contract was for its benefit. Lake Ontario Shore R. R. *v.* Curtiss, 80 N. Y. 219 (1880). Where a subscription prior to incorporation does not specify the par value of the shares and there is no agreement to form the corporation and take stock therein and pay therefor a certain sum and no means of ascertaining the exact amount which the subscriber agreed to pay, even though he specifies the number of shares he subscribes for, his subscription cannot be enforced. Woods, etc. Co. *v.* Brady, 181 N. Y. 145 (1905).

subscription, a subscription made in another way cannot be enforced.[1]

On the other hand, a direct subscription to "take" stock may be enforced by the corporation, even though such subscription was made prior to the incorporation.[2] An agreement reading, "the under-

1 Where the statute prescribes that the subscribers for stock shall subscribe the articles of incorporation, a person who, prior to incorporation, subscribes for stock and agrees to pay for it, but does not sign the articles of incorporation, cannot be held liable by the corporation on his subscription. Poughkeepsie, etc. Co. *v.* Griffin, 24 N. Y. 150 (1861); Troy, etc. R. R. *v.* Tibbits, 18 Barb. 297 (1854). A note given in payment for the subscription price of stock is illegal under the New York statute which requires ten per cent. to be paid in cash where the subscription is a cash subscription, and hence in such a case the entire subscription is void, even though it provided for the employment of the subscriber and for giving him a bonus of stock. Hapgoods *v.* Lusch, 123 N. Y. App. Div. 23 (1907).

A person who signs the certificate of organization, acts as director, indorses other certificates of stock, and declares himself to be a stockholder, may or may not be liable as a stockholder. Where, in addition thereto, he signed an agreement with other corporators to take and pay for certain stock, he is liable as a stockholder, even though a subscription by itself would not constitute a contract with the company. Powers *v.* Knapp, 71 Hun, 371 (1893).

2 Quoted and approved in Planters', etc. Co. *v.* Webb, 144 Ala. 666 (1905). A subscription before incorporation, the subscription containing an agreement to pay, was enforced by the corporation when formed in Avon, etc. Co. *v.* Weed, 125 N. Y. App. Div. 51 (1908), the corporation alleging that the subscriber had, after incorporation, accepted the scrip and given his check therefor. See S. C. 119 App. Div. 560; rev'd 189 N. Y. 557. Where a person, with others, prior to incorporation, signs his name in a memorandum book containing an agreement that, "in consideration of and for the purpose of becoming stockholders in" the B. & J. R. R. Co., they "do hereby subscribe and take the number of shares . . . of the capital stock of said company set opposite [their] respective names," and they agree to pay therefor "as required by said company," and where such person after incorporation pays two calls on the stock, he is liable for the remainder. Buffalo, etc. R. R. *v.* Gifford, 87 N. Y. 294 (1882).

Where a person prior to the incorporation of a company signs a paper as follows: "We, the subscribers, agree to take the number of shares by us subscribed," etc., and after his name writes the words "twenty shares," the corporation, after organization, may enforce the subscription. Buffalo, etc. R. R. *v.* Dudley, 14 N. Y. 336 (1856).

Where there is subscribed to the articles of incorporation a subscription contract by which subscribers agree to take the number of shares set opposite their respective names, and the corporation is subsequently organized and becomes insolvent, a subscriber to such subscription contract is liable on such subscription for the number of shares specified. Sagory *v.* Dubois, 3 Sandf. Ch. 466 (1846).

Where a statute requires that subscribers to the articles of incorporation shall sign for the number of

signed hereby subscribe for the number of shares set opposite our names," may be enforced by the corporation when it is formed.[1] A subscription made to the corporation itself after incorporation is of course enforceable by it.[2]

§ 74. *In New England a subscription for stock cannot be enforced unless the subscriber expressly promised to pay, or the charter expressly obligated him to do so.* —Such is the rule in New England. It grew out of the peculiar charters of the early turnpike companies,

shares they take in the company, a person who so signs cannot, prior to the filing of the articles, withdraw. The corporation after it is organized may enforce his subscription. Lake Ontario, etc. R. R. *v.* Mason, 16 N. Y. 451 (1857).

A person who, prior to incorporation, signs at the foot of the articles of incorporation a writing by which he agrees to pay to the directors the sums which he might from time to time be required to pay on his subscription is liable to the corporation after it is organized. Stanton *v.* Wilson, 2 Hill, 153 (1841).

"It has been repeatedly decided that a subscription made before a corporation was *in esse*, with a view to a future incorporation, was binding, and that corporation, subsequently organized, could sustain an action upon it." Reformed, etc. Church *v.* Brown, 17 How. Pr. 287 (1859).

Where a person signed an instrument stating that, for value received, he promised to pay two individuals named a specified sum, for the purpose of building a plank road between two points named, and authorized them to transfer such subscription to a corporation thereafter to be formed for that purpose; and a corporation was afterwards organized to construct the road and the subscription transferred to it, in an action by the corporation to recover the amount, *held*, that the defendant was liable. Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546 (1856).

Where a person, prior to incorporation, signs a subscription contract which should have been attached to the incorporation papers but was not, but afterwards, the corporation having been organized in good faith but not in compliance with the statute, he transfers a mortgage in payment of his subscription, and still later the incorporation is made legal by new papers, and he does not sign, yet if he paid the interest on the mortgage after all this he is liable on the subscription. Valk *v.* Crandall, 1 Sandf. Ch. 179 (1843).

The written agreement of a subscriber "to take the shares by him subscribed" is sufficient to sustain an action against him by the judgment creditor of the corporation. Spear *v.* Crawford, 14 Wend. 20 (1835); Cole *v.* Ryan, 52 Barb. 168 (1868).

A person subscribing to the capital stock of a bank incorporated in New Jersey must pay the subscription to the bank, even though the subscription did not contain an express promise to pay. Dayton *v.* Borst, 31 N. Y. 435 (1865).

1 Yonkers, etc. Co. *v.* Taylor, 30 N. Y. App. Div. 334 (1898).

2 A person who, after the incorporation of the company, subscribes for its stock in writing, and in such writing agrees to pay for the same, may be held liable thereon by the corporation. Dutchess Cotton Mfy. *v.* Davis, 14 Johns. 238 (1817); Highland Turnpike *v.* M'Kean, 11 Johns. 98 (1814); Goshen, etc. Road *v.* Hurtin, 9 Johns. 218 (1812); Northern R. R. *v.* Miller, 10 Barb. 260 (1851).

which had shares of stock not limited in amount, but indefinite, so that, as a result, if a subscriber were liable at all, he was liable for the whole capital stock, except so far as it had already been paid in by himself and others. Consequently, inasmuch as these charters gave to the corporation the right to forfeit stock for non-payment of subscriptions, the courts held that an action to collect did not lie, and that the remedy by forfeiture was the only remedy of the corporation.[1] This rule has become firmly established in the New England states, and still prevails in its application to all classes of corporations.[2] A subscriber who merely agrees to "take" a certain amount of stock is not liable on his subscription, at least not until a sale of the stock has been had under the statutory power to sell.[3] But suit lies if there is an express promise to pay.[4]

The supreme court of Vermont, however, has refused to follow the rule laid down in Massachusetts, Maine and New Hampshire, and holds that where a party subscribes for stock he may be sued on the subscription, even though he did not expressly promise to pay.[5] Where a stockholder applies for stock and authorizes the insertion of

1 Worcester, etc. Turnp. Co. *v.* Willard, 5 Mass. 80 (1809); Andover, etc. Turnp. Corp. *v.* Gould, 6 Mass. 40 (1809); New Bedford, etc. Turnp. Corp. *v.* Adams, 8 Mass. 138 (1811); Essex Turnp. Corp. *v.* Collins, 8 Mass. 292 (1811); Franklin Glass Co. *v.* White, 14 Mass. 286 (1817).

2 Kennebec, etc. R. R. *v.* Kendall, 31 Me. 470 (1850); Belfast, etc. Ry. *v.* Moore, 60 Me. 561 (1871); New Hampshire Cent. R. R. *v.* Johnson, 30 N. H. 390 (1855); White Mountains R. R. *v.* Eastman, 34 N. H. 124 (1856); Essex, etc. Co. *v.* Tuttle, 2 Vt. 393 (1830); Connecticut, etc. R. R. *v.* Bailey, 24 Vt. 465 (1852); Atlantic Cotton Mills *v.* Abbott, 63 Mass. 423 (1852); Katama, etc. Co. *v.* Jernegan, 126 Mass. 155 (1879); Boston, etc. R. R. *v.* Wellington, 113 Mass. 79 (1873); Buckfield, etc. R. R. *v.* Irish, 39 Me. 44 (1854); Russell *v.* Bristol, 49 Conn. 251 (1881). *Cf.* Odd Fellows Hall Co. *v.* Glazier, 5 Harr. (Del.) 172 (1849); Stokes *v.* Lebanon, etc. Co., 6 Humph. (Tenn.) 241 (1845); City Hotel *v.* Dickinson, 72 Mass. 586 (1856); Belfast, etc. R. R. *v.* Cottrell, 66 Me. 185 (1876); Katama Land Co. *v.* Holley, 129 Mass. 540 (1880); Mechanics', etc. Co. *v.* Hall, 121 Mass. 272 (1876). In Maine an agreement to "take and fill" a number of shares has been held equivalent to an express promise to pay for them. Buckfield, etc. R. R. *v.* Irish, 39 Me. 44 (1854); Penobscot, etc. R. R. *v.* Bartlett, 78 Mass. 244 (1858); Pittsburgh, etc. R. R. *v.* Gazzam, 32 Pa. St. 340 (1858).

3 Rockingham, etc. Co. *v.* Burlingame, 67 N. H. 301 (1892).

4 Northwood, etc. Co. *v.* Pray, 67 N. H. 435 (1893). An agreement to take and pay for stock in a Maine corporation may be enforced in a suit at law. Hastings Lumber Co. *v.* Edwards, 188 Mass. 587 (1905).

5 Windsor Elec. Light Co. *v.* Tandy, 66 Vt. 248 (1894).

When "neither the general laws nor the act by which the plaintiffs were incorporated, nor any by-laws of the company, created any forfeiture of the shares for the non-payment of the assessment, . . . the legal effect of his (defendant's) subscribing for the stock is to render him liable in *assumpsit*, even where

his name in the charter of a foreign corporation, the charter containing the provision that the subscriptions may be collected by suit, such a suit will lie.[1]

§ 75. *Professor Collin's rules on this subject.*—Professor Collin, of the Cornell Law School, states the law on this subject as follows:

"The following propositions are given as the substantially harmonious net result of much confusion in cases and text-books. Rambling remarks may be found contrary to each proposition, but very few reported cases have been decided contrary to any one of these propositions upon the facts coming within it, and I believe every proposition can be sustained in any state or federal court:

"(a) A preliminary agreement to form a corporation and take stock therein is not a contract by the subscribers with each other, and cannot be enforced by one or more against any other, but only by the corporation.

"(b) Such an agreement, not made as a step authorized by statute in the process of forming the corporation, is a mere offer to the corporation not yet in existence, and is revocable by any subscriber until the birth of the corporation, which operates as an acceptance of the offer, and thereafter the subscription, if not previously revoked, is irrevocable and may be enforced by the corporation.

"(c) Such an agreement, made as a step authorized by statute in the process of forming a corporation, is made valid by the statute, and is binding upon each subscriber from the time of signing, and is irrevocable thereafter, but can be enforced only by the corporation.

"(d) An agreement to pay money to trustees, to be by them paid to a corporation thereafter to be created, the trustees to return to the subscribers stock in the corporation accordingly, is a valid contract between the subscribers and the trustees.

"(e) The distinction made between a present subscription and an agreement to subscribe to the stock of a corporation thereafter to be created is unsound in principle, and disappears as mere *dicta* upon a thorough sifting of the cases.[2]

"(f) The damages recoverable by the corporation upon a subscription is the amount of the subscription; and all discussion of any other measure of damages, such as difference between par and market value of stock subscribed, arises from a misconception of the situation, and disappears from the net result of the authorities."

there is no express promise to pay." Essex, etc. Co. *v.* Tuttle, 2 Vt. 393 (1830).

1 Anglo-American, etc. Co. *v.* Dyer, 181 Mass. 593 (1902).

2 Quoted and approved in Woods, etc. Co. *v.* Brady, 39 N. Y. Misc. 79 (1902).

§ 76. *Stockholders' agreements to guarantee company debts and stockholders' contracts for the benefit of the corporation.*—An agreement of stockholders to be responsible for future debts of the corporation can be enforced, but the corporation and all the parties are to be made parties defendant.[1]

Where the stockholders enter into a contract by which they give a certain amount of their stock to a person who agrees to do certain work for the corporation in consideration of the stock, the remedy for a breach of contract on his part is an action for damages, unless by the contract the stock was to be returned in case of nonperformance.[2] Advances made by one of the promoters to the com-

[1] Farmers' Nat. Bank *v.* Hannon, 14 Fed. Rep. 593 (1883). If the plaintiff is one of the parties to the agreement his remedy is in equity. Farmers' Nat. Bank *v.* Hannan, 4 Fed. Rep. 612 (1880). See also 69 Atl. Rep. 788.

An agreement of stockholders to indemnify, protect, and save harmless in proportion to their stock other stockholders who sign corporate notes, construed, and the remedy explained. Taylor *v.* Coon, 79 Wis. 76 (1891); Taylor *v.* North, 79 Wis. 86 (1891).

Stockholders who sign corporate notes are co-sureties and not guarantors. Southerland *v.* Fremont, 107 N. C. 565 (1890).

An agreement of stockholders that if a creditor of the corporation will release certain security they will give other security or that the debt will be paid is a contract of guaranty and not an original undertaking. Home Nat. Bank *v.* Waterman, 134 Ill. 461 (1890). An agreement whereby one corporation borrows money from the stockholders of another corporation, and agrees to repay the same, is enforcible by such stockholders in an action at law and the remedy is not in equity. Thomas *v.* Council Bluffs, etc. Co., 92 Fed. Rep. 422 (1899). Where a vendor of machinery to a corporation takes its bonds in payment therefor on the promise of the officers that they will purchase the bonds at par at any time within six months, he may tender the bonds and sue for the purchase price. Erie, etc. Works *v.* Thomas, 139 Fed. Rep. 995 (1905).

[2] Gillett *v.* Bowen, 23 Fed. Rep. 625 (1885). See also § 662, *infra*. If the action is to recover back the stock, the corporation is a proper party in order to obtain a transfer. Johnson *v.* Kirby, 65 Cal. 482 (1884). See also, in general, Cates *v.* Sparkman, 73 Tex. 619 (1889). For the construction of a contract by which the owners of all the stock of a mining company turned it over in pledge to parties who would furnish the money to carry on the mine, see Newton *v.* Van Dusen, 47 Minn. 437 (1891). For the construction of an agreement whereby a stock and bond holder deposits all his stock and bonds as security to another person who advances money to carry on the business, see Huston's Appeal, 127 Pa. St. 620 (1889). Where a stockholder, owning a majority of the stock, transfers it to a person under a contract by the latter to do certain work for the corporation, and make a loan to the former, and retain the former as president, but the stockholder endeavors to sell out to another party, his bill in equity to set aside the transfer as obtained by fraud will fail. Healey *v.* Loveridge, 72 Md. 220 (1890). Where, for the purpose of forwarding a corporate enterprise, one of its chief promoters contracts

pany may be shown to be in performance of his contract with his associates and substantially as payments for his stock, and that the company is not liable to repay the same.[1]

A stockholder may hold liable in damages a person who has broken his agreement to loan money to the corporation, the consideration of such agreement having been furnished by the stockholder. But if

to give and sell to a third person certain bonds, etc., if the latter will do certain acts, the former cannot, after part performance by the latter, rescind and recover back the bonds, etc, unless he recompenses the latter for his part performance; nor can he rescind at all unless he can recompense the latter. His remedy is for damages. Such is the rule even though defendant is charged with fraud in refusing complete performance. Snow *v.* Alley, 144 Mass. 546 (1887). Where the stockholders transfer a portion of their stock to one of their number to be disposed of by him for the interests of the company and to raise money to carry on business, he may use a portion of the same to reimburse one of the stockholders for stock which the latter used in the interest of the company. Playa, etc. Co. *v.* Gage, 60 N. Y. App. Div. 1 (1901); aff'd, 172 N. Y. 630. A contract whereby a stockholder delivers certain stock for money to be paid to the corporation, the money to be repaid out of dividends and in other ways, and the stock then to be returned, is a conditional sale and not a loan to the corporation. Crimp *v.* McCormick Const. Co., 71 Fed. Rep. 356 (1896). Where a director loans money to the company and takes security, and afterwards uses such security to secure another loan to the company from another party, the latter party cannot by agreement with the corporation dispose of such security without the knowledge of the director, and if he does so the director is released from liability and may reclaim the property. Wright, etc. *v.* McAdam, 113 N. Y. App. Div. 872 (1906). In the case Dudley *v.* Armenia Ins. Co., 115 N. Y. App. Div. 380 (1906), it was held that a stock holder who with other stockholders pledged his stock to secure a debt from the corporation, and whose stock was sold out for the non-payment of the debt, cannot hold the pledgee liable in damages, even though he charges that the latter wrecked the corporation and thereby rendered the stock valueless, the decision being based on the theory that the depreciation in the value of the stock was due to a wrong perpetrated upon the corporation, for which the remedy in the first instance was with the corporation. A contract by which the president agrees to give fifty shares of stock to an employee who lives up to his contract with the corporation, has no consideration and cannot be enforced, although it might be otherwise if the employee could prove that he entered into the contract with the corporation by reason of such promise. Petze *v.* Leary, 117 N. Y. App. Div. 829 (1907). Where stockholders contribute a part of their stock to one of their number to use in robbing a railroad and bribing a judge, and he uses only a part of it for that purpose, he cannot be compelled by the others to distribute among them the balance. The court will leave the parties where it finds them. Tobey *v.* Robinson, 99 N. Y. 222 (1881). Compare § 39, *supra*.

[1] Hollins *v.* American, etc. Co., 66 N. J. Eq. 457 (1905).

the agreement did not provide for any particular duration of the loan, only nominal damages can be recovered.[1]

It has been held that a stockholder's agreement to pay a corporate debt is not void under the statute of frauds, even though it is oral;[2] but in England it is held that a director's verbal agreement to indorse paper of the corporation is void by the statute of frauds.[3]

Where the solvent stockholders agree that they will severally contribute to raise a fund to pay the corporate liabilities, the agreement is valid and enforceable, and each must contribute in the proportion that the number of shares held by him bears to the number of shares held by all those who entered into such agreement.[4] A bond given

1 Kelly *v.* Fahrney, 97 Fed. Rep. 176 (1899).

2 Emerson *v.* Slater, 22 How. 28 (1859). The oral guarantee of directors that money loaned by a bank to their corporation will be made good by them is within the statute of frauds and not enforceable. Mechanics' etc. Bank *v.* Stettheimer, 116 N. Y. App. Div. 198 (1906).

3 Harbourg, etc. Co. *v.* Martin, 86 L. T. Rep. 505 (1902). *Contra*, Andover Free Schools *v.* Flint, 54 Mass. 539 (1847).

4 Sterling Wrench Co. *v.* Amstutz, 50 Ohio St. 484 (1893). A contract by which several stockholders each agreed to pay loans made by certain persons to the corporation is a several contract and may be enforced against each without joining the others. Dornan *v.* Swift, 1 Pennewill (Del.), 457 (1898). Where the stockholders authorize the receiver of an insolvent bank to borrow money to pay debts of the company, each of said stockholders to be liable therefor in proportion to his holdings of stock, a person so loaning the money to the receiver on the faith of such agreement may bring suit against them and all may be joined without joining the bank or the receiver. Hanover, etc. Bank *v.* Cocke, 127 N. C. 467 (1900). Where six stockholders, in order to enable the corporation to borrow money, agree that one of them shall indorse the company's note for the full amount, and that the other five shall each give their note for one-sixth of the amount to the corporation and that the corporation shall indorse the five notes to the one who indorsed the company's note for the full amount, which was sold to an outsider, the obligors in such notes for one-sixth each are guarantors or sureties to the one who indorsed the note for the full amount, and hence his renewal of the principal note does not release them. Koehler *v.* Hussey, 57 S. W. Rep. 241 (Ky. 1900). Where one stockholder agrees with the others that he will advance money to pay the debts of the corporation and that all the stockholders shall contribute *pro rata*, he may maintain an action against them for such contribution. Davidson *v.* Gretna, etc. Bank, 59 Neb. 63 (1899). The agreement of a stockholder of an insolvent corporation to pay *pro rata* its debt to a bank after the assets of the company have been exhausted, is not binding, there being no consideration. *In re* Lehnhoff's estate, 109 N. W. Rep. 164 (Neb. 1906). A stockholder may defend against a guaranty of the company's debts on the ground that it was not to be delivered until other stockholders signed it. Blair *v.* Security Bank, 103 Va. 762 (1905). Where by a subscriber's contract, the loss, if any, is to be divided among them *pro rata*, the proportion of one is not increased by

by stockholders for the payment of notes to a specified amount to be issued by the corporation within a specified time is enforcible even though one of the bondsmen dies during that time and notes are

the insolvency of another. Kentucky, etc. Assoc. *v.* Miller, 119 Ky. 393 (1905). A holder of notes of the corporation, who endorses and delivers them up to the corporation, on an agreement that the latter should deliver them to a stockholder, who would advance the money to take them up, is not liable as an endorser of the notes. Bradley *v.* Bush, 1 Cal. App. 516 (1905). Where stockholders each agree on default of the corporation in paying a note to purchase a proportionate part of the collateral, and the corporation borrows but a part of the sum, the liability of stockholders signing the agreement is in proportion to the amount actually borrowed. Buffalo Loan, etc. Co. *v.* Carstensen, 107 N. Y. App. Div. 128 (1905); aff'd, 186 N. Y. 608. Where several stockholders assign as security to a corporate note their unpaid subscriptions and the holder of the note enforces the same against a part of them they may have contribution from the others. Hart *v.* Sickles, 45 Misc. Rep. 174 (1904). A contract between officers on distribution of assets of an insolvent corporation whereby three of them agree to pay a note held by a creditor is legal and may be established in a court of law. Mills *v.* Hendershot, 70 N. J. Eq. 258 (1905). Where a few of the directors and stockholders of a bank borrow money for their note to pay a bad debt due their bank, and their bank afterwards purchases such note, they are liable to their bank on the note. Traders', etc. Bank *v.* Black, 60 S. E. Rep. 743 (Va. 1908).

The agreement of the stockholders to secure the directors for becoming sureties for corporate loans is a several and not a joint obligation, if the obligation is so drawn, and the obligation is original and not a collateral obligation of suretyship. Spencer *v.* McLean, 20 Ind. App. 626 (1898).

A contract by which stockholders agreed to turn in proportionately the notes of the company as a contribution to the company was construed in Traders' Nat. Bank *v.* Smith, 22 S. W. Rep. 1056 (Tex. 1893).

A corporation may enforce an agreement of the stockholders to contribute to the payment of the debts. Lillard *v.* Decatur, etc. Co., 36 S. W. Rep. 792 (Tex. 1896).

Where the solvency of a bank is questioned, and the directors give their accommodation notes to the bank to give it credit, such notes are enforceable. Dykman *v.* Keeney, 10 N. Y. App. Div. 610 (1896).

In Wisconsin, etc. Bank *v.* Wilkin, 95 Wis. 111 (1896), the court held that a guaranty by the stockholders of the debts, each of the guarantors agreeing to pay the proportion which his stock held to the whole capital stock, rendered each stockholder liable for all the debts, it appearing that some of the signers did not hold any of the stock.

A bank may accept a deed of real estate from a stockholder and director to make good an impairment of the capital stock, it being agreed that compensation therefor should be paid from future profits. Brown *v.* Bradford, 103 Iowa, 378 (1897).

Where certain stockholders agree to pay a proportion of the corporate debts if the other solvent stockholders sign, a partial payment by the former does not prevent their defending against the agreement on the ground that other solvent stockholders have not signed. Brady *v.* Eliot, 181 Pa. St. 259 (1897).

A subscription to pay *pro rata* the

issued thereafter.[1] Where directors are joint indorsers of corporate notes, and one of them buys the property at public sale in good faith and pays the notes, he may sue the others for contribution and need not account for profits he made in such purchase.[2] A stockholder who voluntarily pays more than par for his stock cannot compel the company to repay to him the excess, even though other stockholders paid only par, it being shown that the parties originally agreed on

losses of a specific public enterprise was construed in Laramee *v.* Tanner, 69 Minn. 156 (1897).

As to accommodation notes given by the stockholders to the corporation and the withdrawal of one, see Patterson *v.* Bank of B. Columbia, 26 Oreg. 509 (1895). The fact that a stockholder guaranteed the payment of a corporate note does not make him liable to the corporation itself. Wright *v.* Knoxville, etc. Co., 59 S. W. Rep. 677 (Tenn. 1900). As against a receiver notes given as a contribution to the corporation may be shown to have been given upon conditions. Catt *v.* Olivier, 98 Va. 580 (1900). At common law a married woman, even though she owns a majority of the stock of a corporation, cannot bind herself to pay its debts, and even under the New Jersey statute she does not obtain anything for the use of her separable estate sufficient to sustain such promise. Allen *v.* Beebe, 63 N. J. L. 377 (1899).

An agreement of one stockholder to pay interest on the money invested by the others is binding. The contract may be equivalent to a purchase-money mortgage and may entitle the holders to a foreclosure. Near *v.* Donnelly, 80 Mich. 130 (1890). In the case of Wisconsin, etc. Bank *v.* Mann, 100 Wis. 596 (1898), a guarantee by stockholders was declared not enforceable because it did not correctly state the oral agreement leading up to it. Where the president of a bank, in order to aid its credit, deeds land to the bank to secure the depositors, the bank has power to mortgage such land, and the mortgagee is protected even though the proceeds are misapplied. Steinke *v.* Yetzer, 108 Iowa, 512 (1899). An insolvent individual who owes a bank may convey land to the bank for the benefit of depositors, and the doctrine that individual assets must be applied to individual debts before being applied to partnership debts does not apply, even though he owns one-half of the stock of the bank. Steinke *v.* Yetzer, 108 Iowa, 512 (1899).

1 Home, etc. Bank *v.* Hosie, 119 Mich. 116 (1898).

2 Weeks *v.* Parsons, 176 Mass. 570 (1900). Corporate property held by a trustee for stockholders who made loans to the corporation does not pass to his trustee in bankruptcy. *In re* Coffin, 152 Fed. Rep. 381 (1907). Where stockholders purchase at foreclosure sale and convey the title to one of their number and subsequently consent to a decree vesting complete title in him, and he becomes bankrupt, his creditors are entitled to the property, even though from time to time he had distributed among the stockholders the proceeds of sales of parcels of the property sold by him. *In re* Coffin, 146 Fed. Rep. 181 (1906). Where the purchaser at foreclosure sale purchases for the benefit of stockholders who advance the money for that purpose, a subsequent sale of his stock by one of the stockholders who advanced the money carries his interest in the property so purchased. Riordan *v.* Schlicher, 146 Ala. 615 (1906).

the payments as made.[1] Where notes are given by the directors instead of the corporation, they are practically sureties, the lender having insisted that the transaction be that way, but all the parties knowing that it was for the benefit of the corporation.[2] A corporate creditor cannot enforce a person's agreement to pay the corporate debts and take stock in payment.[3] In New York, however, where the director and treasurer of an insolvent corporation promises its creditors that he will pay its debts if he is allowed to acquire the property at a judicial sale for less than its real value, they may enforce such promise.[4] A subscription agreement signed by various parties to pay the amount set opposite their respective names, towards a creamery, is several and not joint.[5]

An agreement of stockholders that if a creditor of the corporation will release certain security they will give other security, or that the debt will be paid, is a contract of guaranty and not an original undertaking.[6]

Where the stockholders loan money to the company to be repaid out of the first net earnings, no repayment will be ordered where

1 Esgen *v.* Smith, 113 Iowa, 25 (1901).

2 Hughes *v.* Ladd, 42 Oreg. 123 (1902).

3 Washburn *v.* Interstate Inv. Co., 26 Oreg. 436 (1894). But where the corporation assigns claims to its president upon his guaranty that he will pay therefrom certain corporate debts, such guaranty may be enforced by such creditors. Telford *v.* Oslin, 99 Ga. 507 (1896).

4 Lilienthal *v.* Betz, 185 N. Y. 153 (1906).

5 Cornish *v.* West, 82 Minn. 107 (1901). See also § 72, *supra*. A subscription agreement prior to incorporation, in which the parties state the number of shares taken, and in which they agree to pay the contractors, who are parties to the contract, a specified sum, is a joint undertaking on the subscribers' part. The contractors may hold them liable as partners, the agreement not limiting their liability to the number of shares taken by each. An immaterial alteration after a part have signed does not release any one. The agreement of the contractors to hold each subscriber liable only on his subscription if he would pay that is without consideration and void. Any subscriber could expressly limit his liability to his subscription. Davis *v.* Shafer, 50 Fed. Rep. 764 (1892). See Doud *v.* National Park Bank, 54 Fed. Rep. 846 (1893). *Cf.* Davis, etc. Co. *v.* Barber, 51 Fed. Rep. 148 (1892); Conrad *v.* La Rue, 52 Mich. 83 (1883).

6 Home Nat. Bank *v.* Waterman, 134 Ill. 461 (1890). Stockholders who sign corporate notes are co-sureties and not guarantors. Southerland *v.* Fremont, 107 N. C. 565 (1890).

Where the stockholders guarantee the debts of the company, no notice of the acceptance of the guaranty, when acted on, need be given. Doud *v.* National Park Bank, 54 Fed. Rep. 846 (1893).

Where the vendors of stock guarantee that the stock shall be non-assessable until they have advanced $30,000, a stockholder who is held liable on a statutory liability may hold the guarantors liable if they have not paid the $30,000. Omo *v.* Bernart, 108 Mich. 43 (1895).

the company becomes insolvent and the court distributes the assets.[1] Where a stockholder agrees with corporate creditors that he will buy the property at foreclosure sale and pay a price sufficient to pay their debts, they may hold him liable if he does not do so, even though it is not in writing.[2] Directors are liable on a note given by them to a bank to make up losses of the bank.[3] Where the president of a bank agrees that a subscriber for stock giving in payment the notes of another party will not be held liable as an endorser thereon, the president is liable to him if he is afterwards held liable as endorser.[4] An embarrassed corporation may, in order to obtain working capital, borrow money on its notes endorsed by its stockholders and directors and may give a mortgage to secure them.[5]

"Where stockholders voluntarily assess themselves, to relieve the corporation from pecuniary embarrassment, or for the betterment of their stock, whatever may be the occasion of the assessment, the advances thus made are not debts against, but assets of, the corporation."[6]

1 Lyman *v.* Northern, etc. Co., 62 Fed. Rep. 891 (1894). Where a purchaser of stock agrees to and does advance money to the corporation to make it financially strong, the amount to be repaid when the company is in condition to repay it, he cannot thereafter, when the corporation becomes insolvent, undo the transaction and obtain a preference for such advances. Hart *v.* Globe Ins. Co., 113 Fed. Rep. 307 (1882). Where the directors of a corporation, in order to restore the capital stock which has been impaired, agree that one of them shall give his note to the corporation and that the others shall be responsible for their proportionate part of the note, the note to be retired out of the earnings of the company, and the maker of the note pays it, he may recover from the others their part of the same. Crane *v.* Bayley, 126 Mich. 323 (1901). Where a stockholder advances money to the corporation and agrees not to demand repayment so long as the business is continued, he may demand repayment within a reasonable time after the business is discontinued. Burke *v.* Sidra Bay Co., 116 Wis. 137 (1902). A loan from stockholders to be repaid from the first profits is payable absolutely within a reasonable time if no profits are made. Busby *v.* Century, etc. Co., 27 Utah, 231 (1904). Notes given by the directors of a bank to replace impaired capital may be enforced by its receiver, even though it was agreed that they were to be paid out of profits. State Bank, etc. *v.* Kirk, 216 Pa. St. 452 (1907).

2 Satterfield *v.* Kindley, 57 S. E. Rep. 145 (N. C. 1907).

3 Skordal *v.* Stanton, 89 Minn. 511 (1903). See also 69 Atl. Rep. 490.

4 Patrick *v.* Barker, 112 N. W. Rep. 358 (Neb. 1907).

5 Webster *v.* Ypsilanti, etc. Co., 113 N. W. Rep. 7 (Mich. 1907).

6 Brodrick *v.* Brown, 69 Fed. Rep. 497 (1895). Where a person owns the entire capital stock of a corporation and contributes money to it by reason of its capital stock being impaired, and then sells all the stock, he cannot claim that the corporation owes him the money so contributed, such money having been charged by him on the books to profit and loss. Times, etc. Co. *v.* Given, 106 Fed. Rep. 253 (1900).

Where the vendor agrees by contract with the vendee, and accepted by the company, that he, the vendor, will for five years give his personal supervision to the business of the company, he, the vendor, cannot recover compensation from the company for such services.[1] The agreement of the purchaser of the majority of the stock that he will indemnify and save harmless the vendors from the liabilities of the company does not render the vendee liable to the creditors of the company,[2] nor to the corporation.[3] The agree-

A fund raised by the stockholders for the benefit of the creditors and deposited in the bank may be used by the company to pay a debt due to the bank, the bank having no notice of the trust character of the fund. Wyman *v.* National Bank, 51 Neb. 636 (1897).

Where the owner of oil lands agrees to convey them to a corporation for stock, and to give one-half of the stock to another party, who pays the vendor five thousand dollars and pays to the corporation twenty-five thousand dollars, the twenty-five thousand dollars is not to be credited as a payment by the vendor on an assessment on his stock. Hardee *v.* Sunset Oil Co., 56 Fed. Rep. 51 (1893). A stockholder who voluntarily guarantees or assumes a debt of the corporation cannot, in case he is compelled to pay, claim contribution from the other stockholders. Gorder *v.* Connor, 56 Neb. 781 (1898).

Where subscribers for stock loaned money to the company on condition that it be repaid to them through a trustee, and repayment is made to the trustee, a corporate creditor can attack the transaction only by a bill in equity. Baltimore, etc. R. R. *v.* Kensington Land Co., 175 Pa. St. 95 (1896). Where the chief stockholder has paid a corporate debt by giving his own notes therefor, and subsequently the corporation again assumes the debt, the transaction is legal as against subsequent creditors of the corporation. Fernald *v.* Highland Hall Co., 59 Kan. 534 (1898). Even though a stockholder pledges his stock to secure a debt of the corporation, and such stock is sold out, yet he is not entitled to an equal amount of stock from the corporation, but is merely a creditor of it. Dempster *v.* Rosehill, etc. Co., 206 Ill. 261 (1903). Where minority stockholders agree to finance the company if they are given control of its business and under such agreement do finance the company and the majority stockholders then take control, the minority stockholders may have a receiver appointed, if the company is not able to repay money advanced on their credit. Wood, etc. Co. *v.* American, etc. Co., 62 Atl. Rep. 768 (N. J. 1906).

1 Wetmore *v.* C. A. Wetmore Co., 113 Cal. 321 (1896). The fact that a vendor of personalty said he would not sell to the corporation, but would to the directors, does not make them liable if the sale was to the corporation. Woodbury Granite Co. *v.* Mulliken, 66 Vt. 465 (1894).

Where certain stockholders agree with a subscriber for stock that he shall receive certain dividends and that they will take his stock if he desires after three years, he has a reasonable time after the three years to exercise his right to sell to them. Rogers *v.* Burr, 97 Ga. 10 (1895); s. c., 105 Ga. 432.

2 Traders', etc. Bank *v.* Washington, etc. Co., 22 Wash. 467 (1900). *Cf.* § 673, *infra.*

3 A corporation cannot enforce a promise made by a stockholder to a purchaser of his stock that he, the vendor, would pay the corporate

ment of vendors of stock to protect the vendee against the payment of existing claims of a corporation is not enforcible until payment is actually made.[1] Where the stockholders personally guarantee the debts of the corporation they are liable on the guaranty and also on any statutory liability attached to their stock.[2] A corporation cannot enforce a contract by which the seller of its stock agrees with the purchaser that the corporate accounts will be collected and that the debts do not exceed a certain amount.[3] The agreement of the stockholders upon a sale of the corporate property not to engage in that line of business in a certain county, is binding upon them.[4]

Where the statute provides for raising funds for a mutual insurance company by assessments, the bond of the directors to advance a certain sum to the company as needed is *ultra vires* and unenforceable.[5]

An alteration of a corporate note after stockholders have signed as sureties releases the stockholders.[6]

debts. German St. Bank *v.* Northwestern, etc. Co., 104 Iowa, 717 (1898). A corporation cannot enforce a contract by which the seller of its stock agrees with the purchaser that the corporate accounts will be collected and that the debts do not exceed a certain amount. Rochester, etc. Co. *v.* Fahy, 111 N. Y. App. Div. 748 (1906); aff'd, 188 N. Y. 629.

1 Cochran *v.* Selling, 36 Oreg. 333 (1899).

2 London, etc. Bank *v.* Parrott, 125 Cal. 472 (1899). As to contribution where stockholders who are sureties on a note are also liable as stockholders for the same debt, see Myers *v.* Sierra Val. etc. Assoc., 122 Cal. 669 (1898). Where a stockholder has guaranteed the bonds of a corporation and allowed the mortgage to cover some of his own property and the corporation becomes insolvent, other stockholders when sued on their statutory liability cannot set up that this guaranty and mortgage should first be exhausted before they are held liable. Winthrop, etc. Bank *v.* Minneapolis, etc. Co., 77 Minn. 329 (1899).

3 Rochester, etc. Co. *v.* Fahy, 111 N. Y. App. Div. 748 (1906); aff'd, 188 N. Y. 629.

4 Union Mills *v.* Harder, 116 N. Y. App. Div. 22 (1906).

5 Goss *v.* Peters, 98 Mich. 112 (1893). Where the condition to a particular subscription is that $50,000 be subscribed, the verbal guaranty of an individual that the $50,000 would be subscribed is not a compliance with the condition. Branch *v.* Augusta Glass Works, 95 Ga. 573 (1895).

6 Pelton *v.* San Jacinto Lumber Co., 113 Cal. 21 (1896). A modification of the contract between the subscribers and a contractor does not release the former where they accept the work upon the completion of the contract. Gibbons *v.* Ellis, 83 Wis. 434 (1892). An agreement of stockholders that certain corporate notes will be paid is released by taking new notes from the corporation extending the debt. Home Nat. Bank *v.* Waterman, 134 Ill. 461 (1891). A note made by the stockholders for the benefit of the corporation may be barred by the statute of limitations, even though the corporation has made partial payments. Patterson *v.* Collier, 113 Mich. 12 (1897).

Stockholders' contracts relative to treasury stock[1] and for the sale of stock[2] are considered elsewhere. The subject of the character, rights and liabilities of an underwriter is also considered elsewhere.[3]

Stockholders who endorse a bond of a corporation may set up the five years' statute of limitation although the bond was a sealed instrument. Facts connected with the stockholders endorsing the bond may be explained by parol.[4]

1 See § 46, *supra*. A corporation cannot enforce the agreement of its promoters that a certain amount of the bonds and stock should be donated to the company. Flanagan *v.* Lyon, 54 N. Y. Misc. Rep. 372 (1907).

2 See § 334, *infra*.

3 See § 14, *supra*. An underwriter is a guarantor, and if the agreement which he underwrites is modified without his consent he is thereby released. Guardian T. Co. *v.* Peabody, 122 N. Y. App. Div. 648 (1907).

4 Somers *v.* Florida, etc. Co., 50 Fla. 275 (1905).

CHAPTER V.

CONDITIONAL SUBSCRIPTIONS.

§ 77. Definition.
78. Conditions precedent and conditions subsequent.
79. Conditional subscriptions in New York and Pennsylvania before incorporation.
80. In New York such subscription is void; in Pennsylvania the condition is void.
81. Oral conditions are void.
§ 82. Conditional subscriptions after incorporation.
83. What may be the condition.
84. Acceptance by the corporation is necessary—Withdrawal.
85. Construction of the condition.
86, 87. Performance of the condition.
88. Waiver.
89. Notice and calls on conditional subscriptions.

§ 77. *Definition of conditional subscription.*—A conditional subscription is one on which payment can be enforced by the corporation only after the occurrence or after the performance by the corporation of certain things specified in the subscription itself.[1] Oral agreements made with the subscriber to the effect that payment will not be required except on certain events or contingencies are sometimes spoken of as conditions to the subscription, but more properly are mere variations of a written contract, and are treated elsewhere.[2]

§ 78. *Conditions precedent and conditions subsequent.*—A conditional subscription is also to be distinguished from a subscription on a condition subsequent. A subscription on a condition subsequent contains a contract between the corporation and the subscriber, whereby the corporation agrees to do some act. It thereby combines two contracts: one the contract of subscription, the other an ordinary contract of the corporation to perform the specified acts.[3] The subscription is valid and enforceable whether the con-

1 A conditional subscription has often been spoken of as "a continuing offer which is final and absolute when accepted." Taggart *v.* Western Md. R. R., 24 Md. 563, 595 (1866); Ashtabula, etc. R. R. *v.* Smith, 15 Ohio St. 328 (1864); Lowe *v.* Edgefield, etc. R. R., 1 Head (Tenn.), 659 (1858).

2 See ch. IX; also § 81, *infra.* The fact that a subscriber understood that certain persons controlled the proposed corporation does not make the subscription conditional. Smith *v.* First, etc. Bank, 95 S. W. Rep. 1111 (Tex. 1906).

3 Thus, adding to a subscription the words, "to be expended between Connecticut river and the east line of the state," has been held to form a contract to that effect, but not to make the subscription conditional. Lane *v.* Brainerd, 30 Conn. 565 (1862); Henderson, etc. R. R. *v.* Leavell, 16 B. Mon. (Ky.) 358 (1855). So, also, of words requiring a certain

ditions are performed or not.[1] The condition subsequent is the same as a separate collateral contract between the corporation and the subscriber, for breach of which an action for damages is the remedy.[2] The distinction between such a contract and the ordi-

location or route to be adopted. Henderson, etc. R. R. *v.* Leavell, 16 B. Mon. (Ky.) 358 (1855); the court saying, however, that if the route is laid out otherwise, before payment, probably the subscriber would be discharged; if changed after payment, it could be enjoined. Laches will bar the right to such an injunction. Chapman *v.* Mad River, etc. R. R., 6 Ohio St. 119 (1856). A more frequent requirement is a certain location of the route, and also the construction of a part or the whole of the road. The first requirement is construed to be a condition precedent, the second a condition subsequent, since the payment of the subscription itself is necessary to carry out the requirement. Chamberlain *v.* Painesville, etc. R. R., 15 Ohio St. 225 (1864); Belfast, etc. Ry. *v.* Moore, 60 Me. 561, 576 (1871); North Missouri R. R. *v.* Winkler, 29 Mo. 318 (1860); Bucksport, etc. R. R. *v.* Brewer, 67 Me. 295 (1877); McMillan *v.* Maysville, etc. R. R., 15 B. Mon. (Ky.) 218 (1854); Swartout *v.* Michigan, etc. R. R., 24 Mich. 389 (1872), where Judge Cooley says: "It is only reasonable to infer that they would have expressed that intent more clearly, and would have indicated with definiteness what stage the work should reach, before their liability should become fixed." So also in Miller *v.* Pittsburgh, etc. R. R., 40 Pa. St. 237 (1861), where the court says: "It is a most extraordinary defense, for it presupposes that the company were to build their road without money, and to deliver it, a finished work, to the stock subscribers, who were then to pay their subscriptions." In Pittsburgh, etc. R. R. *v.* Biggar, 34 Pa. St. 455 (1859), a condition "provided the road goes within half a mile of Florence," was held to be a condition subsequent. A condition that alterations shall be ordered only by a vote of the directors is a condition subsequent. Bucksport & B. R. R. *v.* Buck, 68 Me. 81 (1878). So also of a condition that commissioners should be appointed to see that other conditions are complied with. Shaffner *v.* Jeffries, 18 Mo. 512 (1853). And a condition that the money subscribed shall be expended on a certain part of the road. Lane *v.* Brainerd, 30 Conn. 565 (1862). A condition that a depot shall be established at a certain place is a condition subsequent. Paducah, etc. R. R. *v.* Parks, 86 Tenn. 554 (1888). A condition that bonds will be issued as a "bonus" to a stockholder is void. It is a condition subsequent. The subscription is enforceable. Morrow *v.* Nashville, etc. Co., 87 Tenn. 262 (1889). Condition construed to be subsequent. Johnson *v.* Georgia, etc. R. R., 81 Ga. 725 (1888). For the English cases on conditions precedent and subsequent to subscriptions for stock, see ch. II, *supra*.

1 A condition subsequent "will not defeat an action for the recovery of the money, notwithstanding it had not been performed when the action was commenced." Belfast, etc. Ry. *v.* Moore, 60 Me. 561 (1872). "A failure to perform an independent stipulation, not amounting to a condition precedent, though it subject the party failing to damages, does not excuse the party on the other side from the performance of all stipulations on his part." Mill Dam Foundry *v.* Hovey, 38 Mass. 417, 437 (1839).

2 The subscriber is left to the ordinary remedies for breaches of contracts. In a contract of subscription covenants of the company to do certain things with the money are in-

nary conditional subcriptions—that is, subscriptions on conditions precedent—is sometimes difficult to determine. The supreme court of Maine has said that the question whether a condition in a subscription "be precedent or subsequent is a question purely of intent, and the intention must be determined by considering not only the words of the particular clause, but also the language of the whole contract, as well as the nature of the act required and the subject-matter to which it relates."[1] The courts, in accordance with well-established rules, favor conditions subsequent.[2]

§ 79. *In New York and Pennsylvania conditional subscriptions are not allowed in subscriptions to obtain incorporation.*—In New York and Pennsylvania it is held that subscriptions taken for the purpose of complying with a statute which grants a charter only upon a certain amount of stock being subscribed cannot be conditional, but must be absolute.[3]

dependent and a breach thereof is no defense to the subscription. Pacific Mill Co. *v.* Inman, etc. Co., 46 Ore. 352 (1905).

A subscriber cannot avoid payment as against a corporate creditor although the subscription was on condition that, if the subscription exceeded one-half the cost of a certain building, only so much of the subscription should be called for as would equal that half. The subscriber cannot forfeit what he has paid and refuse to pay the remainder. Mathis *v.* Pridham, 1 Tex. Civ. App. 58 (1892).

A condition that the subscriptions when collected shall be used to build factories which should be leased was enforced in Porter *v.* Carpenter, 65 N. H. 650 (1874).

A consolidated company is not liable to a subscriber to stock of the original company for removing the shops of the company from a certain place, although the subscription was conditional upon the shops being located there. Elizabethtown *v.* Chesapeake, etc. R. R., 94 Ky. 377 (1893).

Where several persons subscribed on condition that the payee do certain things, and the payee commits a breach of contract, each of the subscribers may sue separately on the breach, and may recover back the amount paid. Batsell *v.* St. Louis, etc. Ry., 4 Tex. Civ. App. 580 (1893).

See also § 97, *infra.*

1 Bucksport, etc. R. R. *v.* Brewer, 67 Me. 295 (1877). "The situation and relation of the parties to each other, the object sought to be attained, and the subject-matter to which the agreement relates, are material . . . and indispensable aids" in deciding whether the condition be precedent or subsequent. Chamberlain *v.* Painesville, etc. R. R., 15 Ohio St. 225 (1864).

2 Chamberlain *v.* Painesville, etc. R. R., 15 Ohio St. 225 (1864); Swartout *v.* Michigan, etc. R. R., 24 Mich. 389 (1872).

3 "A subscription to the stock of a public corporation, made before letters patent are issued and an organization effected, must be considered absolute and unqualified, and any condition attached thereto void. Commissioners have no authority to receive conditional subscriptions." Boyd *v.* Peach Bottom Ry., 90 Pa. St. 169 (1879). "Any other rule would lead to the procurement from the commonwealth of valuable charters without any absolute capital for their support, and thus give rise to a system of

§ 80. *In New York the subscription is void; in Pennsylvania the condition is void.*—The New York and Pennsylvania cases differ, however, in regard to the effect of a conditional subscription to stock before and for the purpose of incorporation. In New York the whole subscription is void absolutely. It is as though not made, and cannot be enforced either by the corporation or by the would-be subscriber.[1] In Pennsylvania a different rule prevails. The condition is void, but the subscription itself is treated as an absolute unconditional subscription, and may be enforced by the corporation.[2]

§ 81. *Oral conditions are void.*—Under the general rule of evidence that a written agreement cannot be varied or added to by parol evidence, it is not competent for a subscriber to stock to allege that he is but a conditional subscriber.[3] The condition must be inserted in the writing in order to be effectual. Where, how-

speculation and fraud which would be intolerable." Caley *v.* Philadelphia, etc. R. R., 80 Pa. St. 363 (1876). See also Erie, etc. Co. *v.* Brown, 25 Pa. St. 156 (1855); Nippenose Mfg. Co. *v.* Stadon, 68 Pa. St. 256 (1871); Pittsburgh, etc. R. R. *v.* Stewart, 41 Pa. St. 54 (1861); Troy, etc. R. R. *v.* Tibbits, 18 Barb. 297 (1854). That conditional subscriptions are not to be counted in ascertaining whether the whole capital stock has been subscribed, which must be shown before another absolute subscriber can be made liable, see § 180, *infra.*

Conditional subscriptions made previous to and for the purpose of incorporation were upheld in Chamberlain *v.* Painesville, etc. R. R., 15 Ohio St. 225 (1864).

1 Troy, etc. R. R. *v.* Tibbits, 18 Barb. 297 (1854); *Re* Rochester, etc. R. R., 50 Hun, 29 (1888), where the subscription was to be paid in land.

Under the New York statute a conditional subscription, payable one-half when the rails had been laid and one-half when the road goes into operation, is void and cannot be collected. General Elec. Co. *v.* Wightman, 3 N. Y. App. Div. 118 (1896). See also p. 114, note 4, *supra.*

2 "Where one subscribes to the stock of a public corporation prior to the procurement of its charter, such subscription is to be regarded as absolute and unqualified, and any condition attached thereto is void." Caley *v.* Philadelphia, etc. R. R., 80 Pa. St. 363 (1876). "The subscription is valid and binding, and the condition null and void." Boyd *v.* Peach Bottom Ry., 90 Pa. St. 169 (1879). To the same effect see Bedford R. R. *v.* Bowser, 48 Pa. St. 29 (1864); Bavington *v.* Pittsburgh, etc. R. R., 34 Pa. St. 358 (1859); Pittsburgh, etc. R. R. *v.* Biggar, 34 Pa. St. 455 (1859); Pittsburgh, etc. R. R. *v.* Woodrow, 3 Phila. 271 (1858). The subscription itself, however, is not binding if it is not reported by the commissioners and used to obtain the charter. Ligonier R. R. *v.* Williams, 35 Leg. Int. 40 (1878). In the federal courts, Burke *v.* Smith, 16 Wall. 390, 396 (1872), favors the Pennsylvania rule, while Putnam *v.* New Albany, 4 Biss. 365, 385 (1869); s. c., 20 Fed. Cas. 79, 86, favors the New York rule. In both cases the opinions are *dicta.* See also Ellison *v.* Mobile, etc. R. R., 36 Miss. 572 (1858). See also p. 114, note 4, *supra.*

3 See §§ 137, 138, *infra.*

ever, the parol agreement or condition is made subsequently to the making of the contract, and upon a sufficient consideration, it has been upheld.[1]

§ 82. *Conditional subscriptions after incorporation are valid.*—A conditional subscription to stock, taken and accepted by a corporation after its incorporation, is legal and valid by the common law of all the states. In Pennsylvania the legality of such conditional subscriptions is clearly declared and sustained.[2] In New York, also, conditional subscriptions have been upheld,[3] but not where the condition is one that affects the route of a turnpike or railroad company. In other states the legality of such subscriptions is rarely questioned, but is generally assumed to be admitted.[4]

§ 83. *What condition may be attached to a subscription.*—Any condition which can be legally performed or complied with by the

1 See §§ 137, 138, *infra*.

2 "It is no longer to be doubted that an incorporated company, after it has obtained its letters patent and effected its organization, may receive conditional subscriptions to its stock." Pittsburgh, etc. R. R. *v.* Stewart, 41 Pa. St. 54 (1861); Caley *v.* Philadelphia, etc. R. R., 80 Pa. St. 363 (1876); Philadelphia, etc. R. R. *v.* Hickman, 28 Pa. St. 318 (1857). After incorporation conditional subscriptions may be received, although the letters patent have not been issued and cannot be until ten per cent. of the capital stock is subscribed. The conditional subscription cannot, however, form any part of such percentage. Hanover, etc. R. R. *v.* Haldeman, 82 Pa. St. 36 (1876).

3 Ordinary conditional subscriptions were treated as valid in Union Hotel Co. *v.* Hersee, 79 N. Y. 454 (1880); Burrows *v.* Smith, 10 N. Y. 550 (1853); Morris Canal, etc. Co. *v.* Nathan, 2 Hall (N. Y.), 239 (1829). But the condition that a particular location of the proposed road should be adopted has been held to be contrary to public policy, since improper means would thereby influence the question of location. Butternuts, etc. Turnp. Co. *v.* North, 1 Hill, 518 (1841); Fort Edward, etc. Co. *v.* Payne, 15 N. Y. 583 (1857); Macedon, etc. Co. *v.* Snediker, 18 Barb. 317 (1854); *dictum* in Dix *v.* Shaver, 14 Hun, 392 (1878). However, in Lake Ontario, etc. R. R. *v.* Curtiss, 80 N. Y. 219 (1880), a condition of this kind was involved, and no objection was made to its validity. Subscriptions conditional, in that payment is to be permitted in property, labor, or contract for construction, have been repeatedly passed upon in New York and upheld. See ch. II, *supra*.

4 "Except in New York, conditional subscriptions, in the absence of a special prohibition, so far as we have observed, have been sustained as authorized and not in conflict with public policy." Ashtabula, etc. R. R. *v.* Smith, 15 Ohio St. 328 (1864). See also § 97, *infra;* New Albany, etc. R. R. *v.* McCormick, 10 Ind. 499 (1858); Shick *v.* Citizens' Enterprise Co., 15 Ind. App. 329 (1896); McMillan *v.* Maysville, etc. R. R., 15 B. Mon. (Ky.) 218 (1854); Dayton, etc. R. R. *v.* Hatch, 1 Disney (Ohio), 84 (1855). A conditional subscription to the stock of a railroad company is legal. Baltimore, etc. R. R. *v.* Pumphrey, 74 Md. 86 (1891). Conditional subscriptions may be received. Armstrong *v.* Karshner,

corporation may be the condition to a subscription for stock.[1] The condition may be that payment shall be in labor or materials;[2] it may require the expenditure of the subscription on a particular part of the enterprise;[3] it may stipulate that a certain amount or the whole of the capital stock shall be subscribed before calls are made on the subscriptions;[4] or it may limit the time within which certain things specified therein must be done.[5] Instead of subscribing for stock a party may make a contract with a corporation to take the stock with the right to return it and receive back the purchase price within a certain time. Such a contract is legal, and the stock may be returned and the money recovered if corporate creditors' rights do not intervene.[6] In most states the condition to a subscription may require the route of a railroad to be located on a particular line.[7] In New York such a conditional subscription

47 Ohio St. 276 (1890). If the condition is *ultra vires* of the corporation, the subscription is not enforceable, there having been no performance. Pellatt's Case, L. R. 2 Ch. App. 527 (1867).

1 The subscriber "may agree to take and pay for the stock absolutely or upon such conditions as he may choose to incorporate into his subscription." Penobscot, etc. R. R. *v.* Dunn, 39 Me. 587 (1855); Mathis *v.* Pridham, 1 Tex. Civ. App. 58 (1892).

2 See ch. II, *supra*.

3 Milwaukee, etc. R. R. *v.* Field, 12 Wis. 340 (1860); Hanover Junction, etc. R. R. *v.* Haldeman, 82 Pa. St. 36 (1876).

4 Philadelphia, etc. R. R. *v.* Hickman, 28 Pa. St. 318 (1857); Penobscot, etc. R. R. *v.* Dunn, 39 Me. 587 (1855); Hanover Junction, etc. R. R. *v.* Haldeman, 82 Pa. St. 36 (1876); Union Hotel Co. *v.* Hersee, 79 N. Y. 454 (1880). Even though the charter allowed the commencement of business upon the subscription of a less sum. Ridgefield, etc. R. R. *v.* Brush, 43 Conn. 86 (1875).

5 Ticonic Water Power, etc. Co. *v.* Lang, 63 Me. 480 (1874), holding also that time herein is of the essence of the contract. See also Morris Canal, etc. Co. *v.* Nathan, 2 Hall (N. Y.), 239 (1829). A condition that the road should be finished within a certain time, and that notice thereof should be given in a certain way, was involved in Garner *v.* Hall, 114 Ala. 167 (1896); s. c., 122 Ala. 221. See also § 87, *infra*.

6 Vent *v.* Duluth, etc. Co., 64 Minn. 307 (1896). *Cf.* § 170, *infra*.

7 Fisher *v.* Evansville, etc. R. R., 7 Ind. 407 (1856); Connecticut, etc. R. R. *v.* Baxter, 32 Vt. 805 (1860); Cumberland Valley R. R. *v.* Baab, 9 Watts (Pa.), 458 (1840); Evansville, etc. R. R. *v.* Shearer, 10 Ind. 244 (1858); Jewett *v.* Lawrenceburgh, etc. R. R., 10 Ind. 539 (1858); Missouri Pac. Ry. *v.* Tygard, 84 Mo. 264 (1884); Wear *v.* Jacksonville, etc. R. R., 24 Ill. 593 (1860); Taggart *v.* Western Md. R. R., 24 Md. 563 (1866); Racine County Bank *v.* Ayers, 12 Wis. 512 (1860). See also Caley *v.* Philadelphia, etc. R. R., 80 Pa. St. 363 (1876). Location may be required to be subject to the approval of the subscriber. Roberts's Case, 3 De G. & Sm. 205 (1850); aff'd, 2 Macm. & G. 192. See also Mansfield, etc. R. R. *v.* Brown, 26 Ohio St. 223 (1875); Mansfield, etc. R. R. *v.* Stout, 26 Ohio St. 241 (1875); Chamberlain *v.* Painesville, etc. R. R., 15 Ohio St. 225 (1864); North Missouri R. R. *v.*

has been held to be void, on the ground of public policy, inasmuch as the discretion of the directors, in laying out the route, would thereby be influenced by considerations other than those of a purely public nature.[1]

In general, however, subscriptions to the capital stock of a corporation may be conditional as to the time, manner, or means of payment, or in any other way not prohibited by statute, or the rules of public policy, and not beyond the powers of the corporation to comply with.[2]

§ 84. *Acceptance by the corporation is necessary.*—The acceptance by the corporation of a conditional subscription is necessary to the formation of a contract.[3] Until such acceptance the condi-

Winkler, 29 Mo. 318 (1860); Spartanburg, etc. R. R. *v.* De Graffenreid, 12 Rich. L. (S. C.) 675 (1860); Des Moines Valley R. R. *v.* Graff, 27 Iowa, 99 (1869). A subscription or note, not for stock, but absolutely as a gift to the corporation, in consideration of a particular route being adopted, has been upheld. Stowell *v.* Stowell, 45 Mich. 364 (1881); First Nat. Bank *v.* Hendrie, 49 Iowa, 402 (1878). A subscription or donation to a railroad, conditional on the location of a depot, is enforceable by the company. Berryman *v.* Cincinnati Southern Ry., 14 Bush (Ky.) 755 (1879). See § 650, *infra*. A construction company, under contract to construct a road by the shortest route, cannot collect a sum promised by a third person for a deflection of the route. Woodstock Iron Co. *v.* Richmond, etc. Co., 129 U. S. 643 (1889).

1 See § 82, n., *supra*.

2 Conditions inconsistent with the charter are void. Thigpen *v.* Mississippi Cent. R. R., 32 Miss. 347 (1856). The conditions which may be legally made to a subscription are practically limited only by the power of the corporation to contract. A few of the conditions which have been passed upon by the courts have been given. Many minor ones are involved in the cases and present a great variety of conditions, corresponding, as they do, to the wishes and motives of individuals subscribing to the stock of the different kinds of joint-stock corporations. The condition of a subscription may be that the subscriber be made district manager. Mogridge's Case, 58 L. T. Rep. 801 (1888).

A subscription payable to whomsoever might lease premises free of rent to a stock exchange, may be enforced by a corporation thereafter organized for that purpose, and the delivery of the subscription to the person obtaining the same is a sufficient delivery. A separate contract with the then owners of the building which was afterwards acquired by the corporation does not affect such subscription, the corporation having no notice thereof. Merchants', etc. Co. *v.* Chicago, etc. Co., 210 Ill. 26 (1904).

3 Junction R. R. *v.* Reeve, 15 Ind. 236 (1860), where the subscription was payable in land. See also Galt *v.* Swain, 9 Gratt. (Va.) 633 (1853). "When the offer was accepted the minds of the parties met and the contract was complete. . . . The acceptance by the plaintiff constituted a sufficient legal consideration for the engagement on the part of the defendants." Taggart *v.* Western Md. R. R., 24 Md. 563 (1866). By the entry of the subscription on the corporate record an acceptance is implied. New Albany, etc. R. R. *v.* McCormick, 10 Ind. 499 (1858). Acceptance by the president of the cor-

tional subscription is but a continuing offer. After acceptance the subscriber is bound, until performance of the condition by the corporation, to await such performance; he cannot withdraw the conditional subscription after it has been accepted. A conditional subscription cannot be revoked after the condition has been fulfilled.[1] It seems, however, that if the performance of the condition is delayed unreasonably by the corporation, the conditional subscriber will be thereby released from his obligation.[2]

§ 85. *Construction of conditional subscription.*—Conditional subscriptions, like other contracts, are to be construed reasonably and according to the intent of the parties, as indicated by the language used in the contract.[3] The circumstances under which the subscription was made are also to be taken into consideration.[4] If two interpretations are possible, that which facilitates the enterprise, is

poration, and a subsequent ratification by the directors of all his acts, are sufficient. Pittsburgh, etc. R. R. *v.* Stewart, 41 Pa. St. 54 (1861). The delivery and acceptance may be proved by parol. Mansfield, etc. R. R. *v.* Brown, 26 Ohio St. 223 (1875). Where it is delivered in escrow to the agent of the corporation, there can be no acceptance of it by the corporation, so long as such delivery continues. Cass *v.* Pittsburgh, etc. Ry., 80 Pa. St. 31 (1875). It may be revoked while still in the hands of a person acting as corporate agent without authority. Lowe *v.* Edgefield, etc. R. R., 1 Head (Tenn.), 659 (1858). See also §§ 72, 167. The subscribers cannot withdraw unless there is unreasonable delay. Armstrong *v.* Karshner, 47 Ohio St. 276 (1890).

1 Philadelphia, etc. R. R. *v.* Conway, 177 Pa. St. 364 (1896).

2 Where, the condition not being performed, the subscriber notifies the secretary of his withdrawal from the subscription, he is released. Wood's Case, L. R. 15 Eq. 236 (1873). "The objection to a continuing offer, that it suspends indefinitely the liability of the conditional subscribers, is sufficiently answered by the consideration that all such offers are subject to retraction, and may be recalled if their acceptance is unreasonably deferred." Taggart *v.* Western Md. R. R., 24 Md. 563 (1866); Mansfield, etc. R. R. *v.* Stout, 26 Ohio St. 241 (1875), which holds that the question of acceptance is immaterial where performance of the condition has been completed by the corporation.

3 The whole contract is "to be taken together, and to have a reasonable construction according to the intent of the parties." People's Ferry Co. *v.* Balch, 74 Mass. 303, 312 (1857). "The language was chosen by them to express their mutual intent, and such construction must be given thereto as will carry into effect that mutual understanding. . . . We are to ascertain what the parties understood and intended by this language, and may not deviate therefrom, whether that contract, as so interpreted, be wise or unwise for either party." Memphis, etc. Ry. *v.* Thompson, 24 Kan. 170 (1880).

4 "The contract must be interpreted by the light of the circumstances which existed at the time it was made, and not of those which arose afterwards." Monadnock R. R. *v.* Felt, 52 N. H. 379 (1872); Detroit, etc. R. R. *v.* Starnes, 38 Mich. 698 (1878).

preferred to that which retards it.[1] If the meaning is ambiguous, it is for the jury to say what the interpretation is to be.[2]

§ 86. *Performance of the condition.*—A condition to a subscription for stock must be performed or complied with before the subscriber can be compelled to pay such subscription.[3] A substantial performance of the condition is sufficient.[4] A failure to perform is not excused by reason of unforeseen difficulties arising from floods

1 Quoted and approved in Sweeney *v.* Tennessee, etc. R. R., 100 S. W. Rep. 732 (Tenn. 1907); Ashtabula, etc. R. R. *v.* Smith, 15 Ohio St. 328 (1864).

2 Connecticut R. R. *v.* Baxter, 32 Vt. 805 (1860).

3 Porter *v.* Raymond, 53 N. H. 519 (1873); Monadnock R. R. *v.* Felt, 52 N. H. 379 (1872); Montpelier, etc. R. R. *v.* Langdon, 46 Vt. 284 (1873); Ashtabula, etc. R. R. *v.* Smith, 15 Ohio St. 328 (1864); Philadelphia, etc. R. R. *v.* Hickman, 28 Pa. St. 318 (1857); Burrows *v.* Smith, 10 N. Y. 550 (1853); McFarland *v.* Lyon, 4 Tex. Civ. App. 586 (1893). "Upon the performance of the condition by the promisee the contract is clothed with a valid consideration, which relates back, and the promise at once becomes obligatory." Des Moines Valley R. R. *v.* Graff, 27 Iowa, 99 (1869). Upon fulfillment of the condition that a certain amount be subscribed, the subscription may be collected. Security State Bank *v.* Raine, 31 Neb. 517 (1891). A contract of subscription to a railroad company when certain things are done by it is collectible when these things have been done. Lesher *v.* Karshner, 47 Ohio St. 302 (1890). A conditional subscription may be enforced after the condition has been performed. Webb *v.* Baltimore, etc. R. R., 77 Md. 92 (1893).

4 Hall *v.* Sims, 106 Ala. 561 (1895); O'Neal *v.* King, 3 Jones, L. (N. C.) 517 (1856). See also Virginia, etc. R. R. *v.* Lyon County, 6 Nev. 68 (1870); Springfield Street Ry. *v.* Sleeper, 121 Mass. 29 (1876); People *v.* Holden, 82 Ill. 93 (1876). Performance must be within a reasonable time. Stevens *v.* Corbitt, 33 Mich. 458 (1876). A donation to a railroad on condition that the road run through the town, etc., is enforceable only when the condition is substantially complied with. St. Louis, etc. R. R. *v.* Houck, 120 Mo. App. 634 (1906). A subscription conditional on the railroad being completed and trains run within a certain date, may be satisfied by substantial performance and the running of trains within the time limited, even though further work is done on the roadbed thereafter. Doherty *v.* Arkansas, etc. R. R., 5 Ind. Ter. 537 (1904). Where the condition is that a certain amount should be subscribed, there cannot be counted a subscription which is not genuine, nor a subscription which by secret agreement is to be only partly paid for. State Bank *v.* Cook, 125 Iowa, 111 (1904). Donations on condition, but collected before the condition was performed, still belong to the subscribers. Larrimer *v.* Murphy, 72 Ark. 552 (1904). Subscription on express condition that it shall be payable only in case the whole amount is subscribed cannot be collected, where the whole amount was made up by including the subscriptions of married women who had not paid. Hahn's Appeal, 7 Atl. Rep. 482 (Pa. 1886). Condition that subscription shall be payable only when a sum deemed sufficient by the directors has been subscribed is not fulfilled when the directors fixed a sum and then later reduced the sum to the amount subscribed. Only uncondi-

and natural causes.[1] A conditional subscriber is not a stockholder or member of the corporation until after the condition is performed.[2] Whether or not the condition has been performed is a question of fact.[3] Performance may be proved by parol or by the records of the corporation.[4]

tional subscriptions are to be counted. If performance turns on a writing, the question is for the court. Brand *v.* Lawrenceville Branch R. R., 77 Ga. 506 (1887). Reasonable performance is all that is required. Thus, the completion of a blast furnace, as a condition, is satisfied by completion by the lessee. Cornell's Appeal, 114 Pa. St. 153 (1886). A condition that the company shall construct a road from and to specified points is not fulfilled by the construction of part of the way and running over another railroad for the remainder of the distance. Brown *v.* Dibble, 65 Mich. 520 (1887). *Contra*, People *v.* Holden, 82 Ill. 93 (1876). In the case of Martin *v.* Pensacola, etc. R. R., 8 Fla. 370, 390 (1859), it is stated, in a *dictum*, that a strict compliance is necessary. But see Branham *v.* Record, 42 Ind. 181 (1873). The question of whether the fulfillment of the condition was in good faith and not merely temporary may be for the jury. Tabor, etc. Ry. *v.* McCormick, 90 Iowa, 446 (1894). A subscription to an enterprise, conditional upon the performance of that enterprise by certain named parties and a conveyance of the results to a corporation, may be enforced by such parties upon due performance. Brewer *v.* Stone, 77 Mass. 228 (1858). A subscription to a railroad, conditional upon its completing the road, is not enforceable by a consolidated company which succeeds to and completes the road. Toledo, etc. R. R. *v.* Hinsdale, 45 Ohio St. 556 (1888). Substantial compliance with the condition is sufficient. Cravens *v.* Eagle, etc. Co., 120 Ind. 6 (1889). Where a subscription is on condition that the railroad company subscribe to the stock of a blast furnace company, a purchase of the furnace company stock by the railroad company is not a compliance with the condition precedent. Echols *v.* Bristol, 90 Va. 165 (1893). A note given on condition that a road be built into a town is not collectible if only a branch of that road was built into the town. Gulf, etc. Ry. *v.* Pittman, 4 Tex. Civ. App. 167 (1893). It is no defense that the condition was that the subscriber should have a contract and that after he commenced work the company stopped the work. Cook *v.* Hopkinsville, etc. Co., 32 S. W. Rep. 748 (Ky. 1895). Where the condition to a particular subscription is that $50,000 be subscribed, the verbal guaranty of an individual that the $50,000 would be subscribed is not a compliance with the condition. Branch *v.* Augusta Glass Works, 95 Ga. 573 (1895).

1 Memphis, etc. Ry. *v.* Thompson, 24 Kan. 170 (1880).

2 Chase *v.* Sycamore, etc. R. R., 38 Ill. 215 (1865); Slipher *v.* Earhart, 83 Ind. 173 (1882); Evansville, etc. R. R. *v.* Shearer, 10 Ind. 244 (1858); Ashtabula, etc. R. R. *v.* Smith, 15 Ohio St. 328 (1864).

3 Jewett *v.* Lawrenceburgh, etc. R. R., 10 Ind. 539 (1858). And is a question for the jury. St. Louis, etc. R. R. *v.* Eakins, 30 Iowa, 279 (1870).

4 By parol. St. Louis, etc. R. R. *v.* Eakins, 30 Iowa, 279 (1870). By corporate records. Penobscot, etc. R. R. *v.* Dunn, 39 Me. 587 (1855). Performance must be alleged in the complaint or declaration. Trott *v.* Sarchett, 10 Ohio St. 241 (1859); Roberts *v.* Mobile, etc. R. R., 32 Miss. 373

§ 87. Where the condition is that the work shall be begun, contracted for, or completed within a certain time, time is of the essence of the contract, and any failure to perform within the time so specified defeats the subscription.[1] A condition that the road shall be "permanently" located on a specified route is satisfied by the adoption of that route by the directors.[2] Where the question of whether performance has been completed rests in the decision of the directors, their conclusion cannot be questioned, unless fraud or bad faith is proved.[3] A condition that the subscription shall be applied to a particular portion of the road is satisfied by the completion of that portion.[4] Any fraud on the part of the corporation in the performance of the condition may be shown by parol.[5] All of several conditions must be performed before calls are made.[6] But if one part of the subscription be free from condition, that part may be collected independently.[7] Where there are different conditions for different instalments, compliance with the first condition entitles the company to the instalment, even though the second condition is not complied with.[8] Where, after part payment by the conditional subscriber, the corporate plans are changed,

(1856); Henderson, etc. R. R. *v.* Leavell, 16 B. Mon. (Ky.) 358 (1855)

1 Burlington, etc. R. R. *v.* Boestler, 15 Iowa, 555 (1864), per Dillon, J.; Freeman *v.* Matlock, 67 Ind. 99 (1879); Memphis, etc. Ry. *v.* Thompson, 24 Kan. 170 (1880); Portland, etc. R. R. *v.* Hartford, 58 Me. 23 (1870). An agreement to pay a corporation a certain sum if it builds and starts a factory within a certain time is not collectible if the contract is not fulfilled within that time. Bohn Mfg. Co. *v.* Lewis, 45 Minn. 164 (1891). If the directors certify that the condition was performed within the specified time, the subscriber may prove the falsity of their certificate. Morris Canal, etc. Co. *v.* Nathan, 2 Hall (N. Y.), 239 (1829). Upon the failure of the corporation to comply with the condition the subscription ceases to have any vitality "by its own limitation." Ticonic Waterpower, etc. Co. *v.* Lang, 63 Me. 480 (1874). In Missouri Pac. Ry. *v.* Tygard, 84 Mo. 264 (1884), however, a completion of the road within a reasonable time after the time specified in the condition was held to be a substantial performance, and sufficient, the grading having been completed in the specified time. See also Moore *v.* Campbell, 111 Ind. 328 (1887), where the condition was inserted in a promissory note.

2 Smith *v.* Allison, 23 Ind. 366 (1864); and see cases in § 78, *supra*. So also a condition that the road shall cross another at a certain point is satisfied by its being so located. Wear *v.* Jacksonville, etc. R. R., 24 Ill. 593 (1860).

3 Cass *v.* Pittsburgh, etc. Ry., 80 Pa. St. 31 (1875).

4 Nichols *v.* Burlington, etc. Co., 4 Greene (Iowa), 42 (1853).

5 New York Exchange Co. *v.* De Wolf, 31 N. Y. 273 (1865).

6 Porter *v.* Raymond, 53 N. H. 519 (1873).

7 St. Louis, etc. R. R. *v.* Eakins, 30 Iowa, 279 (1870).

8 Coos Bay, etc. *v.* Dixon, 30 Ore. 584 (1897).

so that the condition is not complied with, the money, it has been held, may be recovered back.[1] Where a stock subscription is payable when the road is finished the statute of limitations does not begin to run until such road is actually finished.[2]

§ 88. *Waiver of the condition.*—A conditional subscriber to the stock of a corporation may waive the condition and performance thereof, and thus become liable on his subscription, as though it had been originally an absolute one. The waiver may be by an oral statement or agreement of the subscriber.[3] Certain acts of the subscriber have been held to indicate an intent to waive a condition to the subscription, and to be equivalent to a direct waiver. Thus, acting as a director,[4] or as president of the corporation,[5] paying the whole of the subscription,[6] giving an absolute promissory note without conditions in payment of the subscription,[7] have each been

1 Jewett *v.* Lawrenceburgh, etc. R. R., 10 Ind. 539 (1858). Where the condition of a municipal subscription for stock is that the money shall be expended when necessary and within the county, the company may exercise its reasonable judgment as to such necessity, and even if the money is misappropriated, yet a suit against the company is barred after twenty years. Marion County *v.* Louisville, etc. R. R., 78 S. W. Rep. 437 (Ky. 1904).

2 The transfer of its cars by a ferry, pending the construction of a bridge, is not a completion of the road, even though the directors have declared it finished before such bridge was completed. Garner *v.* Hall, 122 Ala. 221 (1899).

3 Hanover Junction, etc. R. R. *v.* Haldeman, 82 Pa. St. 36 (1876). See also Woonsocket Union R. R. *v.* Sherman, 8 R. I. 564 (1867). A municipality may waive conditions which it makes to its subscription. Graves *v.* Saline County, 161 U. S. 359 (1896). Conditions may be waived by the acts of the subscriber. Seymour *v.* Jefferson, 74 N. W. Rep. 149 (Minn. (1898).

4 Lane *v.* Brainerd, 30 Conn. 565 (1862).

A subscriber who acts as an incorporator and director thereby waives a condition to his preliminary subscription that a certain amount must be subscribed. Wright *v.* Agelasto, 104 Va. 159 (1905).

Where a person subscribes for preferred stock, but no preferred stock is provided for, and he becomes a director and acts as such for several years, he is liable on such stock to corporate creditors, as though it were a subscription for common stock. Tama Water-power Co. *v.* Hopkins, 79 Iowa, 653 (1890).

5 Dayton, etc. R. R. *v.* Hatch, 1 Disney (Ohio), 84 (1855).

6 Parks *v.* Evansville, etc. R. R., 23 Ind. 567 (1864). The condition is waived by the subscriber where he accepts the stock and sells it. Wyman *v.* Bowman, 127 Fed. Rep. 257 (1904).

7 Chamberlain *v.* Painesville, etc. R. R., 15 Ohio St. 225 (1864); Slipher *v.* Earhart, 83 Ind. 173 (1882); Evansville, etc. R. R. *v.* Dunn, 17 Ind. 603 (1861); Keller *v.* Johnson, 11 Ind. 337 (1858); O'Donald *v.* Evansville, etc. R. R., 14 Ind. 259 (1860). But not where the note was given by reason of false representations that the condition has been complied with. Parker *v.* Thomas, 19 Ind. 213 (1862); Taylor *v.* Fletcher, 15 Ind. 80 (1860).

held to constitute a waiver of the condition to a subscription. Where the condition of a proposition to donate land to a corporation is that a certain amount of stock should be subscribed by responsible parties, the fact that a part of the subscriptions was not by responsible parties cannot be set up, where the party himself subscribed and had not paid.[1] Mere silence may be a waiver;[2] but payment of part of the subscription,[3] or aid in the attempt to start the enterprise, by soliciting subscriptions and being elected to a corporate office, may not amount to a waiver.[4] It is not a waiver of the performance of the condition that the subscriber brought suit to have the subscription canceled on the ground that he had been induced to subscribe by fraud.[5] A condition is not waived by partial payment, such payment being made without knowledge that the condition had not been performed.[6] Where a subscription of stock is conditional and the subscribers are falsely informed that the conditions have been complied with, they may defend against the subscription, even though they have made partial payments, and even though corporate debts have been incurred.[7]

1 Work *v.* Welsh, 160 Ill. 468 (1896).

2 Burlington, etc. R. R. *v.* Boestler, 15 Iowa, 555 (1864); Bucksport, etc. R. R. *v.* Brewer, 67 Me. 295 (1877). Even though two persons signed the articles of incorporation as incorporators and as subscribers of stock, on condition that the articles would not be used unless a certain other party signed, and even though the latter party did not sign and the articles were filed and the stock subsequently tendered to such signers, which they refused, yet if they took no steps to remove their names as subscribers from the books they are liable as stockholders to corporate creditors on a statutory liability. Rehbein *v.* Rahr, 109 Wis. 136 (1901). In Oregon it is held that where the condition was the subscribing of a certain amount within a certain time, which was not done, but was performed soon after that time, the conditional subscriber is bound, where he did not cause his subscription to be stricken from the books. Lee *v.* Imbrie, 13 Oreg. 510 (1886). Subscribers obtaining stock on condition that a building contract be given to them cannot rescind for non-performance by the company, where the subscribers long delayed rescission, after such refusal of the company to perform. Rankin *v.* Hop, etc. Co., 20 L. T. Rep. 207 (1869). Failure of a subscriber conditionally, for a long time, to have his name taken off the list, renders him liable on the wind-up. Wheatcroft's Case, 29 L. T. 324 (1873).

3 Pittsburgh, etc. R. R. *v.* Stewart, 41 Pa. St. 54 (1861); Roberts's Case, 2 Macm. & G. 192 (1850); Jewett *v.* Lawrenceburgh, etc. R. R., 10 Ind. 539 (1858). But see Mack's Appeal, 7 Atl. Rep. 481 (Pa. 1886), where, however, a substantial performance had been made.

4 Ridgefield, etc. R. R. *v.* Reynolds, 46 Conn. 375 (1878).

5 *Re* Thomas, etc. Sons, 77 L. T. Rep. 521 (1897).

6 Johnson *v.* Schar, 9 S. Dak. 536 (1897).

7 Hawkins *v.* Citizens', etc. Co., 38 Oreg. 544 (1901).

§ 89. *Notice of performance and calls.*—There is some doubt as to whether, upon performance of the condition, the subscriber is entitled to notice of such performance. The better rule seems to be that he is entitled to such notice, and that a general "call" for the payment of part or all of the subscriptions for stock does not apply to conditional subscribers, unless the condition has been performed, and the fact of performance has been brought to the attention of the subscriber.[1]

Subscriptions payable in property are not subject to calls, and a demand for the property must be made by the corporation.[2] Upon failure of the subscriber to furnish the property, or upon insolvency of the corporation, such subscriptions become payable in cash.[3]

1 Chase *v.* Sycamore, etc. R. R., 38 Ill. 215 (1865); Trott *v.* Sarchett, 10 Ohio St. 241 (1859). *Contra*, Nichols *v.* Burlington, etc. Co., 4 Greene (Iowa), 42 (1853); Spartanburg, etc. R. R. *v.* De Graffenreid, 12 Rich. L. (S. C.) 675 (1860), holding that no "call" is necessary. An underwriters' agreement to subscribe if called upon so to do does not render them liable on a winding up if they were not so called upon. *Re* Harvey's Oyster Co., [1894] 2 Ch. 474. A subscription payable when the road reaches a certain point becomes absolutely payable then, upon demand. The statute of frauds does not apply to such a subscription. Webb *v.* Baltimore, etc. R. R., 77 Md. 92 (1893).

2 Ohio, etc. R. R. *v.* Cramer, 23 Ind. 490 (1864). Payment cannot be required in installments. *Id.* But upon demand the subscriber must ascertain when and where the materials are to be delivered. McClure *v.* People's Freight Ry., 90 Pa. St. 269 (1879).

3 Haywood, etc. Co. *v.* Bryan, 6 Jones, L. (N. C.) 82 (1858); Sperry *v.* Johnson, 11 Ohio, 452 (1842); Wheatcroft's Case, 29 L. T. Rep. 324 (1873). See n. 3, p. 115, *supra*. *Cf.* Dayton, etc. R. R. *v.* Hatch, 1 Disney (Ohio), 84 (1855). A subscription on condition of being appointed local manager is not enforceable on the wind-up, the appointment not having been made. Rogers's Case, L. R. 3 Ch. App. 633 (1868).

CHAPTER VI.

MUNICIPAL SUBSCRIPTIONS.

§ 90. A municipal corporation has no implied power or authority to subscribe for stock in any other corporation.
91. The legislature may authorize municipal subscriptions to public but not to private enterprises.
92. Constitutional provisions prohibiting municipal subscriptions.
93. Change in the state constitution, or the general statutory laws, after the municipal corporation has voted to subscribe.
94. Statutory formalities must be substantially complied with.
95. Submission to popular vote.
§ 96. What officer or agent of the municipality may make the contract of subscription.
97. Municipal subscriptions may be conditional.
98. When may a municipal subscription be paid in bonds instead of money?
99. A municipal corporation as a stockholder.
100. A municipality may enforce delivery of stock to itself in a proper case.
101. Division of the municipality after the subscription.
102, 103. Consolidation of companies after the municipal aid is voted.

§ 90. *A municipal corporation has no implied power or authority to subscribe for stock in any other corporation.*—A municipal corporation, being in its nature and purposes a very different legal institution from an ordinary private corporation, being indeed but a mode or department of government—"an investing the people of a place with the local government thereof,"[1]—it is plain that the general rules of law applicable to private corporations having capital stock are, for the most part, not applicable when the rights, duties, powers, and liabilities of municipal corporations are sought to be accurately determined.[2]

It is proposed to consider the right of a municipality to enter into the contract of subscription to the capital stock of other corporations, and of the liabilities, rights, and duties growing out of such a subscription. The subject practically narrows itself to the right of municipal corporations to subscribe to the stock of railroad corporations, inasmuch as this right, wherever it exists, is almost universally exercised in favor of these corporations, and the adjudicated cases almost all present phases of the question applying to railroad corporations alone.

It is a well-settled rule of law that municipal corporations have

1 Cuddon *v.* Eastwick, 1 Salk. 183 (1704); Dillon, Mun. Corp., §§ 19, 20.

2 People *v.* Morris, 13 Wend. 325 (1835); People *v.* Hurlbut, 24 Mich. 44 (1871); State *v.* Leffingwell, 54 Mo. 458 (1873); Norton *v.* Peck, 3 Wis. 714 (1854); Ottawa *v.* Carey, 108 U. S. 110 (1883).

no *implied* right or authority to subscribe for the stock of any other incorporated company.[1] In order, therefore, to establish the validity of a municipal subscription to the stock of a railway company, an express grant of authority from the legislature must be shown.[2] The right to subscribe is derived from the legislative enactment; and whether or not an enabling act is sufficient to validate a subscription is a question of law for the court, not for the jury.[3]

1 "To become stockholders in private corporations," says Judge Dillon, "is manifestly foreign to the purposes intended to be subserved by the creation of corporate municipalities." Dillon, Mun. Corp., § 161; Kelley *v.* Milan, 127 U. S. 139 (1888). See also Kenicott *v.* Supervisors, 16 Wall. 452 (1872); Thomson *v.* Lee County, 3 Wall. 327 (1865); Bell *v.* Railroad Co., 4 Wall. 598 (1866); Wells *v.* Supervisors, 102 U. S. 625 (1880); Lamoille Valley R. R. *v.* Fairfield, 51 Vt. 257 (1878); Barnes *v.* Lacon, 84 Ill. 461 (1877), holding that a vote of the people of a town to subscribe for stock without the authorization of law is not binding upon the town. To same effect, Allen *v.* Louisiana, 103 U. S. 80 (1880); Pennsylvania R. R. *v.* Philadelphia, 47 Pa. St. 189 (1864); Jonesboro *v.* Cairo, etc. R. R., 110 U. S. 192 (1883), holding that a general power to borrow money and issue bonds therefor does not confer the right to subscribe for stock, even with the sanction of the voters at a general election. *Cf.* Gelpcke *v.* Dubuque, 1 Wall. 175, 220 (1863); Campbell *v.* Paris, etc. R. R., 71 Ill. 611 (1874); East Oakland *v.* Skinner, 94 U. S. 255 (1876); Lynchburg *v.* Slaughter, 75 Va. 57 (1880); Brodie *v.* McCabe, 33 Ark. 690 (1878). A municipality has no inherent power to acquire stock in a waterworks corporation nor to issue bonds in payment therefor. Voss *v.* Waterloo, etc. Co., 163 Ind. 69 (1904). A municipal corporation cannot enforce a penal bond, given to it by a plank-road company, conditioned that the latter will use to build its road certain bonds issued by the former, it appearing that the aid to the plank-road company was *ultra vires* of the municipality. Montgomery *v.* Montgomery, etc. Co., 31 Ala. 76 (1857). The attorney-general may restrain a municipality from illegally issuing bonds to a railroad company. State *v.* Saline County Court, 51 Mo. 350 (1873), reviewing the English and American cases.

2 Sharpless *v.* Philadelphia, 21 Pa. St. 147 (1853); Leavenworth County *v.* Miller, 7 Kan. 479 (1871). *Cf.* Welch *v.* Post, 99 Ill. 471 (1881); Marsh *v.* Fulton County, 10 Wall. 676 (1870), holding that the power to subscribe to the stock of a railroad is not sufficient to authorize a subscription to a new incorporation of a part of it; Lafayette *v.* Cox, 5 Ind. 38 (1854); Dillon, Mun. Corp., § 161; Ottawa *v.* Carey, 108 U. S. 110 (1883); Lewis *v.* Shreveport, 108 U. S. 282 (1883). A city has no inherent power to aid a railroad. It cannot do so indirectly by way of a monthly rental for water-works, the water-works company obligating itself to construct the railroad. A lease by a water-works company of its plant to individuals, with an agreement on the part of the company to construct a railroad, the plan being for the individuals to then sublet only the water to the city, the whole scheme being a device to obtain the city aid in the construction of the railroad, is not enforceable. Higgins *v.* City of San Diego, 45 Pac. Rep. 824 (Cal. 1896).

3 Post *v.* Supervisors, 105 U. S. 667

Every holder of municipal bonds issued to raise money to pay such a subscription, whether he receives them directly from the town or county, or from the railroad company to which they may have been delivered, or takes them from some prior holder in the ordinary course of business, is chargeable with notice of the statutory provisions under which they were issued.[1]

The right to make a donation to a railroad or other work of internal improvement must equally be derived from the act of the legislature. Without such express authority of law, a donation or issue of bonds as a gift to a railroad company is invalid and void.[2]

§ 91. *The legislature may authorize municipal subscriptions to public but not to private enterprises.*—It was long a question whether the legislature had the constitutional right to authorize a municipality to subscribe money, or donate it, in furtherance of any enterprise not governmental in its nature. It has been contended with great ability and learning that such a right does not inhere in the legislative branch of the government in this country, and consequently that such assumed grants are unconstitutional and void.[3] But it is now a well-settled rule that the legislature has the constitutional power to authorize a municipal corporation, by its charter or an express act, to subscribe to the stock of a railroad or other quasi-public corporation, and to issue and sell its bonds for that purpose.[4] By reason of the decisions to that effect, hundreds

(1881); Leavenworth County *v.* Miller, 7 Kan. 479 (1871).

1 Ogden *v.* Daviess County, 102 U. S. 634 (1880); Lewis *v.* Shreveport, 108 U. S. 282 (183); Ottawa *v.* Carey, 108 U. S. 110 (1883); McClure *v.* Oxford, 94 U. S. 429 (1876). This is the settled rule of the supreme court of the United States on this point.

2 Dixon County *v.* Field, 111 U. S. 83 (1884).

The power of the legislature to authorize a municipality to donate funds or bonds herein is absolutely denied in Hanson *v.* Vernon, 27 Iowa, 28 (1869); Sweet *v.* Hulbert, 51 Barb. 312 (1868). *Cf.* Leavenworth County *v.* Miller, 7 Kan. 479 (1871). The railroad cannot collect, as a donation, money which was voted as a subscription. Crooks *v.* State, 4 N. E. Rep. 589 (Ind. 1886).

As to a gift of bonds and a subscription payable in bonds where part of the bonds are turned back for stock. See Wesson *v.* Saline County, 73 Fed. Rep. 919 (1896), overruling Post *v.* Pulaski County, 49 Fed. Rep. 628 (1892).

3 Cooley, Const. Lim. (5th ed.), pp. 261-266; Dillon, Mun. Corp., §§ 12, 117, 153. For the rule in Michigan, Iowa and New York, see next note.

4 So held by the supreme court of the United States. Knox County *v.* Aspinwall, 21 How. 539 (1858); Zabriskie *v.* Cleveland, etc. R. R., 23 How. 381 (1859); Amey *v.* Allegheny City, 24 How. 364, 376 (1860); Curtis *v.* Butler County, 24 How. 435 (1860); Gelpcke *v.* Dubuque, 1 Wall. 175 (1863); Mercer County *v.* Hackett, 1 Wall. 83 (1863); Seybert *v.* Pittsburg, 1 Wall. 272 (1863); Van Hostrup *v.* Madison, 1 Wall. 291 (1863); Havemeyer *v.* Iowa County, 3 Wall. 294

of millions of dollars of municipal bonds were issued in aid of railroads. But when the time came to pay the bonds, many efforts were made to avoid payment. This inclination, however, of municipali-

(1865); Thomson *v.* Lee County, 3 Wall. 327 (1865); Rogers *v.* Burlington, 3 Wall. 654 (1865), holding that power "to borrow money for *any* public purpose" gives authority to borrow to aid a railroad company; Mitchell *v.* Burlington, 4 Wall. 270 (1866); Von Hoffman *v.* Quincy, 4 Wall. 535 (1866); Campbell *v.* Kenosha, 5 Wall. 194 (1866), holding that a subscription may be validated by subsequent legislation, and such validation may be by implication; holding also that the levy of a tax and payment of interest validate bonds irregularly issued; Meyer *v.* Muscatine, 1 Wall. 384 (1863); Lee County *v.* Rogers, 7 Wall. 181 (1868); Beloit *v.* Morgan, 7 Wall. 619 (1868); Kenosha *v.* Lamson, 9 Wall. 477 (1869); Railroad Co. *v.* Otoe County, 16 Wall. 667 (1872); s. c., 1 Dillon, 338 (1871); s. c. *sub nom.* Chicago, etc. R. R. *v.* Otoe County, 5 Fed. Cas. 598, holding that, unless restrained by provisions of the constitution of a state, its legislature may authorize a county to issue bonds and *donate* them to the railroad company which will give it a valuable connection with some other region. As to the legislative power, donations and subscriptions for stock stand on the same ground. Queensbury *v.* Culver, 19 Wall. 83 (1873); Woods *v.* Lawrence County, 1 Black, 386 (1861), holding that where, by statute, the grand jury of a county is required to fix the amount of the subscription, their act in pursuance thereof cannot afterwards be questioned by the county as to such amount; and if payment is to be made as may be agreed upon, an issue of bonds for that purpose is binding upon the county; Gilman *v.* Sheboygan, 2 Black, 510 (1862), holding that a statute authorizing a city to borrow money, and to tax property to pay it, does not constitute such a contract with the bondholders that the state cannot afterwards modify the taxation even by the exemption of portions of taxable property; Olcott *v.* Supervisors, 16 Wall. 678 (1872); Rock Creek *v.* Strong, 96 U. S. 271 (1877); Seven Hickory *v.* Ellery, 103 U. S. 423 (1880); Clay County *v.* Society for Savings, 104 U. S. 579 (1881); Taylor *v.* Ypsilanti, 105 U. S. 60 (1881); Lewis *v.* Barbour County, 105 U. S. 739 (1881); Amoskeag Bank *v.* Ottawa, 105 U. S. 667 (1881); Gilman *v.* Sheboygan, 2 Black, 510; Scipio *v.* Wright, 101 U. S. 667 (1879). And in the circuit and district courts of the United States. Long *v.* New London, 9 Biss. 539 (1880); s. c., 5 Fed. Rep. 559; Sibley *v.* Mobile, 3 Woods, 535 (1876); s. c., 22 Fed. Cas. 57.

Alabama: Stein *v.* Mobile, 24 Ala. 591 (1854); Opelika *v.* Daniel, 59 Ala. 211 (1877); *Ex parte* Selma, etc. R. R., 45 Ala. 696 (1871); Gibbons *v.* Mobile, etc. R. R., 36 Ala. 410 (1860).

Arkansas: Mississippi, etc. R. R. *v.* Camden, 23 Ark. 300 (1861); English *v.* Chicot County, 26 Ark. 454 (1871); Jacksonport *v.* Watson, 33 Ark. 704 (1878); Chicot County *v.* Sherwood, 148 U. S. 529 (1893).

California: Robinson *v.* Bidwell, 22 Cal. 379 (1863); People *v.* Coon, 25 Cal. 635 (1864); Napa Valley R. R. *v.* Napa County, 30 Cal. 435 (1866); Stockton, etc. R. R. *v.* Stockton, 41 Cal. 147 (1871).

Colorado: People *v.* Pueblo County, 2 Colo. 360 (1874); Chaffee County *v.* Potter, 142 U. S. 355 (1892).

Connecticut: Bridgeport *v.* Housatonic R. R., 15 Conn. 475 (1843), holding that a subscription made by a city without authority may be made

ties to repudiate their obligations after receiving the benefits of those obligations has been thwarted by the courts. And the result

valid by subsequent legislative action; in this case the validating statute was passed upon the application of the city making the subscription; Beardsley *v.* Smith, 16 Conn. 368 (1844); Society for Savings *v.* New London, 29 Conn. 174 (1860); Douglas *v.* Chatham, 41 Conn. 211 (1874).

Florida: Cotten *v.* Leon County, 6 Fla. 610 (1856).

Georgia: Winn *v.* Macon, 21 Ga. 275 (1857); Powers *v.* Inferior Court of Dougherty County, 23 Ga. 65 (1857).

Illinois: Shaw *v.* Dennis, 10 Ill. 405 (1849); Prettyman *v.* Tazewell County, 19 Ill. 406 (1858), holding that an injunction on the ground of fraud at an election authorizing a subscription will not be granted to one who delays until others have acted upon the faith that the municipal corporation will aid an enterprise; Robertson *v.* Rockford, 21 Ill. 451 (1859); Schuyler County *v.* People, 25 Ill. 181 (1860); Butler *v.* Dunham, 27 Ill. 474 (1861); Dunnovan *v.* Green, 57 Ill. 63 (1870); Madison County *v.* People, 58 Ill. 456 (1871); Chicago, etc. R. R. *v.* Smith, 62 Ill. 268 (1871); Decker *v.* Hughes, 68 Ill. 33 (1873); Quincy, etc. R. R. *v.* Morris, 84 Ill. 410 (1877); Chicago, etc. R. R. *v.* Aurora, 99 Ill. 205 (1881); Olcott *v.* Supervisors, 16 Wall. 678 (1872). But see Weightman *v.* Clark, 103 U. S. 256 (1880).

Indiana: Aurora *v.* West, 9 Ind. 74 (1857); s. c., 22 Ind. 88 (1864); Evansville, etc. R. R. *v.* Evansville, 15 Ind. 395 (1860); Bartholomew County *v.* Bright, 18 Ind. 93 (1862); Thompson *v.* Peru, 29 Ind. 305 (1868); Lafayette, etc. R. R. *v.* Geiger, 34 Ind. 185 (1870); John *v.* Cincinnati, etc. R. R., 35 Ind. 539 (1871); Crawford County *v.* Louisville, etc. Ry., 39 Ind. 192 (1872); Mount Vernon *v.* Hovey, 52 Ind. 563 (1876); Indiana, etc. Ry. *v.* Attica, 56 Ind. 476 (1877); Williams *v.* Hall, 65 Ind. 129 (1879); Bittinger *v.* Bell, 65 Ind. 445 (1879); Brocaw *v.* Gibson County, 73 Ind. 543 (1881); Peed *v.* Millikan, 79 Ind. 86 (1881).

Iowa: "In Iowa, up to 1858, it was held that such acts were constitutional; but from that time up to 1869 they were held to be unconstitutional, when the court seems to have undergone a radical change, and from that time to the present the constitutionality of such measures has been sustained." Wood, Railw. (1st ed.), p. 264, citing Dubuque County *v.* Dubuque, etc. R. R., 4 Green, 1 (1853); State *v.* Bissell, 4 Greene, 328 (1854); Clapp *v.* Cedar County, 5 Iowa, 15 (1857); McMillen *v.* Lee County, 6 Iowa, 391 (1858). The above authorities, prior to 1858, hold these acts constitutional, as do the following, since 1869: Stewart *v.* Polk County, 30 Iowa, 9 (1870); Bonnifield *v.* Bidwell, 32 Iowa, 149 (1871); Jordon *v.* Hayne, 36 Iowa, 9 (1872); Muscatine, etc. R. R. *v.* Horton, 38 Iowa, 33 (1873); Wapello County *v.* Burlington, etc. R. R., 44 Iowa, 585 (1876); McMillen *v.* Boyles, 6 Iowa, 304 (1858); Games *v.* Robb, 8 Iowa, 193 (1859); Chamberlain *v.* Burlington, 19 Iowa, 395 (1865), holding that a charter authorizing a city to borrow money for "any public purpose" does not confer power to aid in constructing a railroad; particularly King *v.* Wilson, 1 Dillon, 555 (1871); s. c., 14 Fed. Cas. 563, as to how far the federal courts will follow the state courts as to the constitutionality of such statutes; while the following cases, decided between 1858 and 1869, hold such acts unconstitutional and void: Stokes *v.* Scott County, 10 Iowa, 166 (1859); State *v.* Wapello County, 13 Iowa, 388 (1862); Myers *v.* Johnson County, 14 Iowa, 47 (1862). See also, in gen-

is a satisfactory one. Any other decision would have checked the growth of the country, unsettled investments, and brought upon

eral, Doon *v.* Cummins, 142 U. S. 366 (1892).

Kansas: Atchison *v.* Butcher, 3 Kan. 104 (1865); Leavenworth County *v.* Miller, 7 Kan. 479 (1871); Southern Kansas, etc. R. R. *v.* Towner, 41 Kan. 72 (1889); Morris *v.* Morris County, 7 Kan. 576 (1871); State *v.* Nemaha County, 7 Kan. 542 (1871); Burnes *v.* Atchison, 2 Kan. 454 (1864); Leavenworth, etc. R. R. *v.* Douglas County, 18 Kan. 169 (1877); Turner *v.* Woodson County, 27 Kan. 314 (1882), holding that, where the amount of bonds voted to be issued was in excess of the amount which a township might legally issue, the vote was a nullity only as to excess. Kansas City, etc. R. R. *v.* Rich Township, 45 Kan. 275 (1891); Hutchinson, etc. R. R. *v.* Kingman County, 48 Kan. 70 (1892).

Kentucky: Talbot *v.* Dent, 9 B. Mon. 526 (1849); Slack *v.* Maysville, etc. R. R., 13 B. Mon. 1 (1852); Maddox *v.* Graham, 2 Metc. (Ky.) 56 (1859); Shelby County Court *v.* Cumberland, etc. R. R., 8 Bush. (Ky.), 209 (1871), holding that a subscription not authorized by law may be validated by later legislation; Allison *v.* Louisville, etc. R. R., 10 Bush, 1 (1873); Christian County Court *v.* Smith, 12 S. W. Rep. 134 (Ky., 1889); on rehearing, 13 S. W. Rep. 276. A railroad cannot be taxed to aid in paying a municipal subscription to its construction. Louisville, etc. R. R. *v.* Commonwealth, 89 Ky. 531 (1890); Brown *v.* Tinsley, 21 S. W. Rep. 535 (Ky. 1893).

Louisiana: Police Jury *v.* McDonogh, 8 La. Ann. 341 (1853); Parker *v.* Scogin, 11 La. Ann. 629 (1856). *Cf.* Wilson *v.* Shreveport, 29 La. Ann. 673 (1877). Municipal-aid bond case. Reynolds, etc. Co. *v.* Monroe, 45 La. Ann. 1024 (1893).

Maine: Augusta Bank *v.* Augusta, 49 Me. 507 (1860); Stevens *v.* Anson, 73 Me. 489 (1882). A town may maintain a bill in equity against many bondholders to compel them to deliver up their bonds as having been illegally issued in aid of a railroad. Farmington Village Corp, *v.* Sandy River Nat. Bank, 85 Me. 46 (1892).

Massachusetts: Portage County *v.* Wisconsin Cent. R. R., 121 Mass. 460 (1877), holding that the legislature of *Wisconsin* has power to authorize counties to subscribe for stock in aid of railroads and to issue bonds therefor.

Michigan: In Michigan the courts hold that statutes authorizing municipal corporations to subscribe to the stock of a railroad or vote bonds to it are void, and the subscription and bonds are void. People *v.* Salem, 20 Mich. 452 (1870); Thompson *v.* Port Huron, 27 Mich. 320 (1873); People *v.* State Treasurer, 23 Mich. 499 (1871); People *v.* Detroit, 28 Mich. 228 (1873). But see Talcott *v.* Pine Grove, 1 Flip. (U. S.) 120 (1872); s. c., 23 Fed. Cas. 652, where the position taken by the court of Michigan was held to be so contrary to precedent and so unexpected as to operate as a surprise upon the community; s. c. affirmed, *sub. nom.* Pine Grove *v.* Talcott, 19 Wall. 666 (1873), which was adhered to in Taylor *v.* Ypsilanti, 105 U. S. 60 (1881). See also Chickaming *v.* Carpenter, 106 U. S. 663 (1882). Where the issue of municipal bonds in aid of a railroad is illegal, as in Michigan, the law cannot be evaded by issuing bonds nominally for public improvements, but really in aid of a railroad. Risley *v.* Howell, 57 Fed. Rep. 544 (1893).

Minnesota: Davidson *v.* Ramsey Co., 18 Minn. 482 (1872); State *v.* Clark, 23 Minn. 422 (1877); Kimball *v.* Lakeland, 41 Fed. Rep. 289 (1890).

Mississippi: Strickland *v.* Railroad

American municipalities the disgrace and disastrous loss of credit which arise from repudiation.

Co., Miss MSS., cited in 1 Dillon, Mun. Corp. (4th ed.), p. 225, n.; New Orleans, etc. R. R. *v.* McDonald, 53 Miss. 240 (1876); Wells *v.* Supervisors, 102 U. S. 625 (1880); Madison County *v.* Priestly, 42 Fed. Rep. 817 (1890); Barnum *v.* Okolona, 148 U. S. 393 (1893).

Missouri: St. Louis *v.* Alexander, 23 Mo. 483 (1856); St. Joseph, etc. R. R. *v.* Buchanan County Court, 39 Mo. 485 (1867); State *v.* Macon County Court, 41 Mo. 453 (1867); Chillicothe, etc. R. R. *v.* Brunswick, 44 Mo. 553 (1869); State *v.* Linn Co., 44 Mo. 504 (1869); State *v.* Sullivan County Court, 51 Mo. 522 (1873); Osage Valley, etc. R. R. *v.* Morgan County Court, 53 Mo. 156 (1873); Smith *v.* Clark County, 54 Mo. 58 (1873); State *v.* Green County, 54 Mo. 540 (1874); State *v.* Hannibal, etc. R. R., 101 Mo. 136 (1890).

Nebraska: Hallenbeck *v.* Hahn, 2 Neb. 377 (1873); Reineman *v.* Covington, etc. R. R., 7 Neb. 310 (1878), holding that, if a county votes aid to a railroad in excess of the sum allowed by law, such act is void and will not authorize the issue of any bonds whatever; Railroad Co. *v.* Otoe County, 16 Wall. 667 (1872); Dixon County *v.* Field, 111 U. S. 83 (1884). In Nebraska a failure to construct the road in the municipality, and the construction of the road by a vendee, are both fatal. Midland Township *v.* Gage County, 37 Neb. 582 (1893). If voters have been induced to favor bonds by false and fraudulent representations, a court of equity will enjoin the delivery. Nash *v.* Baker, 37 Neb. 713 (1893).

Nevada: Gibson *v.* Mason, 5 Nev. 283 (1869); Lincoln County *v.* Luning, 133 U. S. 529 (1890).

New Hampshire: Perry *v.* Keene, 56 N. H. 514 (1876).

New Jersey: Bernards Township *v.* Morrison, 133 U. S. 523 (1890).

New York: In New York the courts have unwillingly sustained the validity of such grants. Clarke *v.* Rochester, 28 N. Y. 605 (1864); Grant *v.* Courter, 24 Barb. 232 (1857); Benson *v.* Albany, 24 Barb. 248 (1857); People *v.* Henshaw, 61 Barb. 409 (1870); *Ex parte* Taxpayers of Kingston, 40 How. Pr. 444 (1870); Gould *v.* Oneonta, 71 N. Y. 298 (1877); Sweet *v.* Hulbert, 51 Barb. 312 (1868), denying the constitutionality of a *donation* of bonds. *Cf.* People *v.* Batchellor, 53 N. Y. 128 (1873), holding that a municipal corporation cannot be compelled by the legislature, against its consent and that of its taxpayers, to become a stockholder in a corporation which is private in character (as here, a railroad)—a statute for such a purpose is void; Queensbury *v.* Culver, 19 Wall. 83 (1873), in which the New York doctrine is denied by the supreme court of the United States.

But the law is clear, in New York, that such statutes and subscriptions thereunder are constitutional. Bank of Rome *v.* Rome, 18 N. Y. 38 (1858); Starin *v.* Genoa, 23 N. Y. 439 (1861); Solon *v.* Williamsburgh Sav. Bank, 114 N. Y. 122 (1889); Alvord *v.* Syracuse Sav. Bank, 98 N. Y. 599 (1885), holding that the legislature may give to the bonds a negotiability which is not given to them by the court; Craig *v.* Andes, 93 N. Y. 405 (1883), holding that bonds, even in *bona fide* hands, are void where part of the consents thereto were conditional, even though the bond recites that all legal steps to comply with the law were taken; Lyons *v.* Chamberlain, 89 N. Y. 578 (1882), where the person to whom illegal bonds were issued was held to account for them; Cagwin *v.* Hancock,

The act of the legislature, however, authorizing a municipal subscription will not avail to validate such a contract, unless it is duly

84 N. Y. 532 (1881), holding that the town may set up that a majority did not vote for the issue of the bonds; that the federal decisions will not be followed; that an innocent holder is not protected, and that "the bonding acts are now regarded as hostile to a sound public policy;" Springport *v.* Teutonia Sav. Bank, 84 N. Y. 403 (1881), also holding that the affidavit of assessors as to the vote is only *prima facie* evidence. To same effect see Dodge *v.* Platt County, 82 N. Y. 218 (1880), declaring void certain Missouri municipal bonds; Duanesburgh *v.* Jenkins, 57 N. Y. 177 (1874), sustaining the constitutionality of bonding acts and reviewing the New York cases; People *v.* Mitchell, 35 N. Y. 551 (1866); s. c., 45 Barb. 208 (1865); People *v.* Spencer, 55 N. Y. 1 (1873); Williams *v.* Duanesburgh, 66 N. Y. 129 (1876); Horton *v.* Thompson, 71 N. Y. 513 (1878); affirmed in Scipio *v.* Wright, 101 U. S. 665 (1879). In New York an effectual remedy against the illegal bonding of a town in aid of a railroad is found in holding liable to the town the parties who promoted the aid, for all sums paid by the town to *bona fide* holders of the bonds. Farnham *v.* Benedict, 107 N. Y. 159 (1887). A suit in equity to cancel illegal municipal bonds does not lie, except where the defendant fails to allege that there is a remedy at law. Mentz *v.* Cook, 108 N. Y. 504 (1888). Long delay may bar the right of a municipality to have such bonds canceled. Calhoun *v.* Millard, 121 N. Y. 69 (1890). See also, in general, Solon *v.* Williamsburgh, etc. Bank, 114 N. Y. 122 (1899); Brownell *v.* Greenwich, 114 N. Y. 518 (1889).

North Carolina: Taylor *v.* Newberne, 2 Jones, Eq. 141 (1855); Caldwell *v.* Burke County, 4 Jones, Eq. 323 (1858); Hill *v.* Forsyth County, 67 N. C. 367 (1870); Wood *v.* Oxford, 97 N. C. 227 (1887); McDowell *v.* Massachusetts, etc. Co., 96 N. C. 514 (1887); Goforth *v.* Rutherford, etc. Co., 96 N. C. 535 (1887). The United States courts will not follow a decision of the supreme court of North Carolina declaring invalid certain municipal bonds, where none of the bondholders were parties to that suit. Board of Commissioners, etc. *v.* Coler, 113 Fed. Rep. 705 (1902).

Ohio: Cincinnati, etc. R. R. *v.* Clinton County, 1 Ohio St. 77 (1852); Steubenville, etc. R. R. *v.* North Township, 1 Ohio St. 105 (1852); Cass *v.* Dillon, 2 Ohio St. 607 (1853); Thompson *v.* Kelly, 2 Ohio St. 647 (1853); State *v.* Union Township, 8 Ohio St. 394 (1858); State *v.* Hancock County, 11 Ohio St. 183 (1860); Knox County *v.* Nichols, 14 Ohio St. 260 (1863); State *v.* Perrysburg, 14 Ohio St. 472 (1863); State *v.* Goshen, 14 Ohio St. 569 (1863); Walker *v.* Cincinnati, 21 Ohio St. 14 (1871); s. c., 1 Cin. 121 (1871).

Pennsylvania: Com'th *v.* McWilliams, 11 Pa. St. 61 (1849); Brown *v.* Commissioners, 21 Pa. St. 37 (1853); Sharpless *v.* Philadelphia, 21 Pa. St. 147 (1853); Moers *v.* Reading, 21 Pa. St. 188 (1853); Com'th *v.* Allegheny County, 32 Pa. St. 218 (1858); Com'th *v.* Pittsburgh, 34 Pa. St. 496 (1859); Com'th *v.* Pittsburgh, 41 Pa. St. 278 (1861); Com'th *v.* Perkins, 43 Pa. St. 400 (1862); Pennsylvania R. R. *v.* Philadelphia, 47 Pa. St. 189 (1864); Riddle *v.* Philadelphia, etc. R. R., 1 Pittsb. (Pa.) 158 (1854); Armstrong County *v.* Brinton, 47 Pa. St. 367 (1864).

South Carolina: State *v.* Charleston County, 10 Rich. L. 491 (1857); Lancaster County *v.* Cheraw, etc. R. R., 28 S. C. 134 (1888); State *v.* Whitesides, 30 S. C. 579 (1889); Floyd *v.* Perrin, 30 S. C. 1 (1888).

passed in accordance with all the constitutional formalities.[1] In California the courts go even to the extent of holding that the legislature may compel a municipality to subscribe to the stock of a railway company and to issue its bonds in payment thereof.[2] But this extreme view is disapproved in New York [3] and in Illinois,[4] the courts in these states taking the better ground that, while it is competent for the legislature to authorize a municipal subscription in a proper case, there is no power anywhere to compel such a subscription or donation.

While it may be conceded that, from a constitutional standpoint as well as from that of public policy and expediency, there are grave objections to the existence or exercise of this power, which has plainly been monstrously abused,[5] it is clear that the courts, almost universally, as has been shown, have taken and will con-

Tennessee: City, etc. *v.* Charleston, etc. R. R., 100 Tenn. 138 (1897); Taxpayers of Milan *v.* Tennessee, etc. R. R., 11 Lea, 329 (1883); Wilson County *v.* Nat. Bank, 103 U. S. 770 (1880); Nichol *v.* Nashville, 9 Hump. 252 (1848); Louisville, etc. R. R. *v.* Davidson County Court, 1 Sneed, 637 (1854); Williams *v.* Duck River, etc. R. R., 9 Baxt. 488 (1876); Clay *v.* Hawkins County, 5 Lea, 137 (1880); Lauderdale County *v.* Fargason, 7 Lea, 153 (1881); Winston *v.* Tennessee, etc. R. R., 1 Baxt. 60 (1873).

Texas: San Antonio *v.* Jones, 28 Tex. 19 (1866); San Antonio *v.* Lane, 32 Tex. 405 (1869); San Antonio *v.* Gould, 34 Tex. 49 (1870).

Vermont: Bennington *v.* Park, 50 Vt. 178 (1877); First Nat. Bank *v.* Concord, 50 Vt. 257 (1877).

Virginia: Goddin *v.* Crump, 8 Leigh, 120 (1837); Cumberland County *v.* Randolph, 89 Va. 614 (1893). See also Goshorn *v.* Ohio County, 1 W. Va. 308 (1865).

Wisconsin: State *v.* Common Council, 96 Wis. 73 (1897); Clark *v.* Janesville, 10 Wis. 136 (1860); s. c., 13 Wis. 136; Bushnell *v.* Beloit, 10 Wis. 195 (1860); Foster *v.* Kenosha, 12 Wis. 616 (1860); Veeder *v.* Lima, 19 Wis. 280 (1865); Fisk *v.* Kenosha, 26 Wis. 23 (1870); Phillips *v.* Albany, 28 Wis. 340 (1871); Rogan *v.* Watertown, 30 Wis. 259 (1872); Lawson *v.* Milwaukee, etc. R. R., 30 Wis. 597 (1872); Oleson *v.* Green Bay, etc., 36 Wis. 383 (1874). *Cf.* Whiting *v.* Sheboygan, etc. R. R., 25 Wis. 167 (1870). Municipal gift of land to a railroad. Northern Pac. R. R. *v.* Roberts, 42 Fed. Rep. 734 (1890); aff'd, 158 U. S. 1. A county cannot donate land to a railroad. Ellis *v.* Northern, etc. R. R., 77 Wis. 114 (1890).

The leading cases upon the constitutionality of statutes authorizing municipal subscription to railroads are Goddin *v.* Crump, 8 Leigh (Va.) 120 (1837)—which is said by Judge Dillon to be the first in a long series; Leavenworth County *v.* Miller, 7 Kan. 479 (1871); Slack *v.* Maysville, etc. R. R., 13 B. Mon. (Ky.) 1 (1852); Knox Co. *v.* Aspinwall, 21 How. (U. S.) 539 (1858); Sharpless *v.* Mayor, 21 Pa. St. 157 (1853).

1 Amoskeag Bank *v.* Ottawa, 105 U. S. 667 (1881).

2 Napa Valley R. R. *v.* Napa County, 30 Cal. 435 (1866).

3 People *v.* Batchellor, 53 N. Y. 128 (1873). *Cf.* Queensbury *v.* Culver, 19 Wall. (U. S.) 83 (1873).

4 Cairo, etc. R. R. *v.* Sparta, 77 Ill. 505 (1875).

5 Dillon, Mun. Corp., §§ 12, 117, 157; Cooley, Const. Lim., pp. 261 *et seq.*

tinue to hold the most liberal views as to the legislative prerogative in this respect. Such authority inhering in the legislature is generally conceded.

A municipality which has not yet been incorporated cannot hold an election and vote a subscription for stock. The subscription is void.[1] But a *de facto* municipal corporation recognized by the legislature cannot defeat its bonds by alleging irregular incorporation.[2] It is no objection to the validity of the legislative act, or the municipal subscription, that the subscription is made to a railroad company not yet in existence,[3] or to the company that first builds the road.[4]

It must not be overlooked, however, that municipalities never have the power, by virtue of any of these legislative enactments, to tax themselves for the benefit of enterprises or objects which are private in their nature. Municipal subscriptions can only be made to the stock of companies of an essentially public character. This is a rule conclusively settled.[5] Municipal aid can lawfully be

1 Clark *v.* Janesville, 13 Wis. 414 (1861); s. c., 10 Wis. 136; Rochester *v.* Alfred Bank, 13 Wis. 432 (1861); Berliner *v.* Waterloo, 14 Wis. 378 (1861). See Lewis *v.* Clarendon, 5 Dillon, 329 (1878); s. c., 15 Fed. Cas. 474, to the effect that, if authority is given "to any incorporated town or city" to subscribe for stock, it is not limited to such towns as are incorporated when the act was passed.

2 Comanche County *v.* Lewis, 133 U. S. 198 (1890).

3 In Daviess County *v.* Huidekoper, 98 U. S. 98 (1878), it is held that county bonds in the hands of a *bona fide* holder for value are not rendered void by the fact that, at the time the vote authorizing the subscription was taken, the company to be benefited was not created according to law. To same effect, James *v.* Milwaukee, 16 Wall. 159 (1872); Railroad Co. *v.* Falconer, 103 U. S. 821 (1880). *Contra*, Rubey *v.* Shain, 54 Mo. 207 (1873); People *v.* Franklin, 5 Lans. (N. Y.) 129 (1871); Concord *v.* Portsmouth Sav. Bank, 92 U. S. 625 (1875).

4 North *v.* Platte County, 29 Neb. 447 (1890).

5 Loan Assoc. *v.* Topeka, 20 Wall. 655 (1874); Weismer *v.* Douglas, 64 N. Y. 91 (1876); Bissell *v.* Kankakee, 64 Ill. 249 (1872); Brewer Brick Co. *v.* Brewer, 62 Me. 62 (1873); Allen *v.* Jay, 60 Me. 124 (1872); Lowell *v.* Boston, 111 Mass. 454 (1873); State *v.* Osawkee, 14 Kan. 418 (1875); McConnell *v.* Hamm, 16 Kan. 228 (1876); Union Pac. R. R. *v.* Smith, 23 Kan. 745 (1880); Clark *v.* Des Moines, 19 Iowa, 199 (1865); Frederick *v.* Augusta, 5 Ga. 561 (1848); Commercial Nat. Bank *v.* Iola, 2 Dill. 353 (1873); s. c., 6 Fed. Cas. 221; aff'd, 22 U. S. (Lawy. Ed.) 463; Citizens' Sav. Assoc. *v.* Topeka, 3 Dill. 376 (1874); s. c., 5 Fed. Cas. 737; aff'd, 20 Wall. 655. *Cf.* Bloodgood *v.* Mohawk, etc. R. R., 18 Wend. 9, 65 (1837); Chapman *v.* Gates, 54 N. Y. 132, 144 (1873); Osborne *v.* Adams County, 109 U. S. 1 (1883); s. c., 106 U. S. 181 (1882); Ottawa *v.* Carey, 108 U. S. 110 (1883); Freeland *v.* Hastings, 92 Mass. 570 (1865); Jenkins *v.* Andover, 103 Mass. 94 (1869); People *v.* Salem, 20 Mich.

extended only to railroads or other enterprises of a distinctly public or quasi-public character. Many instances of the application of this principle of constitutional law are given in the notes below.[1]

452 (1870); Curtis *v.* Whipple, 24 Wis. 350 (1869); Cook *v.* Sumner Spinning, etc. Co., 1 Sneed (Tenn.), 698 (1854); Cooley, Const. Lim. (5th ed.), p. 261.

[1] A municipal donation to a private manufacturing concern is void. Cole *v.* La Grange, 113 U. S. 1 (1884). Aid to bridge-manufacturing and iron-works company held void. Loan Assoc. *v.* Topeka, 20 Wall. 655 (1874). Same as to hydraulic works. Weismer *v.* Douglas, 64 N. Y. 91 (1876). Also to linen company. Bissell *v.* Kankakee, 64 Ill. 249 (1872). Also exempting manufacturing companies from taxes for ten years. Brewer Brick Co. *v.* Brewer, 62 Me. 62 (1873). Also loan of credit to saw-mill and box-factory. Allen *v.* Jay, 60 Me. 124 (1872). Also loan to persons rebuilding after a fire. Lowell *v.* Boston, 111 Mass. 454 (1873). Or to relieve the destitute poor. State *v.* Osawkee, 14 Kan. 418 (1875). Or to aid in constructing a woolen-mill. McConnell *v.* Hamm, 16 Kan. 228 (1876). Or to build a dam. Union Pac. R. R. *v.* Smith, 23 Kan. 745 (1880). Or to construct a toll bridge. Clark *v.* Des Moines, 19 Iowa, 199 (1865). Or to aid a company which manufactures bridges, plows, stoves, etc. Commercial Nat. Bank *v.* Iola, 2 Dill. 353 (1873); s. c., 6 Fed. Cas. 221; Citizens' Sav. Assoc. *v.* Topeka, 3 Dill. 376 (1874); s. c., 5 Fed. Cas. 737. *Cf.* Bloodgood *v.* Mohawk, etc. R. R., 18 Wend. 9, 65 (1837); Chapman *v.* Gates, 54 N. Y. 132, 144 (1873). Or to aid a steam grist-mill. Osborne *v.* Adams County, 109 U. S. 1 (1883); s. c., 106 U. S. 181 (1882). Or to aid the development of a water-power. Ottawa *v.* Carey, 108 U. S. 110 (1883). Or to repay to persons money paid by them for substitutes in the army. Freeland *v.* Hastings, 92 Mass. 570 (1865). As to tax for a school-house, see Jenkins *v.* Andover, 103 Mass. 94 (1869). As to payment of money on account of drafting of soldiers, see Thompson *v.* Pittston, 59 Me. 545 (1871); Tyson *v.* Halifax, 51 Pa. St. 9 (1865). A state may employ a private corporation to care for children who are a public charge. Wisconsin, etc. School *v.* Clark County, 103 Wis. 651 (1899). Aid to a private school is void. (Curtis *v.* Whipple, 24 Wis. 350 — 1869); or to a manufacturing company. Cook *v.* Sumner Spinning, etc. Co., 1 Sneed (Tenn.), 698 (1854); Cooley, Const. Lim., 5th ed., p. 263 *et seq.* A municipal corporation has no power to aid a private manufacturing establishment. Sutherland-Innes Co. *v.* Village, etc., 86 Fed. Rep. 597 (1898). Township bonds issued to raise money to pay for the construction and operation of mills to manufacture sugar are illegal, the purpose being private and not public. Dodge *v.* Mission Tp., 107 Fed. Rep. 827 (1901). A city has no power to extend municipal aid to a mutual life insurance association. Park *v.* Modern, etc. of America, 181 Ill. 214 (1899). A municipality has no power to invest in the stock of a steamship company (Pennsylvania R. R. *v.* Philadelphia, 47 Pa. St. 189 — 1864); nor to operate free ferries (Jacksonport *v.* Watson, 33 Ark. 704 — 1878); but a subscription to a turnpike company has been held legal. Clark *v.* Leathers, 5 S. W. Rep. 576 (Ky. 1887). And to obtain a water supply. Frederick *v.* Augusta, 5 Ga. 561 (1848). See Sutherland-Innes Co. *v.* Village of Evart, 86 Fed. Rep. 597 (1898). Even though a city has paid $2,500 to a manufacturing concern to locate in the city and has taken a bond that it will continue the business there,

A municipal corporation may, however, be authorized by the legislature to build irrigation ditches, the cost thereof to be defrayed by taxation.[1]

§ 92. *Constitutional provisions prohibiting municipal subscriptions.*—The unchecked exercise of this power on the part of the state legislatures has entailed upon the people of the states such a burden of taxation [2] that in many states are found constitutional prohibitions rendering it unlawful for municipal corporations to make subscriptions or lend their credit to any incorporated company or enterprise, not strictly and exclusively governmental in its nature and constitution. This is the case in Pennsylvania,[3] Ohio,[4] Illinois,[5] New York,[6] Indiana,[7] Missouri,[8] Mississippi,[9] and in

such bond cannot be enforced, the entire transaction being *ultra vires*. Collier, etc. Co. *v.* City of Washington, 38 Ind. App. 370 (1905).

1 Fallbrook Irrigation Dist. *v.* Bradley, 164 U. S. 112 (1896).

2 Dillon, Mun. Corp., §§ 156, 160. The sum of municipal indebtedness in this country is said to exceed one thousand millions of dollars, and the amount is constantly increasing.

3 Amend. to Const. 1857, § 7, art. II; Pennsylvania R. R. *v.* Philadelphia, 47 Pa. St. 189 (1864).

4 Const., art. VIII, § 6; Walker *v.* Cincinnati, 21 Ohio Stat. 14 (1871); Cass *v.* Dillon, 2 Ohio St. 607 (1853); State *v.* Perrysburg, 14 Ohio St. 472 (1863); Thompson *v.* Kelly, 2 Ohio St. 647 (1853); Wyscaver *v.* Atkinson, 37 Ohio St. 80 (1881).

5 Const. 1870; Concord *v.* Portsmouth Sav. Bank, 92 U. S. 625 (1875); Louisville *v.* Savings Bank, 104 U. S. 469 (1881); Harter *v.* Kernochan, 103 U. S. 562 (1880); Fairfield *v.* Gallatin County, 100 U. S. 47 (1879); Chicago, etc. R. R. *v.* Pinckney, 74 Ill. 277 (1874); Moultrie County *v.* Rockingham, etc. Bank, 92 U. S. 631 (1875); Robertson *v.* Rockford, 21 Ill. 451 (1859). The constitutional prohibition in Illinois against lending credit applies to the state only, and not to counties or cities.

6 Amend. Const., Jan. 1, 1875; People *v.* Fort Edward, 70 N. Y. 28 (1877); Dodge *v.* Platte County, 82 N. Y. 218 (1880), reversing s. c., 16 Hun, 285.

7 Const., art. X, § 10; Lafayette, etc. R. R. *v.* Geiger, 34 Ind. 185 (1870); John *v.* Cincinnati, etc. R. R., 35 Ind. 539 (1871); Aspinwall *v.* Daviess County, 22 How. (U. S.) 364 (1859); Brocaw *v.* Gibson County, 73 Ind. 543 (1881).

8 Const., art. XI, § 14; Schuyler County *v.* Thomas, 98 U. S. 169 (1878); Smith *v.* Clark County, 54 Mo. 58 (1873); Macon County *v.* Shores, 97 U. S. 272 (1877); Ray County *v.* Vansycle, 96 U. S. 675 (1877); Scotland County *v.* Thomas, 94 U. S. 682 (1876).

9 Const., art. XII, § 14; Calhoun County *v.* Galbraith, 99 U. S. 214 (1878); Hayes *v.* Holly Springs, 114 U. S. 120 (1885); Grenada County *v.* Brogden, 112 U. S. 261 (1884). *Cf.* State *v.* Young, 29 Minn. 474 (1881). Where municipal-aid bonds were issued under an unconstitutional statute, but are enforced by the United States courts in favor of *bona fide* holders, the municipality may recover back from the railroad company or its successor the amounts so paid to such *bona fide* holders. Plainview *v.* Winona, etc. R. R., 36 Minn. 505 (1887). In Walker *v.* Cincinnati, 21 Ohio St. 14 (1871), the building of the Cincinnati Southern Railway by the city of Cincinnati was held legal,

some other states.[1] In general it will be found that these constitutional provisions forbid in terms any subscription or lending of credit by any municipality in the state, or by the state itself, to any company, association, or corporation whatsoever. Sometimes the prohibition is absolute, and at other times two-thirds or a majority of the qualified electors of the municipality must vote to render such aid. The constitutional or statutory provisions which prohibit municipal subscriptions are construed to be prospective only, unless they contain express words making them retroactive.[2] This principle is frequently applied when the constitutional enactment is passed after a municipal subscription is voted, but before it is actually completed.[3]

notwithstanding the state constitution forbade the legislature from authorizing any city, etc., becoming a "stockholder in any joint-stock company, corporation, or association whatever."

1 Where the statutes limit the amount of debt which a county may incur in aid of railroads, and aid is voted to the full amount, subsequent aid is void. Chicago, etc. R. R. *v.* Osage County, 38 Kan. 597 (1888).

2 Moultrie County *v.* Rockingham, etc. Bank, 92 U. S. 631 (1875); Grenada County *v.* Brogden, 112 U. S. 261 (1884); Fairfield *v.* Gallatin County 100 U. S. 47 (1879); Randolph County *v.* Post, 93 U. S. 502 (1876); Ralls County *v.* Douglass, 105 U. S. 728 (1881); Henry County *v.* Nicolay, 95 U. S. 619 (1877), holding that when authority had been granted to a county in Missouri to subscribe, the power was not subject to a constitutional amendment requiring the assent of two-thirds of the voters of the county; Cass County *v.* Gillett, 100 U. S. 585 (1879), following and approving last case; Callaway County *v.* Foster, 93 U. S. 567 (1876), to same effect, same constitution; Louisiana *v.* Taylor, 105 U. S. 454 (1881), to same effect, same constitution; Durkee *v.* Board of Liquidation, 103 U. S. 646 (1880); Howard County *v.* Paddock, 110 U. S. 384 (1884); Dallas County *v.* McKenzie, 110 U. S. 686 (1884). The legislature cannot, after the adoption of a constitutional amendment prohibiting municipalities from voting aid, remedy defects in votes taken before the amendment was adopted. Katzenberger *v.* Aberdeen, 121 U. S. 172 (1887); Decker *v.* Hughes, 68 Ill. 33 (1873), holding that, where a new state constitution has been adopted, the old one governs as to bonds issued under its authority, though not actually issued until after the adoption of the new one; Moultrie County *v.* Fairfield, 105 U. S. 370 (1881), holding that where a donation in aid of a railroad had been voted by a county before the adoption of the new constitution of Illinois, bonds to pay it might be issued after its adoption. In Louisville *v.* Savings Bank, 104 U. S. 469 (1881), it was held that the court would even take cognizance of the fractions of a day in order to do justice in such a case. Schall *v.* Bowman, 62 Ill. 321 (1872); Richards *v.* Donagho, 66 Ill. 73 (1872); Wright *v.* Bishop, 88 Ill. 302 (1878). *Contra*, Jeffries *v.* Lawrence, 42 Iowa, 498 (1876); Falconer *v.* Buffalo, etc. R. R., 69 N. Y. 491 (1877); List *v.* Wheeling, 7 W. Va. 501 (1874). *Cf.* Hayes *v.* Holly Springs, 114 U. S. 120 (1885); Henderson *v.* Jackson County, 2 McCrary, 615 (1881).

3 For cases involving a construc-

It has been held that a provision restricting the power of a state to make subscriptions in aid of railroads cannot be construed so as to prohibit the municipal subdivisions of the state from subscribing.[1] And a restriction as to the power of a country will not be held applicable to a city.[2] School districts have no power to subscribe to the stock of a railroad, and bonds issued to pay such a subscription are void.[3]

§ 93. *Change in the state constitution or the general statutory laws after the municipal corporation has voted to subscribe.*—Constitutional provisions or general statutes prohibiting municipal corporations from subscribing to the stock of other corporations, or from lending their credit thereto, are, as already stated,[4] prospective in their application.

That which a corporation has the constitutional or statutory right to do, and which it has done in pursuance of that right or authority, cannot be affected or undone by subsequent constitutional change or amendment, or by the passage of general statutes. This is a fundamental rule of constitutional law.[5] If, however, a pop-

tion of the Illinois constitution and its effects on previous donations, see Fairfield *v.* Gallatin County, 100 U. S. 47 (1879); Chicago, etc. R. R. *v.* Pinckney, 74 Ill. 277 (1874); Lippincott *v.* Pana, 92 Ill. 24 (1879); Middleport *v.* Ætna L. Ins. Co., 82 Ill. 562 (1876). *Cf.* Moultrie County *v.* Fairfield, 105 U. S. 370 (1881); Enfield *v.* Jordan, 119 U. S. 680 (1887).

1 Pattison *v.* Yuba County, 13 Cal. 175 (1859); New Orleans *v.* Graihle, 9 La. Ann. 561 (1854); Slack *v.* Maysville, etc. R. R., 13 B. Mon. (Ky.) 1 (1852); Leavenworth County *v.* Miller, 7 Kan. 479 (1871); Prettyman *v.* Tazewell County, 19 Ill. 406 (1858). The courts are inclined to hold that a limit on the rate of taxation that a city may levy does not apply to a tax in aid of municipal subscriptions to railroads. *Cf.* People *v.* State Treasurer, 23 Mich. 499 (1871); Pitzman *v.* Freeburg, 92 Ill. 111 (1879).

2 Thompson *v.* Peru, 29 Ind. 305 (1868); Aurora *v.* West, 9 Ind. 74 (1857). The statute may prescribe that the aid voted shall not bind property outside of a town in the county, unless the residents outside of the town vote in favor of it. Kentucky Union R. R. *v.* Bourbon County, 85 Ky. 98 (1887); Dillon, Mun. Corp., § 162, citing Butz *v.* Muscatine, 8 Wall. 575 (1869); Learned *v.* Burlington, 2 Am. L. Reg. (N. S.) 394 (1863), and n.; Leavenworth *v.* Norton, 1 Kan. 432 (1863); Burnes *v.* Atchison, 2 Kan. 454 (1864). And see Commonwealth *v.* Pittsburgh, 34 Pa. St. 496 (1859); Amey *v.* Allegheny City, 24 How. (U. S.) 364 (1860); State *v.* Perrysburg, 14 Ohio St. 472 (1863); Cumberland *v.* Magruder, 34 Md. 381 (1871); Assessors *v.* Commissioners, 3 Brewst. (Pa.) 333 (1869); State *v.* Guttenberg, 38 N. J. L. 419 (1876).

3 Weightman *v.* Clark, 103 U. S. 256 (1880).

4 § 92, *supra*.

5 See, in regard to the Illinois constitution, Clay County *v.* Society for Savings, 104 U. S. 579 (1881); People *v.* Logan County, 63 Ill. 374 (1872); Moultrie County *v.* Rockingham, etc. Sav. Bank, 92 U. S. 631 (1875); Louisville *v.* Savings Bank, 104 U. S. 469 (1881); Choisser *v.*

ular vote does not give the company proposed to be benefited a vested right to the subscription by the municipality, and if, until the subscription is actually made, the contract is unexecuted, and therefore obligatory upon neither party, there is ground for holding that a constitutional prohibition, taking effect after the election, but before the subscription is made pursuant to authority conferred by the popular vote, will be sufficient to invalidate the subscription. This was the view taken by the supreme court of the United States in the case of Aspinwall v. Commissioners of the County of Daviess,[1] and approved in some later cases.[2] There are cases of authority, however, in favor of the rule that, after the corporation has, by a popular vote at an election lawfully held, voted to subscribe for stock, subsequent changes of the constitution or the general statutes will not affect the right of the municipality to go on and complete the contract, to make the formal subscription, and to issue the bonds or levy the special tax to pay the calls.[3]

People, 140 Ill. 21 (1892). See also Nelson *v.* Haywood County, 87 Tenn. 781 (1889). An irregular vote to issue bonds before a constitutional provision is enacted cannot be legalized by legislative act afterwards. Williams *v.* People, 132 Ill. 574 (1890). Where the original subscription was conditional, the condition cannot be waived after a constitutional provision prohibiting these subscriptions has been passed. Richeson *v.* People, 115 Ill. 450 (1886). To the same effect, with regard to the constitution of 1875 of Nebraska, see State *v.* Lancaster County, 6 Neb. 214 (1877); and as to constitution of Missouri of 1865, see Louisiana *v.* Taylor, 105 U. S. 454 (1881); Cass County *v.* Gillett, 100 U. S. 585 (1879); Scotland County *v.* Thomas, 94 U. S. 682 (1876); Ray County *v.* Vansycle, 96 U. S. 675 (1877); Callaway County *v.* Foster, 93 U. S. 567 (1876); Ralls County *v.* Douglass, 105 U. S. 728 (1881), in which bonds issued under a city charter without a popular vote were held valid notwithstanding the provisions of a constitution adopted afterwards, but in force when the bonds were issued, required a submission of such matters to a vote; State *v.* Macon County Court, 41 Mo. 453 (1867), to the same effect; State *v.* Sullivan County Court, 51 Mo. 522 (1873), to the same effect. *Cf.* State *v.* Dallas County Court, 72 Mo. 329 (1880), where a later statute was held to have taken away the power under a former one. A statute passed subsequently to a constitutional prohibition may legalize an irregular subscription made before the prohibition. Bolles *v.* Brimfield, 120 U. S. 759 (1887). The repeal of the act authorizing a tax for municipal aid before any money has been expended by the railroad, excepting a small sum for surveys, prevents a lessee of the railroad enforcing payment when the taxes were not assigned to the lessee. Barthel *v.* Meader, 72 Iowa, 125 (1887).

1 22 How. 364 (1859).

2 Norton *v.* Brownsville, 129 U. S. 479 (1889); Wadsworth *v.* Supervisors, 102 U. S. 534 (1880). See also Railroad Co. *v.* Falconer, 103 U. S. 821 (1880); German Sav. Bank *v.* Franklin County, 128 U. S. 526 (1888); Eddy *v.* People, 127 Ill. 428 (1889).

3 United States *v.* Jefferson County, 5 Dill. 310 (1878); s. c., 26 Fed. Cas. 597; Maenhaut *v.* New Orleans,

After a subscription is made, any act of the legislature restricting or abridging the taxing power so as to deprive the municipality of the power to pay the bonds is unconstitutional and void.[1]

§ 94. *Statutory formalities must be substantially complied with.*— A substantial compliance with the formalities prescribed by a statute authorizing a municipal subscription to stock is all that the law requires; but such a compliance is requisite to the validity thereof.[2]

3 Woods, 1 (1876); s. c., 16 Fed. Cas. 380; Sibley *v.* Mobile, 3 Woods, 535 (1876); s. c., 22 Fed. Cas. 57; Nicolay *v.* St. Clair County, 3 Dill. 163 (1874); s. c., 18 Fed. Cas. 227; Huidekoper *v.* Dallas County, 3 Dill. 171 (1875); s. c., 12 Fed. Cas. 845. *Cf.* Red Rock *v.* Henry, 106 U. S. 596 (1882), and cases in note 5, p. 338.

1 Wolff *v.* New Orleans, 103 U. S. 358 (1880). *Cf.* Edwards *v.* Williamson, 70 Ala. 145 (1881); Hays *v.* Dowis, 75 Mo. 250 (1881).

2 Bonds issued by municipalities to aid railroads are valid only when issued in compliance with the statute authorizing them. Young *v.* Clarendon, 132 U. S. 340 (1889); Hoff *v.* Jasper County, 110 U. S. 53 (1884), following the ruling in Anthony *v.* Jasper County, 101 U. S. 693 (1879), where it was held that a *bona fide* holder of bonds could not maintain an action on bonds not registered with the state auditor as required by statute; Bissell *v.* Spring Valley, 110 U. S. 162 (1884), holding that when a statute required bonds to be attested by the county clerk under the seal of the county, bonds issued without his signature were not valid; Hamlin *v.* Meadville, 6 Neb. 227 (1877), holding that a vote authorizing a subscription gives no power to make a donation; Cairo, etc. R. R. *v.* Sparta, 77 Ill. 505 (1875), where bonds were authorized by a vote upon a proposition that they should run *twenty* years, when the statute submitted a proposition to be voted upon for bonds to run not exceeding *ten* years, the court refused to compel the city to issue them; Mustard *v.* Hoppess, 69 Ind. 324 (1879), where an election, and a tax voted and levied in pursuance of it, were held *not* invalidated on account of a canvass of the votes which was not entirely regular; People *v.* Dutcher, 56 Ill. 144 (1870), holding that when the statute does not prescribe a mode of election it should be held in accordance with the law of the organization of the municipality; People *v.* Logan County, 63 Ill. 374 (1872). This case was an application for *mandamus* to compel a subscription. A demurrer to an answer alleging that the vote in favor of subscription was obtained by fraudulent votes with the knowledge of the corporation to be benefited was overruled; Pana *v.* Lippincott, 2 Ill. App. 466 (1877), where a vote taken at a *special* town meeting, when the statute required it to be taken at a *regular* meeting, was held not to confer authority to subscribe; People *v.* Smith, 45 N. Y. 772 (1871), holding that, when the act requires a petition of taxpayers, the power is personal to them and cannot be exercised by an agent; Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611 (1879), holding that a judgment on bonds issued by a municipality is conclusive upon it as to the validity of the bonds and as to all defenses which might have been urged against it at law; but in a bill in equity to enforce a statutory trust by which the property, etc., of the municipality was pledged to pay them, it may show that the bonds were issued in violation of the conditions of the statute; Munson *v.* Lyons, 12 Blatchf. 539 (1875); s. c., 17 Fed. Cas. 1002;

Where the statute authorizing municipal-aid bonds requires that the road should be constructed before the bonds are good, a purchaser may rely on the fact that the trustee holding the bonds in escrow had decided that the condition had been complied with.[1] A city having power to issue its bonds for stock in a domestic railroad corporation is not thereby given power to issue bonds for stock in a foreign corporation.[2] If the statute requires the profile and estimates to be made before municipal aid is given, a subsequent variation releases the subscription.[3]

But not every failure to observe all the formalities prescribed by the statute is sufficient to invalidate a subscription. When the omission is a matter of form more than of substance, it will not invalidate the subscription.[4]

aff'd, 99 U. S. 684, holding that an objection which would be good in a direct review of the proceedings—as here, that the petition of taxpayers gave the authorities no jurisdiction—may be of no avail as against *bona fide* holders of bonds; Thompson *v.* Perrine, 103 U. S. 806 (1880); Jasper County *v.* Ballou, 103 U. S. 745 (1880), and Massachusetts, etc. Co. *v.* Cherokee, 42 Fed. Rep. 750 (1890), holding that a subsequent statute may correct errors. See also Carroll County *v.* Smith, 111 U. S. 556 (1884); Hawley *v.* Fairbanks, 108 U. S. 543 (1883); Buchanan *v.* Litchfield, 102 U. S. 278 (1880); People *v.* Hulburt, 46 N. Y. 110 (1871); People *v.* Suffern, 68 N. Y. 321 (1877); Wilson *v.* Caneadea, 15 Hun, 218 (1878); Angel *v.* Hume, 17 Hun, 374 (1879); People *v.* Hutton, 18 Hun, 116 (1879); People *v.* Barrett, 18 Hun, 206 (1879); Wheatland *v.* Taylor, 29 Hun, 70 (1883). A municipal subscription, authorized by statute, to a corporation to construct locks and dams, and duly made, cannot be enforced to pay for repairing old locks and dams. Jessamine County *v.* Swigert's Adm'r, 3 S. W. Rep. 13 (Ky. 1887). Where judgment is taken by default the facts alleged cannot be disputed in the *mandamus* proceedings. Harshman *v.* Knox County, 122 U. S. 306 (1887). A vote of municipal aid is void if the grantee is in the alternative. State *v.* Roggen, 22 Neb. 118 (1887). In Kansas a taxpayer cannot enjoin the board from declaring the vote on municipal aid. He must wait and enjoin the subscription. State *v.* Wabaunsee County, 36 Kan. 180 (1887); People *v.* Santa Anna, 67 Ill. 57 (1873), where an election was held illegal because held without a registration of voters as required by law; People *v.* Laenna, 67 Ill. 65 (1873), a similar case; Chicago, etc. R. R. *v.* Mallory, 101 Ill. 583 (1882), where an election presided over by one moderator with one clerk, when the law required three judges and two clerks, was held void, conferring no authority upon a town to issue bonds. Municipal bonds issued without the order of the grand jury, as required by statute, are not collectible by an owner who does not show that he is a *bona fide* holder. Frick *v.* Mercer County, 138 Pa. St. 523 (1891).

1 Provident Life, etc. Co. *v.* Mercer County, 170 U. S. 593 (1898), rev'g Mercer County *v.* Provident, etc. T. Co., 72 Fed. Rep. 623 (1896).

2 Travelers', etc. Co. *v.* Mayor, etc., 99 Fed. Rep. 663 (1900).

3 State *v.* Morristown, 93 Tenn. 239 (1893).

4 Pana *v.* Bowler, 107 U. S. 529 (1882), holding that the fact that an

Many of these defenses, however, are defeated by the fact that the municipality is estopped from setting up the illegality, there having been long delay, or the recitals on the bonds themselves having represented that the legal formalities were duly observed.[1]

election was irregularly conducted could not avail as a defense to bonds in the hands of a *bona fide* holder, the court refusing to follow the ruling of the Illinois supreme court in Lippincott *v.* Pana, 92 Ill. 24 (1879), which declared the bonds void; Johnson County *v.* Thayer, 94 U. S. 631 (1876), where the court said: "Defects, irregularities, or informalities which do not affect the result of the vote do not affect its validity;" Belfast, etc. R. R. *v.* Brooks, 60 Me. 568 (1872), where a call for a town meeting "to see if the town will loan its credit to aid in the construction" of a railroad named was held to give reasonable notice that a proposition to subscribe for its stock would be acted upon; Draper *v.* Springport, 104 U. S. 501 (1881), in which the absence of a seal was held not to affect the right of a *bona fide* holder to recover upon bonds issued in payment of a subscription; Clarke *v.* Hancock County, 27 Ill. 305 (1862), where the informality consisted in submitting two propositions by one vote, and it was held not to invalidate bonds in the hands of *bona fide* holders; Supervisors *v.* Schenck, 5 Wall. 772 (1866), where bonds issued under a vote ordered by a "county court," instead of by the "board of supervisors" were held valid because taxes had been levied and interest paid upon them by the proper authorities for nine years before the claim was made that they were void. *Cf.* Jasper County *v.* Ballou, 103 U. S. 745 (1880); Pana *v.* Bowler, 107 U. S. 529 (1882); Johnson *v.* Stark County, 24 Ill. 75 (1860); Singer Mfg. Co. *v.* Elizabeth, 42 N. J. L. 249 (1880); New Haven, etc. R. R. *v.* Chatham, 42 Conn. 465 (1875), where a vote which should have been by ballot was taken by division of the house, and no objection was made thereto until a railroad had in good faith issued bonds which were to be guaranteed by the town.

1 Nugent *v.* Supervisors, 19 Wall. 241 (1873), is the leading case. It holds that the delivery of the municipal bonds to the railroad in exchange for the stock, together with the levy of a tax to pay the interest on the bonds, and the act of the municipality in voting as a shareholder, estop it from denying the legality of the subscription. Menasha *v.* Hazard, 102 U. S. 81 (1880), where bonds were issued to be valid when it was certified on them that certain conditions had been performed. Such a certificate was held to estop the town from denying their validity; Whiting *v.* Potter, 2 Fed. Rep. 517 (1880), in which it was held that retaining railroad stock received for bonds, and paying interest on the bonds for a long time, estopped a municipality from questioning their validity, such acts being a direct ratification of the issue; Lamb *v.* Burlington, etc. R. R., 39 Iowa, 333 (1874), holding that voting a tax in aid of a railroad, and remaining silent for a year, during which the road was completed upon the faith of the tax, and until the benefits accruing from the completion were realized, estopped the township from denying the validity of the tax; Leavenworth, etc. R. R. *v.* Douglas County, 18 Kan. 169 (1877), where the failure of a railroad to comply with the conditions of an agreement by which it was to receive bonds was a matter of public knowledge, and the county issuing the bonds made no objection, but paid interest on the bonds for years. These

A *bona fide* holder of a municipal bond issued on payment of a subscription to stock need not inquire as to whether the bonds were issued upon the petition of two-thirds of the freeholders, inasmuch as the recitals in the bonds to that effect will protect him.[1]

The meeting must be duly called and by the proper officer;[2] the notice of the meeting must be duly posted for the full time provided in the act.[3] Where a municipality has subscribed for stock

circumstances were considered a ratification of the acts of the county officers in issuing them; Lyons *v.* Munson, 99 U. S. 684 (1878), holding that where, under the act of New York, the county judge decides upon an application of taxpayers, his judgment, recited in the bonds, cannot be attacked by the town in an action on bonds by a *bona fide* holder, and the town is estopped to deny their validity on that account; Hackett *v.* Ottawa, 99 U. S. 86 (1878), holding that, when bonds purport on their face to have been issued to provide for a loan for municipal purposes, the city is estopped from setting up against an innocent purchaser for value that they were void because the proceeds were appropriated to other purposes—as for a donation to a private corporation. Pendleton County *v.* Amy, 13 Wall. 297 (1871), holding that where the issue of bonds by county officers, without previous fulfillment of conditions, would be a misdemeanor, the presumption is that the conditions were fulfilled; and the receiving of stock in payment and holding it for seventeen years work an estoppel; First Nat. Bank *v.* Wolcott, 19 Blatch. 370 (1881), where the retaining of stock received for bonds, and paying interest on the bonds, was held, as against *bona fide* holders, to be a ratification of the act of commissioners in issuing them, the recital on them being that they were issued in pursuance of a certain statute; Block *v.* Commissioners, 99 U. S. 686 (1878), in which a county was held estopped from asserting that a majority of the electors had not voted in favor of the issue of bonds, the bonds having been issued three years after the vote was declared and recorded; Carroll County *v.* Smith, 111 U. S. 556 (1883), holding that a recital in a bond that it is authorized by a particular statute does not estop the municipality from setting up that it was not authorized by a proper majority of voters,—in this case two-thirds. See also Amey *v.* Allegheny City, 24 How. 364 (1860); Cagwin *v.* Hancock, 84 N. Y. 532 (1881), rev'g s. c., 22 Hun, 201; Orleans *v.* Platt, 99 U. S. 676 (1878).

1 Evansville *v.* Dennett, 161 U. S. 434 (1896).

2 Windsor *v.* Hallett, 97 Ill. 204 (1880); Richland County *v.* People, 3 Ill. App. 210 (1878); Jacksonville, etc. R. R. *v.* Virden, 104 Ill. 339 (1882); Bowling Green, etc. R. R. *v.* Warren County Court, 10 Bush (Ky.), 711 (1874). But see Sauerhering *v.* Iron Ridge, etc. R. R., 25 Wis. 447 (1870); Athens County *v.* Baltimore, etc. R. R., 37 Ohio St. 205 (1881).

3 McClure *v.* Oxford, 94 U. S. 429 (1876); Harding *v.* Rockford, etc. R. R., 65 Ill. 90 (1872), where bonds were held invalid because the notice of election was posted less than thirty days, as required by law; Packard *v.* Jefferson County, 2 Colo. 338 (1874), holding that a change in the proposition to vote bonds which is in effect a new proposition cannot be legally voted upon at an election already called, there not being sufficient time remaining before the election to give the required notice; Anderson County *v.* Beal, 113 U. S. 227 (1884), holding that, if the bonds on

illegally, any other stockholder may bring suit to have the subscription canceled.[1]

§ 95. *Submission to popular vote.*—While the legislature may authorize a municipality to make a subscription to the stock of a railway or other corporation without submitting the question to a vote of the people,[2] it has the power to direct that the question shall be so submitted. Such an act does not amount to a delegation of legislative powers.[3] When it is provided that a subscrip-

their face recite that they were issued in pursuance of a vote held on a certain day, the statement is equivalent to one that the vote was regular in form as to prior notice, and the municipal corporation is estopped from showing that it was held without proper notice in an action by a *bona fide* holder; George *v.* Oxford, 16 Kan. 72 (1876), holding that when an election authorizing the issue of bonds was held upon insufficient notice, and the facts appeared upon the face of the bonds, the bonds were void; Williams *v.* Roberts, 88 Ill. 11 (1878), where an election called by twelve voters instead of twenty, as required, upon a ten days' notice, where the statute required twenty days, was held a nullity. See also Wells *v.* Pontotoc County, 102 U. S. 625 (1880); Lincoln *v.* Cambria Iron Co., 103 U. S. 412 (1880). But where the notice was required by the statute to be "posted by the town clerk or supervisors," it was held that this did not require a posting by these officers in person, but that it was sufficient if they procured others to post the notice. Phillips *v.* Albany, 28 Wis. 340 (1871); Lawson *v.* Milwaukee, etc. Ry., 30 Wis. 597 (1872); Jones *v.* Hurlburt, 13 Neb. 125 (1882).

1 Stebbins *v.* Perry County, 167 Ill. 567 (1897).

2 Otoe County *v.* Baldwin, 111 U. S. 1 (1883); Thomson *v.* Lee County, 3 Wall. 327 (1865); Ralls County *v.* Douglass, 105 U. S. 728 (1881); State *v.* Macon County Court, 41 Mo. 453 (1867); State *v.* Sullivan County Court, 51 Mo. 522 (1873). *Cf.* State *v.* Dallas County Court, 72 Mo. 329 (1880); McCallie *v.* Chattanooga, 3 Head (Tenn.), 317 (1859); Chicago, etc. R. R. *v.* Aurora, 99 Ill. 205 (1881); Burr *v.* Chariton Co., 2 McCrary, 603 (1880). In this case a charter of a railroad authorized it to receive subscriptions from counties without a vote of the people. Bonds so issued were held valid though a prior special act required a vote of taxpayers as a condition precedent to such subscriptions.

3 Starin *v.* Genoa, 23 N. Y. 439 (1861); Gould *v.* Sterling, 23 N. Y. 456 (1861); Bank of Rome *v.* Rome, 18 N. Y. 38 (1858); s. c., 19 N. Y. 20 (1859); People *v.* Batchellor, 53 N. Y. 128, 138 (1873); Duanesburgh *v.* Jenkins, 57 N. Y. 177, 192 (1874); Hobart *v.* Butte County, 17 Cal. 23 (1860); Slack *v.* Maysville, etc. R. R., 13 B. Mon. (Ky.) 1 (1852); Winter *v.* Montgomery, 65 Ala. 403 (1880). In Harrington *v.* Plainview, 27 Minn. 224 (1880), it is held that where a submission to the people is provided for, it must be to legal voters of the municipality, and cannot lawfully be confined to resident taxpayers, whether legal voters or not. *Cf.* Babcock *v.* Helena, 34 Ark. 499 (1879); Walnut *v.* Wade, 103 U. S. 683 (1880). Again, where a popular vote, taken in accordance with a statute, authorized a subscription to a designated railway, and the bonds were issued to a consolidated road including the first—these facts appearing on the face of the bond,—the invalidity of the transaction was held to appear on

tion can be made only upon the petition of a certain proportion of the legal voters,[1] there must be a substantial compliance with the spirit as well as the letter of the act.[2]

When the enabling act provides for municipal aid to railways and other quasi-public enterprises upon the assent of a majority or two-thirds of the legal voters of the town or county, this is construed universally to mean that the measure is to be approved by a majority or a two-thirds vote, as the case may be; that is to say, by a majority or two-thirds of the voters who vote at the election called for the purpose, and not two-thirds or a majority of all the qualified electors in the territory. Those who fail to vote against

the face of it. Bates County *v.* Winters, 97 U. S. 83 (1877). *Cf.* Chicot County *v.* Lewis, 103 U. S. 164 (1880); Schaeffer *v.* Bonham, 95 Ill. 368 (1880). But where a town is authorized to subscribe not exceeding a certain sum to a designated railroad, several subscriptions made at different times and authorized by as many elections, the aggregate not exceeding the amount named in the act, are valid. Empire *v.* Darlington, 101 U. S. 87 (1879). See also Hurt *v.* Hamilton, 25 Kan. 76 (1881); Society for Savings *v.* New London, 29 Conn. 174 (1860); First Nat. Bank *v.* Concord, 50 Vt. 257 (1877).

1 *E. g.* in New York, People *v.* Hulbert, 46 N. Y. 110, rev'g 59 Barb. 446 (1871); People *v.* Peck, 62 Barb. 545 (1872); People *v.* Oliver, 1 T. & C. 570 (1873); People *v.* Hughitt, 5 Lans. 89 (1871); People *v.* Franklin, 5 Lans. 129 (1871); People *v.* Smith, 45 N. Y. 772 (1871); Wellsborough *v.* New York, etc. R. R., 76 N. Y. 182 (1879). *Cf.* St. Joseph *v.* Rogers, 16 Wall. 644 (1872); Syracuse Sav. Bank *v.* Seneca Falls, 21 Hun (N. Y.), 304 (1880); aff'd, 86 N. Y. 317; Faris *v.* Reynolds, 70 Ind. 359 (1880).

2 People *v.* Smith, 45 N. Y. 772 (1871); Craig *v.* Andes, 93 N. Y. 405 (1883); People *v.* Oldtown, 88 Ill. 202 (1878). If the statute requires a written application by ten legal voters before the clerk should call an election, such application is necessary to the validity of the election, and without proof of it the municipality cannot be compelled to issue bonds. Monadnock R. R. *v.* Peterborough, 49 N. H. 281 (1870), holding that a town cannot delegate its power to authorize subscriptions to a committee; and a statute requiring the vote of "two-thirds of the legal voters present and voting at" the meeting must be strictly obeyed. Mercer County *v.* Pittsburgh, etc. R. R., 27 Pa. St. 389 (1856), in which a statute designated the grand jury of a county to decide upon a subscription. It was held that the grand jury could not delegate the power so conferred to county commissioners, and that the commissioners could only subscribe in accordance with the decision of the grand jury. Where the municipal bonds recite that the vote was on an application of fifty voters, where the statute required that the application should be by voters and taxpayers, *held*, that the bonds were void, where the application was not by taxpayers. Gilson *v.* Dayton, 123 U. S. 59 (1887). Municipal bonds issued on a vote of a minority of the voters, instead of a majority, as required by the statute, in aid of a railroad, are void. Onstott *v.* People, 123 Ill. 489 (1888). In Prettyman *v.* Tazewell County, 19 Ill. 406, 414 (1858), a case of subscription by a county to railroad stock, a taxpayer waited four months before alleging fraud in the election.

the measure are not considered nor counted as having the power to vote.[1]

The legislature may render effective a prior vote of a municipality, taken without statutory authority, in aid of a railroad. If the state courts vary in their decisions on municipal aid to railroads

Held equivalent to acquiescence, and too late. See also People *v.* Van Valkenburgh, 63 Barb. 105 (1872); Evansville, etc. R. R. *v.* Evansville, 15 Ind. 395 (1860); Chicago, etc. R. R. *v.* Mallory, 101 Ill. 583 (1882). For the manner in Indiana of contesting an election, see Goddard *v.* Stockman, 74 Ind. 400 (1881).

1 Cass County *v.* Johnston, 95 U. S. 360 (1877); Carroll County *v.* Smith, 111 U. S. 556 (1884); Cass County *v.* Jordan, 95 U. S. 373 (1877); Hawkins *v.* Carroll County, 50 Miss. 735 (1874); Louisville, etc. R. R. *v.* State, 8 Heisk. (Tenn.) 663 (1875); State *v.* Brassfield, 67 Mo. 331 (1878); Webb *v.* Lafayette County, 67 Mo. 353 (1878); People *v.* Harp, 67 Ill. 62 (1873). *Contra*, People *v.* Chapman, 66 Ill. 137 (1872). *Cf.* Dunnovan *v.* Green, 57 Ill. 63 (1870), holding that a statute which authorizes a subscription, provided a majority of votes are in favor of it, means a majority of votes cast, not a majority of all voters; Culver *v.* Fort Edward, 8 Hun, 340 (1876), holding that if the statute requires a vote of the majority of taxable inhabitants, the consent of a majority who attended the meeting is not sufficient; Walnut *v.* Wade, 103 U. S. 683 (1879), holding that "inhabitants," as used in an enabling act, meant legal voters; St. Joseph *v.* Rogers, 16 Wall. 644 (1872), where a law of Illinois, requiring a vote of "a majority of the legal voters of any township" in one section, and a majority "voting at such election," was construed to mean a majority of those voting at the election; People *v.* Oliver, 1 T. & C. 570 (1873), holding that "taxpayers" includes all persons whose names are on the assessment roll as such, though wrongfully taxed —as non-residents; Milner *v.* Pensacola, 2 Woods, 632 (1875); s. c., 17 Fed. Cas. 407, where a statute required the "consent of a majority of the corporation composing" the city. A defense to an action on the bonds by an innocent holder, that only a minority of citizens voted, was held not good; Melvin *v.* Lisenby, 72 Ill. 63 (1874), holding that the presumption is that the vote cast at an election held according to law is the vote of the whole number of legal voters; Reiger *v.* Beaufort, 70 N. C. 319 (1874), where a majority of votes cast at an election was held sufficient under a statute requiring a majority of the voters qualified to vote, although a majority of all the voters of the town did not vote. If the petition must be signed by a majority of freeholders, minors and married women, etc., are to be counted. State *v.* Kokomo, 108 Ind. 74 (1886). See also Cagwin *v.* Hancock, 84 N. Y. 532 (1881). And for a contrary rule, well argued out, see Harshman *v.* Bates County, 92 U. S. 569 (1875) [overruled, however, in Cass County *v.* Johnson, 95 U. S. 360 (1877)], and the dissenting opinions of Miller and Bradley, JJ., in Cass County *v.* Johnson, 95 U. S. 360, 370 (1877). As to the right of a voter or signer to revoke his consent once granted, see Springport *v.* Teutonia Sav. Bank, 84 N. Y. 403 (1881); People *v.* Sawyer, 52 N. Y. 296 (1873); People *v.* Wagner, 1 T. & C. 221 (1873); People *v.* Hatch, 1 T. & C. 113 (1873). *Cf.* First Nat. Bank *v.* Dorset, 16 Blatchf. 62 (1879) s. c., 9 Fed. Cas. 98; Noble *v.* Vincennes, 42 Ind. 125 (1873); and see Hannibal *v.* Fauntleroy, 105 U. S. 408 (1881).

the federal court will decide upon its own judgment.[1] The fact that the proposition to vote aid is defeated at one election does not prevent the calling of another election to submit the question again.[2] Nor does a vote of aid to one railroad prevent a subsequent vote of aid to another railroad.[3]

§ 96. *What officer or agent of the municipality may make the contract of subscription.*—In the absence of any express provision in the enabling act, the proper persons to execute the contract of subscription for a municipal corporation are those whose duty it is to execute other contracts for and in the name of the municipality. A subscription is a contract, to be executed in the ordinary way in which any other contract may properly be made. But the act authorizing the subscription frequently provides by whom and in what manner the contract shall be executed. When this is the case the provisions of the statute are to be strictly complied with.[4]

It has been held that, in order to constitute a valid municipal

1 Anderson *v.* Santa Anna, 116 U. S. 356 (1886). *Cf.* State *v.* Holladay, 72 Mo. 499 (1880); Smith *v.* Fond du Lac, 8 Fed. Rep. 289 (1881); McCall *v.* Hancock, 10 Fed. Rep. 8 (1882).

2 Calhoun County *v.* Galbraith, 99 U. S. 214 (1878); Society for Savings *v.* New London, 29 Conn. 174 (1860).

3 Chicot County *v.* Lewis, 103 U. S. 164 (1880).

4 Walnut *v.* Wade, 103 U. S. 683 (1880); Douglas *v.* Niantic Sav. Bank, 97 Ill. 228 (1881); Windsor *v.* Hallett, 97 Ill. 204 (1880). The commissioners cannot bind the municipality by a modification of the subscription voted by it. Bell *v.* Railroad Co., 4 Wall. 598 (1866). A subscription for a municipality by officers in a supposed office which does not constitutionally exist is void. Norton *v.* Shelby County, 118 U. S. 425 (1886). So, for example, where the act provides for the appointment of a board of commissioners to make the subscription, they only are competent to make it; they are for this purpose the agents of the municipality for which they act; they may insert conditions into the contract which, unless repudiated by the corporation, are valid, and will bind all parties concerned; their powers are to be exercised jointly, and therein all must act—a majority not being sufficient by their act to bind the municipality; their acts when once fully performed are final and binding, and cannot be recalled or revoked. Danville *v.* Montpelier, etc. R. R., 43 Vt. 144 (1870). *Cf.* First Nat. Bank *v.* Arlington, 16 Blatchf. 57 (1879); s. c., 9 Fed. Cas. 95; First Nat. Bank *v.* Concord, 50 Vt. 257 (1877); People *v.* Hitchcock, 2 T. & C. (N. Y.) 134 (1873); State *v.* Hancock County, 11 Ohio St. 183 (1860); s. c., 12 Ohio St. 596. *Cf.* Jackson County *v.* Brush, 77 Ill. 59 (1875); Kankakee *v.* Ætna Life Ins. Co., 106 U. S. 668 (1882); Bissell *v.* Spring Valley, 110 U. S. 162 (1884); *Re* Bradner, 87 N. Y. 171 (1881). If the officers or agents of a municipality have a discretion with reference to the subscription, to make it or not, as they may think best under the circumstances, their exercise of that discretion is final and cannot be reviewed or questioned. Mercer County *v.* Pittsburgh, etc. R. R., 27 Pa. St. 389 (1856). *Cf.* Falconer *v.* Buffalo, etc. R. R., 69 N. Y. 491 (1877); First Nat. Bank *v.* Concord, 50 Vt. 257 (1877).

subscription to the stock of a railway company, it is not necessary that there be an actual act of subscribing.[1]

But the vote of the taxpayers or inhabitants, as the case may be, is not a subscription, nor does it amount to a subscription; nor does it in general vest in the company for whose proposed benefit the vote was taken a right to have a subscription made.[2]

It has been held that the officers authorized to make the subscription have a certain amount of discretion in fixing the terms of payment.[3]

§ 97. *Municipal subscriptions may be conditional.*—A municipal corporation may annex to its subscription any condition that an individual subscriber might lawfully prescribe, and may, in consequence, make the payment of the subscription depend upon the performance thereof.[4] Moreover, a municipal corporation is en-

1 Nugent *v.* Supervisors, 19 Wall. 241 (1873), holding, also, that a resolution by a duly authorized board of agents, declaring a subscription made, is, upon the acceptance of the subscription in that shape by the railway company, and a notice to the municipality of the acceptance, a good and binding subscription, although there was no subscription made in the books of the company. To same effect see Moultrie County *v.* Rockingham, etc. Bank, 92 U. S. 631 (1875); Cass County *v.* Gillett, 100 U. S. 585 (1879). *Cf.* State *v.* Jennings, 48 Wis. 549 (1879). The board whose duty it is to make the subscription may do so through the county clerk. Chicago, etc. R. R. *v.* Stafford County, 36 Kan. 121 (1887). The bonds, if signed on Sunday, will be invalid, although the signature is by the proper officer. De Forth *v.* Wisconsin, etc. R. R., 52 Wis. 320 (1881); Bank of Statesville *v.* Statesville, 84 N. C. 169 (1881), where an omission of commissioners to sign bonds was held not fatal, the requirement being directory.

2 Cumberland, etc. R. R. *v.* Barren County Court, 10 Bush (Ky.) 604 (1874); Bates County *v.* Winters, 97 U. S. 83 (1877). A mere vote of the municipality is not a subscription. If the road is foreclosed before subscription, and the conditions of the subscription are not fully complied with, no suit lies to collect. Hamilton County *v.* State, 115 Ind. 64 (1888); Bates County *v.* Winters, 97 U. S. 83 (1877), holding that where, after an election in favor of making a subscription, the county court made an order for a subscription, and its agent reported that the railroad company had no stock books, for which, and other reasons, he did not make the subscription, it was held that these acts were not final and self-executing, and did not constitute a subscription. Wadsworth *v.* St. Croix County, 4 Fed. Rep. 378 (1880).

3 Syracuse Sav. Bank *v.* Seneca Falls, 86 N. Y. 317 (1881), where it was held that after regular proceedings had been taken to bond a town, the commissioners, under the law, had a right to make the bonds payable at one time or at different times. Winter *v.* Montgomery, 65 Ala. 403 (1880), where a vote authorized the issue of bonds to an amount not exceeding $1,000,000, and it was held that the corporate authorities had discretionary power to issue them for a less amount.

4 Brocaw *v.* Gibson County, 73

titled to the benefit of any implied conditions to which an individual subscriber would be entitled.[1]

Where a condition precedent has not been fulfilled the subscription is not enforceable, and bonds issued in payment will be invalid even in the hands of *bona fide* holders; as, for example, where the

Ind. 543 (1881); Portland, etc. R. R. *v.* Hartford, 58 Me. 23 (1870). A municipality authorized to vote a subscription to the stock of a railroad company may impose conditions that shops be built in the town. Casey *v.* People, 132 Ill. 546 (1890); Chicago, etc. R. R. *v.* Aurora, 99 Ill. 205 (1881), holding that if, of two conditions, one is legal and the other unauthorized, and they are severable, the illegal one may be rejected and the bonds issued held good as to the other; Nœsen *v.* Port Washington, 37 Wis. 168 (1875); Perkins *v.* Port Washington, 37 Wis. 177 (1875); Platteville *v.* Galena, etc. R. R., 43 Wis. 493 (1878), holding that, where a town accepted a written proposition from a railroad company, the terms and construction of it were not allowed to be modified by reason of representations made by the company to the voters before the election; Foote *v.* Mount Pleasant, 1 McCrary, 101 (1878); s. c., 9 Fed. Cas. 368. In this case the proceeds of city bonds issued in payment of a subscription to a railroad were to be expended within the county limits. It was held that, as between the city and the road or its assignees with notice, the bonds could not be enforced if no part of the proceeds had been so expended. Atchison, etc. R. R. *v.* Phillips County, 25 Kan. 261 (1881). *Cf.* Memphis, etc. Ry. *v.* Thompson, 24 Kan. 170 (1880); Red Rock *v.* Henry, 106 U. S. 596 (1882); Shurtleff *v.* Wiscasset, 74 Me. 130 (1882); State *v.* Hancock Co., 11 Ohio St. 183 (1860). In this case commissioners who were authorized to subscribe for stock in a railroad to run through their county and to issue bonds therefor, and who had subscribed for the stock, were allowed, as against a proceeding to compel them to issue bonds, to set up the defense that the road had not been located in their county. A certificate of the municipal authorities that the condition has been complied with renders the bonds issued on that certificate valid and enforceable, though the certificate was a fraud on the municipality. Oregon *v.* Jennings, 119 U. S. 74 (1886); People *v.* Holden, 82 Ill. 93 (1876). In this case the completion of a road, except about one mile, and the operation of its trains for that distance over another road so as to supply all the wants of the public, were held a substantial compliance with a condition requiring its completion. Hodgman *v.* St. Paul, etc. Ry., 23 Minn. 153 (1876), holding that a condition calling for the completion of a road to a certain point did not require the building of a bridge across a river, other facilities for crossing it being provided. See also on conditional subscriptions, Concord *v.* Portsmouth Sav. Bank, 92 U. S. 625 (1875); Railroad Co. *v.* Falconer, 103 U. S. 821 (1880); ch. V. *supra*. In Madison County Court *v.* Richmond, etc. R. R., 80 Ky. 16 (1882), it is held that, while a county may make such conditions as may seem proper to it before submitting the question of a subscription to a popular vote, the county court cannot, after the vote is taken, require other conditions, or alter those already imposed, or by a second election change the terms of the contract of subscription as originally made and entered into. See also Carroll County *v.* Smith, 111 U. S. 556 (1884).

[1] Lamb *v.* Anderson, 54 Iowa, 190 (1880).

location of a railway in a certain place is the condition, and the location is not made as required by the condition.[1] But if it be a condition subsequent, as where a town subscribed for stock in a railway company upon condition that the road should "be built through the town on the line as run by the engineer, with a suitable depot for the convenience of the public," a failure to perform is not a defense to an action to collect assessments.[2]

§ 98. *When may a municipal subscription be paid in bonds instead of money?* —The express power of a municipality to subscribe for stock does not authorize it to issue negotiable bonds therefor.[3] But where a municipal corporation is authorized to

1 Mellen *v.* Lansing, 19 Blatchf. 512 (1881); Chicago, etc. R. R. *v.* Marseilles, 84 Ill. 145 (1876); Bucksport, etc. R. R. *v.* Brewer, 67 Me. 295 (1877).

2 Belfast, etc. R. R. *v.* Brooks, 60 Me. 568 (1872). *Cf.* Chicago, etc. R. R. *v.* Schewe, 45 Iowa, 79 (1876). Where the condition of a municipal subscription for stock is that the money shall be expended when necessary and within the county, the company may exercise its reasonable judgment as to such necessity, and even if the money is misappropriated, yet a suit against the company is barred after twenty years. Marion County *v.* Louisville, etc. R. R., 78 S. W. Rep. 437 (Ky. 1904). As to a subsequent breach of a condition attached to the subscription, see People *v.* Rome, etc. R. R., 103 N. Y. 95 (1886). A contract to keep certain shops, etc., permanently in a place, in consideration of local aid, may be disregarded by the railroad after many years, when its terminus changes, etc. Texas, etc. Ry. *v.* Marshall, 136 U. S. 393 (1890). Lessees of the purchaser of a railroad purchased at foreclosure sale are not bound by the contract of the first railroad company, made with the municipalities voting aid, in reference to depots. People *v.* Louisville, etc. R. R., 120 Ill. 48 (1887). See also People *v.* Holden, 82 Ill. 93 (1876); Hodgman *v.* St. Paul, etc. R. R., 23 Minn. 153 (1876); State *v.* Clark, 23 Minn. 422 (1877); State *v.* Lime, 23 Minn. 521 (1877). See also § 78, *supra.* In New York it is held that, where a town imposes, as a condition precedent to its subscription, that the road be located and constructed through the town, the commissioners have no power to accept any agreement from the company or any substitute in lieu of full compliance. Falconer *v.* Buffalo, etc. R. R., 69 N. Y. 491 (1877). Where the agent of the railroad represented that a depot was to be constructed at a certain place, a failure to so construct is good ground for enjoining the issue of municipal-aid bonds. Wullenwaber *v.* Dunigan, 30 Neb. 877 (1890). *Cf.* ch. IX, *infra.* As to the right to revoke a consent by popular vote, see § 94, *supra.*

3 Norton *v.* Dyersburg, 127 U. S. 160 (1888). Even though a municipal corporation be authorized by statute to subscribe to the stock of a railroad, yet it cannot issue its negotiable bonds to pay such subscription, there being no statutory authority for the issue of such bonds. Hill *v.* Memphis, 134 U. S. 198 (1890). *Cf.* Seybert *v.* Pittsburg, 1 Wall. 272 (1863); Commonwealth *v.* Pittsburgh, 41 Pa. St. 278 (1861); Concord *v.* Portsmouth Sav. Bank, 92 U. S. 625 (1875).

Statutory authority to raise money by tax and appropriate it to aid of a railroad does not authorize the issue of bonds by the municipality therefor.

subscribe to the stock of a railway or other corporation, or to lend its credit thereto, and to issue bonds to that end, it may, in the exercise of its proper discretion, instead of selling the bonds and applying the proceeds to the payment of the subscription, deliver the bonds themselves to the railway company in exchange for an equivalent amount of stock.[1]

In New York a contrary view prevails, and there is force in the New York argument that only thus can the full par value of the bonds be realized for the purposes of the enterprise.[2]

§ 99. *A municipal corporation as a stockholder.*—When a municipal corporation subscribes to the stock of a railroad company, it becomes a stockholder in just the same sense as any individual subscriber; is entitled to the same rights, privileges, and emoluments; and is subject to the same burdens of duty and liability as other holders of the stock.[3]

Concord *v.* Robinson, 121 U. S. 165 (1887).

1 Meyer *v.* Muscatine, 1 Wall. 384, 392 (1863); Evansville, etc. R. R. *v.* Evansville, 15 Ind. 395 (1860); Curtis *v.* Butler County, 24 How. (U. S.) 435 (1860); Aspinwall *v.* Daviess County, 22 How. 364 (1859), where, before the authorized subscription was made, a new constitution was adopted making such subscriptions void unless paid in cash; *held*, that bonds issued to pay a subscription made after the new constitution was adopted were void. Where a town issues bonds instead of paying money, as required by statute, and the bonds are declared void, the holder is not subrogated to the right of the railroad to the money itself. Ætna Life Ins. Co. *v.* Middleport, 124 U. S. 534 (1888).

2 Starin *v.* Genoa, 23 N. Y. 439 (1861); Bank of Rome *v.* Rome, 19 N. Y. 20 (1859); Horton *v.* Thompson, 71 N. Y. 513 (1877); People *v.* Batchellor, 53 N. Y. 128, 136 (1873), where the court says that if the bonds were turned over to the railroad the latter would sell them for what they would bring, which would generally be less than par. A sale of municipal bonds at less than par in violation of the statute renders the bonds illegal. Citizens', etc. Bank *v.* Town of Greenburg, 31 N. Y. Misc. Rep. 428 (1900). For decisions to the effect that, at common law, a municipal corporation cannot sell its bonds at less than par, see Neuse River Nav. Co. *v.* Newbern, 7 Jones, L. (N. C.) 275 (1859); Dan. Neg. Inst. (3d ed.), § 1533; Armstrong County *v.* Brinton, 47 Pa. St. 367 (1864); Gould *v.* Sterling, 23 N. Y. 456, 460 (1861). It is apparent that, if bonds are sold below par, the rate of interest is thereby increased, and the rate of interest is generally fixed by the statute authorizing the issue of the bonds.

3 Shipley *v.* Terre Haute, 74 Ind. 297 (1881); Kreiger *v.* Shelby R. R., 84 Ky. 66 (1866); Gray *v.* State, 72 Ind. 567 (1880); 1 Dan. Neg. Inst., § 436; Murray *v.* Charleston, 96 U. S. 432 (1877). See also Curran *v.* State, 15 How. 304 (1853); Robinson *v.* Bank of Darien, 18 Ga. 65 (1855); Bank of U. S. *v.* Planters' Bank, 9 Wheat. 904 (1824); Morgan County *v.* Thomas, 76 Ill. 120 (1875); State *v.* Holladay, 72 Mo. 499 (1880); Marshall *v.* Western N. C. R. R., 92 N. C. 322 (1885); Morgan County *v.* Allen, 103 U. S. 498 (1880), holding that the creditors of an insolvent cor-

This doctrine is established as an unquestioned rule of law by the long line of cases, both in the state and federal courts, which involve the validity of municipal bonds issued in aid of railroad or other corporations. Where a state is a stockholder in a railroad corporation, its rights are no different from those of a private individual who is a stockholder.[1] Hence, where a state is a stock-

poration may enforce the liability of municipal corporations upon their bonds; Robinson *v.* Bidwell, 22 Cal. 379 (1863); People *v.* Coon, 25 Cal. 635 (1864), holding that the individual members of a municipal corporation have no such interest in stock in a railroad subscribed for by it as will disable the legislature from authorizing it to compromise with the railroad. A county holding stock in a railroad is the same as any other stockholder. Hinds County *v.* Natchez, etc. R. R., 85 Miss. 599 (1905). Where a municipality becomes a stockholder of a railroad company, it becomes such, in the absence of statutory regulation, in just the same manner, is entitled to the same rights, and subject to the same burdens as an individual holder of stock. Marklove *v.* Utica, etc. R. R., 48 N. Y. Misc. Rep., 268 (1905). A foreclosure of the railroad on a mortgage closes out the stock which a municipality has therein. Spurlock *v.* Missouri Pac. Ry., 90 Mo. 199 (1886). See also § 890. A judgment creditor may reach a municipal subscription payable in bonds by *mandamus*, after acquiring the company's right thereto. Smith *v.* Bourbon County, 127 U. S. 105 (1888). A municipality as a stockholder may assent to the sale of the railroad by the corporation to another reorganized corporation. Foster *v.* Chesapeake, etc. Ry., 47 Fed. Rep. 369 (1891). A municipality's stock in a corporation cannot be reached by a judgment creditor of the municipality except by proving that the subscription was legal. Hughes *v.* Craven County, 107 N. C. 598 (1890). Where stock in a railroad is owned by a part of a county, that part becomes a municipality for the purpose of owning and voting the stock. Hancock *v.* Louisville, etc. R. R., 145 U. S. 409 (1892). Execution or garnishee process cannot be levied on stock held by an individual as trustee, where the debt is his individual debt, nor can it be levied on the dividends from such stock. So held where stock was owned by a city in trust for the citizens. Hitchcock *v.* Galveston Wharf Co., 50 Fed. Rep. 263 (1880).

Where a municipality is the vendor of land to a corporation and brings suit to set aside the transfer as fraudulent and illegal, and joins the three trustees of a mortgage of the corporation as parties defendant and serves them by publication, and, two of the trustees having died, causes successors to be appointed by the court and obtains decree against the corporation, and the trustees of the mortgage canceling their title to the land, the decree is effective; and even though the mortgage is afterwards foreclosed the purchaser at such sale takes no title to such land, he having delayed thirty years before attacking such decree. Bump *v.* Butler County, 93 Fed. Rep. 290 (1899). On the other hand, where a municipality delays for thirty years in complaining of fraud and illegality whereby it conveyed land to a corporation, the court will not grant it any relief. Rummel *v.* Butler County, 93 Fed. Rep. 304 (1899).

[1] Southern Ry. *v.* North Carolina R. R., 81 Fed. Rep. 595 (1897). A county holding stock in a railroad corporation holds it the same as any

holder, and by statute is entitled to a certain vote at elections, a subsequent statute cannot give to the state a larger vote.[1]

§ 100. *A municipality may enforce delivery of stock to itself in a proper case.*—Under the same circumstances and conditions, and to the same extent, as any other subscriber, a municipal corporation may compel a railway or other corporation to deliver to it stock to which the subscribers in general are entitled. Whatever would prevent an individual subscriber from enforcing such delivery will equally prevent a municipality in a like case.[2] A municipal corporation, as a subscriber, is in no better position than an individual subscriber in this respect.[3]

§ 101. *Division of the municipality after the subscription.*—There is a line of cases in the reports of some of the western states which deals with the questions which have grown out of the subdivision of towns and counties in those states, after a donation or subscription has been made to some railroad or other corporation, and before the bonds have been issued, or before they have become due and payable.

It is, of course, not competent for the legislature so to divide a municipality as to release all or any part of it from the obligation of any contract into which the whole had previously entered.[4] When a town or county is divided, or some part of it annexed to some other town or county, after the undivided municipality has voted a subscription, and it is provided in the act by which the division is accomplished that each part shall remain liable for the previous municipal indebtedness, such provision is held to mean nothing more than that, as concerns the subscription voted, each part is liable for its proportion only of the debt according to the valuation of the property of the undivided municipality at the time the vote was taken.[5] This rule, however, cannot affect the creditor's right to hold liable the whole of the old municipality.

other stockholder. Adams *v.* Natchez, etc. R. R., 76 Miss. 714 (1899).

1 Tucker *v.* Russell, 82 Fed. Rep. 263 (1897).

2 Wapello County *v.* Burlington, etc. R. R., 44 Iowa, 585 (1876). In this case the stock was to be issued only when fully paid.

3 Pittsburgh, etc. R. R. *v.* Allegheny County, 79 Pa. St. 210 (1875). *Cf.* State *v.* Garroutte, 67 Mo. 445 (1878).

4 Sedgwick County *v.* Bailey, 11 Kan. 631 (1873). *Cf.* State *v.* Lake City, 25 Minn. 404 (1879); Marion County *v.* Harvey County, 26 Kan. 181 (1881); Henderson *v.* Jackson County, 12 Fed. Rep. 676 (1881).

5 Hurt *v.* Hamilton, 25 Kan. 76 (1881). See also Eagle *v.* Beard, 33 Ark. 497 (1878), holding that, in the absence of statutory provision, the detached part of a county is released from liability for the debts of the county; but the legislature may apportion the debt between the old and the new counties; McBride *v.* Hardin County, 58 Iowa, 219 (1882), holding

§§ 102, 103. *Consolidation of companies after the municipal aid is voted.*—When the company proposed to be benefited unites or is consolidated with another company or companies of a similar character, after the aid of a municipality has been voted and before the subscription has been paid—the company having before the election the right to consolidate,—the bonds may lawfully be issued to or sold for the benefit of the new or consolidated company.[1] When, however, the consolidation works such a fundamental change in the constitution and purpose of the original corporation that individual subscribers are thereby released, a subscription by the municipality will be invalidated,[2] but otherwise not.[3] Municipal

that a county is not responsible for expenses incurred by one of the townships comprising it in voting taxes in aid of a railroad.

1 Livingston County *v.* Portsmouth Bank, 128 U. S. 102 (1888); New Buffalo *v.* Iron Co., 105 U. S. 73 (1881); Bates County *v.* Winters, 97 U. S. 83 (1877); Scotland County *v.* Thomas, 94 U. S. 682 (1876); East Lincoln *v.* Davenport, 94 U. S. 801 (1876); Wilson *v.* Salamanca, 99 U. S. 499 (1878); Empire *v.* Darlington, 101 U. S. 87 (1879), holding that, where stock in a railroad had been subscribed for by a township under statutory authority, an additional subscription after it was consolidated with another road and under a new name was valid. Menasha *v.* Hazard, 102 U. S. 81 (1880); Harter *v.* Kernochan, 103 U. S. 562 (1880), holding that where township records showed that bonds were directed to be issued and delivered to a consolidated company, although the act authorizing them and the vote under it contemplated the issue to one of the consolidated companies, the township was estopped to deny their validity. Tipton County *v.* Locomotive Works, 103 U. S. 523 (1880); State *v.* Greene County, 54 Mo. 540 (1874); Mount Vernon *v.* Hovey, 52 Ind. 563 (1876). See also Nugent *v.* Supervisors, 19 Wall. 241 (1873); Cantillon *v.* Dubuque, etc. Ry., 78 Iowa, 48 (1889); Henry County *v.* Nicolay, 95 U. S. 619 (1877). In this case a railroad company had, after the subscription, transferred its franchises to another company. In a suit upon the bonds, paid for the stock, in the hands of an innocent purchaser, the bonds were upheld. Schuyler County *v.* Thomas, 98 U. S. 169 (1878). *Cf.* Harshman *v.* Bates County, 92 U. S. 569 (1875). A municipal aid cannot be enforced where the railroad company sells all its property to another company. Cantillon *v.* Dubuque, etc. R. R., 35 N. W. Rep. 620 (Iowa, 1887).

2 Lynch *v.* Eastern, etc. Ry., 57 Wis. 430 (1883); Harshman *v.* Bates County, 92 U. S. 569 (1875), will hardly be followed. It does not accord with the current decisions. See Crooks *v.* State, 4 N. E. Rep. 589 (Ind. 1886). Where a railroad has consolidated with another before a municipal subscription to the former has actually been made, such subscription cannot be enforced. Edwards *v.* Bates County, 117 Fed. Rep. 526 (1902).

3 Atchison, etc. R. R. *v.* Phillips County, 25 Kan. 261 (1881); Society for Savings *v.* New London, 29 Conn. 174 (1860). In this last case the new company was substantially the same as the one to which the subscription was made. The court held the issue of the bonds to the new company valid; Illinois, etc. Ry. *v.* Barnett, 85 Ill. 313 (1877), holding that the legal purchase of another road will not invalidate subscriptions; Howard

bonds voted and delivered to a corporation under a changed name are of course not invalidated by such change.[1] Where a railroad company has received local aid and afterwards removes its tracks, it is liable to the municipality for the aid so rendered.[2]

County *v.* Booneville, etc. Bank, 108 U. S. 314 (1882), holding that the defense, after paying interest for several years, that the road constructed was not the one to whose stock the subscription was authorized, was not good, it appearing that it was a branch of the road referred to in the act. Commonwealth *v.* Pittsburgh, 41 Pa. St. 278 (1861); Lewis *v.* Clarendon, 5 Dillon, 329 (1878); s. c., 15 Fed. Cas. 474; Chickaming *v.* Carpenter, 106 U. S. 663 (1882). A subsequent consolidation of a company with another does not release the municipality from its obligation to deliver the bonds. Morrill *v.* Smith County, 89 Tex. 529 (1896). After consolidation of a railroad a county may make a subscription to its stock, even though the statute authorizing the subscription was passed before the consolidation. Board of Com'rs *v.* Travelers' Ins. Co., 128 Fed. Rep. 817 (1904).

1 Reading *v.* Wedder, 66 Ill. 80 (1872); Commonwealth *v.* Pittsburgh, 41 Pa. St. 278 (1861). In Marsh *v.* Fulton County, 10 Wall. 676 (1870), where the legislature so amended the charter of a railway company as to divide the road into three divisions, and each division was made a new company, so that there were three distinct corporations in place of the original corporation, it was held by the federal supreme court that a subscription of stock and issue of county bonds, authorized by a popular vote to be made to the original corporation, could not legally be made to one of the three new corporations. Consolidation with another railroad is no defense to the county, where the statute authorizing it existed at the time of the county vote. Chicago, etc. R. R. *v.* Stafford County, 36 Kan. 121 (1887); Tipton County, etc. *v.* Locomotive, etc., 103 U. S. 523 (1880), holding that if a municipal corporation consents to a consolidation of roads it is estopped from denying the validity of its bonds in the hands of a *bona fide* holder.

2 Town of Hinckley *v.* Kettle, etc. R. R., 70 Minn. 105 (1897); s. c., 80 Minn. 32. See also note 2, p. 350, *supra*.

CHAPTER VII.

CALLS.

§ 104. Definition of call.
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106. When a call is unnecessary—Payment in advance.
107. In New York no call is required.
108. In case of corporate insolvency no call is necessary.
109. Who has authority to make calls.
110. Calls by directors.
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116. Time, place, amount, and person to whom payable.
117. Notice of calls—Cases holding it not necessary.
118. Notice of calls—Cases holding it necessary.
119. Methods of serving notice of calls.
120. Demand, waiver, pleadings, etc.

§ 104. *Definition of call.*—A "call" may be defined to be an official declaration, by the proper corporate authorities, that the whole or a specified part of the subscriptions to the capital stock is required to be paid.[1] The term, however, is used with different meanings, and may refer to the resolution of the officials that a part or the whole of the subscription must be paid, or to the resolution and notification thereof, or the combination of facts making the parties called on liable to an action for the non-payment of the money called.[2] An assessment is a term often used to designate the same thing as a call, but sometimes refers to payments sought to be recovered from the stockholders, above and in addition

1 Quoted and approved in Campbell *v.* American, etc. Co., 125 Fed. Rep. 207 (1903); Braddock *v.* Philadelphia, etc. R. R., 45 N. J. L. 363 (1883), holding also that a direction by the directors to the president to collect the subscriptions is a call. In Spangler *v.* Indiana, etc. Ry., 21 Ill. 276 (1859), a call or assessment is rather vaguely defined as "a rating or fixing of the proportion, by the board of directors, which every subscriber is to pay of his subscription, when notified of it and when called on." Newry, etc. Ry. *v.* Edmunds, 2 Exch. 118 (1848), holds that a call is an application to each stockholder for a proportion of his share.

2 Quoted and approved in Germania Iron Min. Co. *v.* King, 94 Wis. 439 (1896). See also Queen *v.* Londonderry, etc. Ry., 13 Q. B. 998 (1849). In Ambergate, etc. Ry. *v.* Mitchell, 4 Exch. 540 (1849), it is said "the word 'call' is capable of three meanings: it may either mean the resolution, or its notification, or the time when it becomes payable. It must mean either one of these three."

to the par value of the stock.[1] An instalment is one of the several part payments into which a single call may be divided.

§ 105. *Call is generally necessary.*—As a general rule a call must be made in order to render a subscription or any part thereof due and payable to the corporation. A contract of subscription is a promise to pay; but, unlike other contracts to pay money, the payment is to be only at such times, and in such part payments, as may be designated by the corporate authorities in a formal declaration known as a "call."[2] In other words, the subscription is a debt

1 Quoted and approved in Omo *v.* Bernart, 108 Mich. 43 (1895).

2 "No action can be maintained against a stockholder for an instalment on his subscription until the board has directed the call to be made." Banet *v.* Alton, etc. R. R., 13 Ill. 504 (1851); Spangler *v.* Indiana, etc. Ry., 21 Ill. 276 (1859); Braddock *v.* Philadelphia, etc. R. R., 45 N. J. L. 363 (1883); Ventura, etc. Ry. *v.* Hartman, 116 Cal. 260 (1897). In Grosse Isle Hotel Co. *v.* l'Anson, 42 N. J. L. 10 (1880); aff'd, 43 N. J. L. 442 (1881), the court said a subscription for stock "imports an agreement not to pay at once the whole sum representing the value of the shares subscribed for, but a stipulation to pay such sum when called for by the directors in amounts duly assessed." And in Bank of South Australia *v.* Abrahams, L. R. 6 P. C. App. 265 (1875), the court said: "The company has no absolute right, and the shareholder is under no absolute liability to pay. The right only arises if and when calls are made by the directors. . . . The due making of the call by the resolution of a board of directors is an essential condition precedent." To the same effect, see Wilbur *v.* Stockholders, 18 Nat. Bankr. Reg. 178 (1878); s. c., 29 Fed. Cas. 1189. Where, by statute or charter, payment is to be in such manner and proportion and times as the directors may order, there can be no suit to collect until after a call. Grissell's Case, L. R. 1 Ch. App. 528, 535 (1866); Alabama, etc. R. R. *v.* Rowley, 9 Fla. 508 (1861). Even where the stock is fraudulently issued as paid up, in payment for property, and the transaction is impeached for fraud, a call is necessary before the subscription can be enforced. Granite Roofing Co. *v.* Michael, 54 Md. 65 (1880). Where, however, for failure to furnish the property due on a subscription, a suit for damages is brought by the corporation, no call need precede such suit. An allegation of a general demand suffices. Cheraw, etc. R. R. *v.* Garland, 14 S. C. 63 (1880); Ohio, etc. R. R. *v.* Cramer, 23 Ind. 490 (1864). A call is not applicable to stock which was subscribed for after the call was made. Pike *v.* Bangor, etc. R. R., 68 Me. 445 (1878). A subscription payable "in such instalments and at such times as may be decided by a majority of the stockholders or board of directors," etc., is not collectible until the instalments and times have been so fixed. North, etc. R. R. *v.* Spullock, 88 Ga. 283 (1892). A call must be alleged where the subscription liability is set up by the defendant company as a set-off. Holt *v.* Holt, etc. Co., 79 Fed. Rep. 597 (1897). Uncalled subscriptions are not a debt. They become a debt only after a call has been made. Alexander *v.* Automatic, etc. Co., [1899] 2 Ch. 302; rev'd on another point in [1900] 2 Ch. 56. The statute of limitations does not run against an

payable at a future time.[1] The time when it shall be paid is indefinite until fixed by a call.

§ 106. *When a call is unnecessary — Payment in advance.* —If, however, a subscription contains a promise to pay upon a certain day, no call is necessary; but the subscriber is bound to pay, at all events, upon the day named.[2] So, also, if by statute or the charter the subscription becomes payable at a certain specified time, a call is thereby dispensed with, and is not required.[3] A stockholder, on the other hand, is not obliged to wait for a call even when entitled to it. He may pay at any time.[4] Where stockholders advance money in prepayment of calls, the company may pay them interest on the same up to the time that the call is due, even though such interest is paid out of the capital.[5] A note given in payment for a

unpaid subscription until a call and assessment has been made. McCarter *v.* Ketcham, 72 N. J. L. 247 (1905).

1 The subscription "is a present debt, payable at a future day." Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857). The subscription "creates a debt, but the debt does not accrue due until a call is made." Grissell's Case, L. R. 1 Ch. App. 528, 535 (1866). In *Re* China Steamship, etc. Co., 38 L. J. (Ch.) 512 (1869), the court said: "The moment the call is made it is a debt due in every respect," although it cannot be collected by suit until later.

2 Estell *v.* Knightstown, etc. Turnp. Co., 41 Ind. 174 (1872); New Albany, etc. R. R. *v.* Pickens, 5 Ind. 247 (1854); Ross *v.* Lafayette, etc. R. R., 6 Ind. 297 (1855); Breedlove *v.* Martinsville, etc. R. R., 12 Ind. 114 (1859); Waukon, etc. R. R. *v.* Dwyer, 49 Iowa, 121 (1878). Where a subscriber gives a note in payment of the subscription the assignee of the corporation may enforce the note, although no calls have been made on subscriptions. Ruse *v.* Bromberg, 88 Ala. 619 (1889). No call is necessary where the subscription itself fixes the time of payment. Williams *v.* Taylor, 99 Md. 306 (1904).

3 Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294 (1876).

4 Marsh *v.* Burroughs, 1 Woods, 463 (1871); s. c., 16 Fed. Cas. 800; Poole's Case, L. R. 9 Ch. D. 322 (1878). But if such payment is by the directors themselves, and it is immediately repaid to them for fees, the corporation being insolvent, the transaction will be set aside. Sykes's Case, L. R. 13 Eq. Cas. 255 (1871). So, also, a payment in advance, on an agreement that such payment shall be only a loan if the corporation is successful, but shall be a payment of the subscription if the corporation becomes insolvent, is held to be a loan, though insolvency occurs. Barge's Case, L. R. 5 Eq. Cas. 420 (1868). Frequently a subscription is paid, before a call, by applying to its payment money due the subscriber from the corporation. Adamson's Case, L. R. 18 Eq. Cas. 670 (1874). A subscription for bonds, the amount being payable on call, may be paid at once and the bonds demanded. Watjen *v.* Green, 48 N. J. Eq. 322 (1891). A stockholder who offers to pay his subscription in full, which offer is declined by the corporation, is not thereby released from his obligation if he continues to act as a stockholder. Potts *v.* Wallace, 146 U. S. 689 (1892).

5 Lock *v.* Queensland, etc. Co., [1896] A. C. 461. H. L. aff'g [1896] 1 Ch. 397. Where the purchase price

subscription does not bear interest unless the note itself so provides, especially where no call on the subscription has been made.[1]

Where the pledgor files a bill to redeem and the pledgee claims that the stock is sold and not pledged, and the court decides that the transaction was a pledge and decrees the amount to be paid by the pledgor to redeem, and the pledgee then appeals and pays assessments on the stock, pending the appeal, the pledgee may recover back such assessments from the pledgor, even though the judgment was affirmed on appeal.[2]

§ 107. *New York rule.*—In New York it seems that a peculiar rule prevails. In that state there is a tendency to hold that no call is necessary before suit is brought on a subscription for stock. The subscriber's obligation to pay, and the time and manner of payment, must be sought for in the contract itself. Unless the contract provides for calls, the subscription is payable absolutely and at once, or as soon as the corporation is duly organized.[3] Accordingly, in an action brought to collect a subscription, it is not necessary to allege that a call has been made, unless the terms of the subscription or the provisions of the corporate charter expressly provide for calls. These rules, however, seem not to have been directly passed upon by the highest court in New York, and cannot be considered as clearly established in that state.[4]

of stock is to be in ten equal payments, and interest is to be allowed if payment is made in advance, the interest may be collected. Porter *v.* Beacon Constr. Co., 154 Pa. St. 8 (1893).

1 Seattle T. Co. *v.* Pitner, 18 Wash. 401 (1898).

2 Irvine *v.* Angus, 93 Fed. Rep. 629 (1899).

3 Lake Ontario, etc. R. R. *v.* Mason, 16 N. Y. 451 (1857); Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294, 300 (1876). In the former case, however, calls were made and notice given by advertisement in a newspaper. In the latter case, by the terms of the charter, all subscriptions were due at the time when suit was commenced. Hence, in both cases, the statements in reference to calls have the appearance of *dicta*. In Mann *v.* Pentz, 3 N. Y. 415 (1850), it was held that a receiver could not collect uncalled subscriptions, since "the only condition upon which he (the subscriber) could have been made liable to the corporation was by regular calls made in pursuance of the charter." See also Bouton *v.* Dry Dock, etc. Co., 4 E. D. Smith, 420 (1855); Seymour *v.* Sturgess, 26 N. Y. 134 (1862); Savage *v.* Medbury, 19 N. Y. 32 (1859); Howland *v.* Edmonds, 24 N. Y. 307 (1862); Williams *v.* Taylor, 120 N. Y. 244 (1890), rev'g Williams *v.* Meyer, 41 Hun, 545.

4 These rules seem to be peculiar to New York. The decisions in some of the other states hold, however, that no notice of calls is necessary. See § 117, *infra*. Practically, such a rule is equivalent to requiring no call at all, since in both cases collection is made only by direction of the directors or other officers, and in both cases the subscriber need not be informed of such directions. No notice

§ 108. *In case of corporate insolvency no call is necessary.*— When a corporation becomes insolvent, and there exist subscriptions which have not been fully paid in, the directors frequently neglect or refuse to make the calls necessary for the purpose of paying the corporate debts. In such cases a court of equity will disregard the formality of a call, and will order the unpaid subscriptions to be paid to a receiver for the benefit of the corporate creditors.[1] The courts very properly hold that it is not discretionary with the directors to say whether the company's debts shall be paid or not. And this is the rule even though the statute provides that

of a call need be given before enforcing the same. United Growers Co. *v.* Eisner, 22 N. Y. App. Div. 1 (1897).

[1] "It is well settled that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it." Scovill *v.* Thayer, 105 U. S. 143 (1881); Glenn *v.* Williams, 60 Md. 93 (1882); Glenn *v.* Semple, 80 Ala. 159 (1885). "A company call is but a step in the process of collection, and a court of equity may pursue its own mode of collection, so that no injustice is done to the debtor." Hatch *v.* Dana, 101 U. S. 205 (1879). No call is necessary before stockholders are liable to creditors on their unpaid subscription, even though the charter provides for a call. Hill *v.* Merchants' Mut. Ins. Co., 134 U. S. 515 (1890). See also Myers *v.* Seeley, 10 Nat. Bankr. Reg. 411 (1874); Sanger *v.* Upton, 91 U. S. 56 (1875); Wilbur *v.* Stockholders, 18 Nat. Bankr. Reg. 178 (1879); s. c., 29 Fed. Cas. 1189; Carnahan *v.* Campbell, 158 Ind. 226 (1902). An assessment is necessary before suit against a subscriber, and such assessment must be made by the corporation if solvent, and by the court if insolvent. The assessment by the court will be on all stockholders, and if part cannot be collected a further assessment may be made later. Covell *v.* Fowler, 144 Fed. Rep. 535 (1906). No call is necessary when a trustee in bankruptcy has been appointed. Rathbone *v.* Ayer, 84 N. Y. App. Div. 186 (1903). The United States bankruptcy court may order an assessment on holders of unpaid stock and may direct the trustee in bankruptcy to bring suit at law therefor in the state court. Clevenger *v.* Moore, 71 N. J. L. 148 (1904). A creditor may file a bill to collect unpaid subscriptions without a call being first made by the directors, where the company has disposed of all its property and is insolvent. Chilberg *v.* Siebenbaum, 41 Wash. 663 (1906). An order of the court deciding the amount of debts and the necessity of collecting subscriptions to pay the same and specifying payments to be made by stockholders, and authorizing suit for that purpose, constitutes an assessment. McCarter *v.* Ketcham, 67 Atl. Rep. 610 (N. J. 1907). Where the corporation, being indebted, has the power to call, and does not choose to exercise it, equity at the instance of creditors will exercise it. Marsh *v.* Burroughs, 1 Woods, 463 (1871); s. c., 16 Fed. Cas. 800; Boeppler *v.* Menown, 17 Mo. App. 447 (1885); Adler *v.* Milwaukee, etc. Mfg. Co., 13 Wis. 57 (1860); Glenn *v.* Dodge, 3 Cent. Rep. 283 (1885); Great Western Tel. Co. *v.* Gray, 122 Ill. 630 (1887); Ward *v.* Griswoldville Mfg. Co., 16 Conn. 593 (1844); Miller's Case, 54 L. J. (Ch.) 141 (1884); Henry *v.* Vermillion, etc. R. R., 17 Ohio, 187 (1848); Ogilvie *v.* Knox Ins. Co., 22 How. 380

calls shall be made by the directors.[1] A call may be made by the court, and its discretion in that respect cannot be contested.[2]

There has been some doubt as to whether the writ of *mandamus* would lie to compel the directors to make the call;[3] but the author-

(1859); Curry *v.* Woodward, 53 Ala. 371 (1875); Chandler *v.* Keith, 42 Iowa, 99 (1875); Shockley *v.* Fisher, 75 Mo. 498 (1882). The filing of the bill in the suit in equity is equivalent to a call. Hatch *v.* Dana, 101 U. S. 205 (1879); Thompson *v.* Reno Sav. Bank, 19 Nev. 103, 245 (1885). See also Yeager *v.* Scranton, etc. Bank, 14 Weekly N. Cas. 296 (1884). It is settled law that a decree in a chancery suit is equivalent to a call. Glenn *v.* Saxton, 68 Cal. 353 (1886). If the court orders that notice of the call be given, the receiver cannot collect by suit unless such notice is given. Franklin Savings Bank *v.* Fatzinger, 4 Atl. Rep. 912 (Pa. 1886). Where the whole of the unpaid subscriptions are needed to pay corporate debts, no assessment, even by the court, is necessary. But, unless the evidence clearly shows such necessity, it is for the jury to say whether the whole unpaid subscription shall be paid. Citizens', etc. Co. *v.* Gillespie, 115 Pa. St. 564 (1887), citing cases. See § 207, *infra*. Where an assignment is made by the corporation for the benefit of creditors, the statute of limitations begins to run within a reasonable time, even if no call is made. Glenn *v.* Dorsheimer, 24 Fed. Rep. 536 (1885). *Cf.* § 195, *infra*. In Missouri it has been held that there can be no garnishment of an unpaid subscription until after a call has been made. Parks *v.* Heman, 7 Mo. App. 14 (1879). In New York there are a few *dicta* to the effect that calls by the directors are necessary before unpaid subscriptions can be enforced for the benefit of corporate creditors. Seymour *v.* Sturgess, 26 N. Y. 134 (1862); Mann *v.* Pentz, 3 N. Y. 415 (1850). But the prevailing rule is sustained in Sagory *v.* Dubois, 3 Sandf. Ch. 466 (1846), where the court says: "The articles, it is true, in effect require that calls should be made by the directors, and probably the association could not maintain an action at law until such calls were regularly made; but that does not impair the remedy in behalf of the receiver." An assignee for the benefit of creditors of a corporation may collect a subscription without any call. McKay *v.* Elwood, 12 Wash. 579 (1895). Where by a decree a company is ordered to pay the subscriptions to its stock to one of its creditors, the attorney for the company who collects the subscriptions cannot retain them for his fees. Gray *v.* Overby, 37 S. W. Rep. 159 (Ky. 1896). No call is necessary where a corporate creditor files a bill to reach unpaid subscriptions. Adamant Mfg. Co. *v.* Wallace, 16 Wash. 614 (1897).

1 Glenn *v.* Saxton, 68 Cal. 353 (1886); Crawford *v.* Rohrer, 59 Md. 599 (1882). *Contra*, Louisiana Paper Co. *v.* Waples, 3 Woods, 34 (1877); s. c., 15 Fed. Cas. 968, where the charter prescribed that calls should be only by a three-fourths vote of the stockholders. *Cf.* 46 S. Rep. 285.

2 *Re* Minnehaha, etc. Assoc., 53 Minn. 423 (1893). The order of the court levying an assessment is binding on the stockholders, even though no notice was given to them. Brown *v.* Allebach, 156 Fed. Rep. 697 (1907).

3 "A chancellor will compel the directors to make the calls required by the charter whenever his aid is invoked by creditors or the representative of creditors." Germantown Pass. Ry. *v.* Fitler, 60 Pa. St. 124 (1869). The three English cases usually cited on this point do not hold that a *mandamus* lies herein. Queen *v.* Victoria Park Co., 1 Q. B. 288 (1841); Queen

ities seem to hold that the writ will not lie for this purpose. The usual procedure to collect unpaid subscriptions is an order of a court of equity made in a suit brought by corporate creditors for the purpose of applying corporate assets to corporate debts.[1] The court may direct the receiver to make a call instead of the court making the call itself directly.[2] Where, at the instance of the attorney-general, a bank has been declared insolvent and the transaction of further business enjoined, an assessment on the stock levied before the decree, but payable after the decree, cannot be enforced by the bank.[3]

§ 109. *Who has authority to make calls.*—A call, in order to be legal and enforceable, must be made by the proper corporate authorities. Generally, the power to make calls is vested in the directors or in the stockholders at large. Unless the charter or a statute makes provision therefor, the question as to who shall make calls is a question of internal arrangement. If no provision whatever is made for the exercise of the power, it devolves upon the directors, on the general principle that they alone have power to manage and superintend the financial matters of the corporation and to exercise all corporate powers, except those required to be exercised at corporate meetings.[4] Even though the statute author-

v. Ledgard, 1 Q. B. 616 (1841); Rex *v.* Katharine Dock Co., 4 B. & Ad. 360 (1832). In the case of Dalton, etc. R. R. *v.* McDaniel, 56 Ga. 191 (1876), the court held that a *mandamus* was unnecessary, on the ground that the remedy by bill was easier and more complete, and that justice would be better administered in this way by an account of all the corporate debts, and of all liabilities of solvent stockholders, taken by a master in chancery. In Hatch *v.* Dana, 101 U. S. 205 (1879), the court says a *mandamus* "can avail only when there are directors. The remedy in equity is more complete." In Ward *v.* Griswoldville Mfg. Co., 16 Conn. 593 (1844), the court refused a *mandamus* because it would enforce the collection of only a few debts, whereas the remedy in equity would enforce all proportionately.

1 "Under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment." Scovill *v.* Thayer, 105 U. S. 143 (1881). In bankruptcy, it seems, the assignee, by succeeding to all the rights of the corporation, may make a call and enforce it. Hatch *v.* Dana, 101 U. S. 205 (1879). See also §§ 202, 207, *infra*. At common law a court of equity could not make calls for benefit of corporate creditors. *Dictum*, Grain's Case, L. R. 1 Ch. D. 307, 323 (1875).

2 Falk *v.* Whitman, etc. Co., 55 N. J. Eq. 396 (1897).

3 Bank of National City *v.* Johnson, 133 Cal. 185 (1901).

4 Budd *v.* Multnomah St. Ry., 15 Oreg. 413 (1887). The directors may make calls "as they may do all things, except such as are to be done by the shareholders at a general meeting." Ambergate, etc. Ry. *v.* Mitchell, 4 Exch. 540 (1849). Directors in liqui-

izes calls by the stockholders, yet the directors also have the same power.[1]

§ 110. *Calls by directors.*—Where the power to make calls is vested in the directors, a call by those who are directors *de facto* will be upheld.[2] The directors, in whom the power to make calls is vested, cannot delegate their authority.[3] It is a power the exer-

dating a company may call in unpaid subscriptions, even though the by-laws provided that no calls shall be made except upon a two-thirds vote of the outstanding stock. Union, etc. *v.* Leiter, 145 Cal. 696 (1905).

1 Ambergate, etc. Ry. *v.* Mitchell, 4 Exch. 540 (1849). In *Ex parte* Winsor, 3 Story, 411 (1844); s. c., 30 Fed. Cas. 312, it was held, however, that where the charter gave to the corporation the power to assess stock it must be exercised exclusively by the stockholders in meeting assembled. On the other hand, in Rives *v.* Montgomery, etc. Co., 30 Ala. 92 (1857), the court held that stockholders who by charter have power to make calls may delegate that power to the directors. See also Healey on Companies, 3d ed., p. 125.

2 "An illegal election of directors cannot be set up in resistance of the payment of stock, but would be a case for a *quo warranto* to oust the illegally elected directors." Eakright *v.* Logansport, etc. R. R., 13 Ind. 404 (1859); Johnson *v.* Crawfordsville, etc. R. R., 11 Ind. 280 (1858); Fairfield County Turnp. Co. *v.* Thorp, 13 Conn. 173 (1839); Steinmetz *v.* Versailles, etc. Turnp. Co., 57 Ind. 457 (1877); Macon, etc. R. R. *v.* Vason, 57 Ga. 314 (1876); Atherton *v.* Sugar Creek, etc. Turnp. Co., 67 Ind. 334 (1879). In People's Mut. Ins. Co. *v.* Westcott, 80 Mass. 440 (1860), however, a call by directors elected at a meeting held without notice was declared invalid and not enforceable. A call may be enjoined on the ground that the directors were illegally elected. Moses *v.* Tompkins, 84 Ala. 613 (1888). A call cannot be enjoined on the ground that the *de facto* board is not a *de jure* board. Chandler *v.* Sheep, etc. Co., 15 Utah, 434 (1897). In England the courts will inquire into the right of directors to their office, in cases involving the validity of calls. Swansea Dock Co. *v.* Levien, 20 L. J. (Ex.) 447 (1851). If the directors were not legally elected, their calls and forfeitures of stock based thereon will be set aside. Garden Gully, etc. Co. *v.* McLister, L. R. 1 App. Cas. 39 (1875). See Healey on Companies, 3d ed., p. 126. If the corporate organization was not regular, and the directors were not legally elected, their call is not enforceable. Howbeach Coal Co. *v.* Teague, 5 Hurlst. & N. 151 (1860). Directors elected at a meeting called on thirteen days' notice instead of fourteen as required by statute may make calls, where their election has been confirmed by a subsequent annual general meeting. Briton, etc. Assoc. *v.* Jones, 61 L. T. Rep. 384 (1889).

3 Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863), the court saying: "When a charter requires the directors to do some specific act, there seems to be a stronger reason why they should be held incapable of delegating such authority than when mere general powers are conferred on them." See also Banet *v.* Alton, etc. R. R., 13 Ill. 504 (1851); Pike *v.* Bangor, etc. R. R., 68 Me. 445 (1878); *Re* Bolt & Iron Co., 10 Pr. R. (Can.) 434 (1884); Silver Hook Road *v.* Greene, 12 R. I. 164 (1878), where it was delegated to the treasurer; Farmers' Mut. F. Ins. Co. *v.* Chase, 56 N. H. 341 (1876), citing

cise of which involves a discretion which cannot be exercised by others. A call by a minority meeting of the directors, no quorum being present, is void.[1]

§ 111. *Assignment of subscriptions by corporation before or after call.*—The unpaid and uncalled subscriptions for stock cannot be mortgaged or sold by the corporation. If the transfer by the directors were allowed, "the consequence would be that the discretion which they are bound to exercise would be wholly defeated and put an end to."[2] The power of making calls, being a discretionary one, cannot be transferred to other parties. The transfer is void. The subscribers are bound to pay their subscriptions only when, in the opinion of the proper corporate authorities, or of a court of equity, the money is needed for corporate purposes. This power

authorities; Monmouth, etc. Ins. Co. *v.* Lowell, 59 Me. 504 (1871). But where the power is delegated and exercised, the call may be ratified by the directors, and will then be valid. Read *v.* Memphis Gayoso Gas Co., 9 Heisk. (Tenn.) 545 (1872); Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863). Although the directors cannot delegate the power to make a call, yet they may delegate the power "to determine the amount of some of the installments, and to designate the times of payment." Banet *v.* Alton, etc. R. R., 13 Ill. 504 (1851). It is not necessary to allege that the directors were duly elected. Miller *v.* Wild Cat, etc. Co., 52 Ind. 51 (1875); Steinmetz *v.* Versailles, etc. Turnp. Co., 57 Ind. 457 (1887). But proof must be given that the proper authorities made the call. New Jersey Midland Ry. *v.* Strait, 35 N. J. L. 322 (1872).

1 Price *v.* Grand Rapids, etc. R. R., 13 Ind. 58 (1859); Hamilton *v.* Grand Rapids, etc. R. R., 13 Ind. 347 (1859); Bottomley's Case, L. R. 16 Ch. D. 681 (1880). But may be confirmed by a quorum. *Re* Phosphate of Lime Co., 24 L. T. 932 (1871).

2 *Ex parte* Stanley, 33 L. J. (Ch.) 535 (1864); *Re* Sankey Brook Coal Co., L. R. 10 Eq. 381 (1870). To the same effect, see New Jersey Midland Ry. *v.* Strait, 35 N. J. L. 322 (1872); Wells *v.* Rodgers, 50 Mich. 294 (1883); s. c., 44 Mich. 411 (1886), involving the consolidation of two railroads. See also Crooks *v.* State, 4 N. E. Rep. 589 (Ind. 1866); Wallingford Mfg. Co. *v.* Fox, 12 Vt. 304 (1840); Bank of South Australia *v.* Abrahams, L. R. 6 P. C. App. 265 (1875); Hurlbut *v.* Root, 12 How. Pr. 511 (1855); Hill *v.* Reid, 16 Barb. 280 (1853); Hurlbut *v.* Carter, 21 Barb. 221 (1855). *Cf.* Smith *v.* Hollett, 34 Ind. 519 (1870), where the subscription was not for stock, but as a bonus. The articles of incorporation of a company may authorize a mortgage on unpaid and uncalled subscriptions. *Re* Pyle Works, L. R. 44 Ch. D. 534 (1890); s. c. [1891] 1 Ch. 173. A transfer of the "business and property" of a corporation does not carry unpaid subscriptions. Bank of China *v.* Morse, 44 N. Y. App. Div. 435, 445 (1899); aff'd, 168 N. Y. 458. Where subscriptions are with the consent of the subscribers pledged to secure a debt of the corporation, the pledgee may enforce the subscriptions although the ten per cent. required by the statute to be paid at the time of the subscription was not paid. Knickerbocker T. Co. *v.* Hard, 67 N. Y. App. Div. 463 (1902).

of ascertaining and determining the extent of the corporate needs, being a discretionary power, cannot be transferred or delegated to others. A different rule prevails, however, after a call has been made but not yet collected. An assignment of the amount already called is legal and valid.[1] It has been held in Connecticut that the right to collect unpaid subscriptions may be sold by an insolvent corporation.[2] The usual railroad mortgage does not cover subscriptions for stock in the sense of preventing the corporation from collecting them.[3] Statutory power to transfer the business and property of a corporation does not authorize a transfer of its unpaid subscriptions.[4] In Pennsylvania a statute which authorized a corporation to transfer a subscription from one enterprise to another has been held unconstitutional.[5]

1 *Re* Humber Iron-works Co., 16 Weekly Rep. 474, 667 (1868); Wells *v.* Rodgers, 50 Mich. 294 (1883); Miller *v.* Malony, 3 B. Mon. (Ky.) 105 (1842), where the call was assigned to the contractor who owed the subscriber for work done; Downie *v.* Hoover, 12 Wis. 174 (1860); Morris *v.* Cheney, 51 Ill. 451 (1869), where, however, it is not clear that a call had been made. A call which had been determined upon, but not definitely made, may be transferred if it is afterwards duly made by the directors. *Re* Sankey Brook Coal Co., L. R. 9 Eq. 721 (1870). See s. c., L. R. 10 Eq. 381. As to the enforcement of a subscription by a subsequently created corporation formed by consolidation, see ch. LIII. A mortgage on all the land, property and effects of the corporation does not include uncalled subscriptions. King *v.* Marshall, 33 Beav. 565 (1854). *Cf. Re* Marine Mansions Co., L. R. 4 Eq. 601 (1867); *Re* British Prov. L. Ins. Co., 4 De G., J. & S. 407 (1864); Gardner *v.* London, etc. Ry. Co., L. R. 2 Ch. 201, 215 (1867); Pickering *v.* Ilfracombe Ry., 37 L. J. (C. P.) 118 (1868); Lishmann's Claim, 23 L. T. Rep. (N. S.) 759 (1870). Where a company has assigned unpaid subscriptions, the company itself may not be able to collect them. Clark *v.* Sigua, etc. Co., 81 Fed. Rep. 310 (1897). An assignee of unpaid subscriptions may assign to still another. Rand *v.* Wiley, 70 Iowa, 110 (1886). As to the right of one road built on the line of an abandoned road to recover on a private donation to the latter, see Sickels *v.* Anderson, 63 Mich. 421 (1886). The assignee of the right of a corporation to collect a subscription may collect it the same as the corporation could. Chattanooga, etc. R. R., *v.* Warthen, 98 Ga. 599 (1896). A subscriber is liable although the company under its charter sells its railroad to another company, the subscription being payable to the company and its assigns. The subscriber is entitled to stock in the successor company. Chattanooga, etc. R. R. *v.* Warthen, 98 Ga. 599 (1896). Where a corporation assigns a subscription for stock, the receiver of the corporation is not a necessary party to a suit to collect the subscription. Coler *v.* Grainger County, 74 Fed. Rep. 16 (1896).

2 Fish *v.* Smith, 73 Conn. 377 (1900).

3 See § 852, *infra.*

4 Bank of China *v.* Morse, 168 N. Y. 458 (1901).

5 Pittsburgh, etc. R. R. *v.* Gazzam, 32 Pa. St. 340 (1858).

§ 112. *Interest runs from the time the call is due.*— A subscriber who has failed to pay a call when it becomes due, according to its terms, is properly chargeable with interest from the time of the default.[1] Where subscriptions, by their terms, are payable monthly, they bear interest from the date when they become due, so far as creditors are concerned.[2]

§ 113. *Stockholders cannot question advisability of call.*—The necessity or advisability of making a call is a matter which rests exclusively within the discretion of the corporate authorities who have power to make the call.[3] A stockholder, when sued upon an unpaid call, cannot set up in defense that there was no occasion or use for the money. Whether made by the court or by the directors, the call is conclusive evidence of the necessity therefor unless directly attacked and set aside by judicial proceedings.[4] The call,

1 McCoy *v.* World's, etc. Exposition, 186 Ill. 356 (1900); Gould *v.* Oneonta, 71 N. Y. 298 (1877); Rikhoff *v.* Brown's, etc. Machine Co., 68 Ind. 388 (1879); Casey *v.* Galli, 94 U. S. 673 (1876). See also Burr *v.* Wilcox, 22 N. Y. 551 (1860), and Parker *v.* Adams, 38 N. Y. Misc. Rep. 325 (1902). *Cf.* Stocken's Case, L. R. 5 Eq. 6 (1867); aff'd, L. R. 3 Ch. App. 412; Cleveland *v.* Burnham, 55 Wis. 598 (1882); s. c., 64 Wis. 347. In Liggett *v.* Glenn, 51 Fed. Rep. 381 (1892), interest was allowed only from the date of suit and not from the date of the call. *Cf.* Hambleton *v.* Glenn, 72 Md. 331 (1890). Interest on the instalment cannot be recovered if no notice of the call was given. American Pastoral Co. *v.* Gurney, 61 Fed. Rep. 41 (1894). Interest is due only from the day the subscriber was placed in default. Jackson, etc. Co. *v.* Walle, 105 La. 89 (1900). Interest is allowed from the date of the decree fixing the liability on the particular stockholders. Florsheim *v.* Illinois, etc. Bank, 192 Ill. 382, aff'g 93 Ill. App. 297 (1901).

2 Hawkins *v.* Citizens', etc. Co., 38 Oreg. 544 (1901).

3 The question of the necessity for the call "was a matter for the determination of the board of directors." Chouteau Ins. Co. *v.* Floyd, 74 Mo. 286 (1881). "The question whether those necessities demanded the payment of the money was for the directors." Judah *v.* American, etc. Ins. Co., 4 Ind. 333 (1853); Budd *v.* Multnomah St. Ry., 15 Oreg. 413 (1887). One cannot object to a call on the ground that the motives of the directors were wrong. Oglesby *v.* Attrill, 105 U. S. 605 (1881). Courts cannot in the absence of fraud inquire into the necessity of an assessment by the directors. Nashua Sav. Bk. *v.* Anglo-American, etc. Co., 189 U. S. 221 (1903), citing § 113 *supra.* The necessity and propriety of levying an assessment is for the directors to determine and their discretion cannot be controlled by the stockholders. Weber *v.* Della, etc. Co., 94 Pac. Rep. 441 (Idaho, 1908).

4 Great Western Tel. Co. *v.* Purdy, 162 U. S. 329 (1896). It is no defense that the call is unnecessary. American Alkali Co. *v.* Campbell, 113 Fed. Rep. 398 (1902). A call is presumed to have been regularly made, and it need not be proved that the corporation needed the money. Nashua, etc. Bank *v.* Anglo-American, etc. Co., 189 U. S. 221 (1903). Necessity or advisability of a call cannot be questioned by the stockhold-

however, must be for the *bona fide* purpose of raising money for corporate purposes. It must not be for the purpose of enabling the stockholders to use the money to the detriment of the creditors of the failing corporation.[1] Moreover, a court of equity will set aside calls and payments made and managed with a view to discharging the stockholders' liability and preventing the proceeds from being applied to the general corporate debts. If the purpose of a call is illegal, the call cannot be collected.[2] Equity, however, will not interfere with a call merely because the money received may be diverted by the directors to an act or enterprise beyond the powers of the corporation.[3] The corporation cannot contract to postpone indefinitely a call.[4] To allow such postponement would be unjust to corporate creditors and other stockholders.

§ 114. *Calls must be impartial and uniform.*—A call cannot be made so as to affect a part only of the subscribers. It must be made on all alike or it will be void.[5] The courts will not allow the directors of a company so to proceed as to require some stockholders to pay calls, and not to require others to do the same. Any such

ers. Fitzgerald's Estate *v.* Union Sav. Bank, 65 Neb. 97 (1902). The necessity or wisdom of a call cannot be questioned by the stockholder in the absence of fraud. Anglo-American, etc. Co. *v.* Dyer, 181 Mass. 593 (1902).

1 Habershon's Case, L. R. 5 Eq. 286 (1868). Thus, where the amount paid in is immediately paid out to the directors for fees, the transaction is fraudulent, and is set aside. Sykes's Case, L. R. 13 Eq. Cas. 255 (1872). On the other hand, the directors cannot delay calls in order to enable themselves to transfer their stock and avoid liabilities. Gilbert's Case, L. R. 5 Ch. App. 559 (1870); Preston *v.* Grand Collier Dock Co., 11 Sim. 327 (1840).

2 Bank of China *v.* Morse, 168 N. Y. 458 (1901). An assessment on irrigation stock to be used for a purpose outside of the charter powers, cannot be collected, and a forfeiture and sale of the stock for failure to pay is void. Seeley *v.* Huntington, etc. Assn., 27 Utah 179 (1904).

3 In the case of Bailey *v.* Birkenhead, etc. Ry., 12 Beav. 433 (1850), the court said it is not within the jurisdiction of courts "to take the accounts and make the inquiries necessary for the purpose of ascertaining whether, under the circumstances to which the company is reduced, and in a continuing concern, it is proper, in the due management of the affairs of the company, to raise money by way of calls from the shareholders." Corporate meetings are the places for such complaints. See also Yetts *v.* Norfolk Ry., 3 De G. & Sm. 293 (1849).

4 McComb *v.* Credit Mobilier, 13 Phila. 468 (1878); Van Allen *v.* Illinois Cent. R. R., 7 Bosw. 515 (1861)—the last case holding, however, that this principle does not prevent the issue of bonds convertible into stock whenever the stockholder desires.

5 Pike *v.* Bangor, etc. R. R., 68 Me. 445 (1878). A suit to collect thirty-five per cent. of a subscription fails where other subscribers have paid but two per cent. Great Western Tel. Co. *v.* Burnham, 79 Wis. 47 (1891); Bowen *v.* Kuehn, 79 Wis. 53 (1891).

attempt will be promptly set aside and rectified.[1] If, however, some stockholders have already contributed more than others, the new call may equalize the contributions.[2]

§ 115. *Method of making calls—No formalities necessary.*—There are no prescribed or established rules stating how a call shall be made by the corporate authorities empowered to make it. Any act or resolution which in a court of law would prove a clear official intent to render due and payable a part or all of the unpaid subscriptions seems to be sufficient.[3] A mere street conversation, however, between the directors, by which they "agree" that subscriptions shall be called, is not a sufficient call.[4] The call need not indicate when, or to whom, or where, payment is required to be made.[5] These are to be stated in the notice of the call.[6] Mere

1 Preston *v.* Grand Collier Dock Co., 11 Sim. 327 (1840). The New York courts refused to hold a New York stockholder in an English corporation liable for his unpaid subscription where under a plan of reorganization, sanctioned by the English courts, in accordance with English law, the amount collected is to go to the reorganized company, while other stockholders need not pay their subscriptions if they take part in the reorganized company and pay a small sum, especially where, if all the stockholders paid in full, the amount would be more than necessary to pay the debts. Bank of China *v.* Morse, 168 N. Y. 458 (1901). Even though it is legal under the statutes of England to provide that no calls shall be made on certain shares, except upon a winding up, yet where the directors are the subscribers for such shares and do not fully inform other subscribers of the situation, they may be compelled at the instance of a stockholder to pay at the same time that the others pay, even though there was no actual fraud, the parties having acted in good faith. Alexander *v.* Automatic, etc. Co., [1900] 2 Ch. 56, rev'g [1899] 2 Ch. 302. If directors use their power to make calls oppressively, they will be restrained. Cannon *v.* Trask, L. R. 20 Eq. 669 (1875). As where the object is to disqualify from voting those who cannot pay. Anglo, etc. Bank *v.* Baragnon, 45 L. T. 362 (1881).

2 Brockway *v.* Gadsden, etc. Co., 102 Ala. 620 (1894).

3 Budd *v.* Multnomah St. Ry., 15 Oreg. 413 (1887); Citizens', etc. Ins. Co. *v.* Sortwell, 92 Mass. 110, 112 (1865).

4 Branch *v.* Augusta Glass Works, 95 Ga. 573 (1895).

5 Quoted and approved in Germania Iron Min. Co. *v.* King, 94 Wis. 439 (1896); Fox *v.* Allensville, etc. Turnp. Co., 46 Ind. 31 (1874); Andrews *v.* Ohio, etc. R. R., 14 Ind. 169 (1860). In the case of Great North. etc. Ry. *v.* Biddulph, 7 M. & W. 243 (1840), Baron Parke held that the resolution for a call need not state the place of payment nor the person to whom it was payable. Compare

6 Quoted and approved in American Pastoral Co. *v.* Gurney, 61 Fed. Rep. 41 (1894), where the omission in the call to state where and to whom the call was payable was held not fatal, even though the charter seemed to require those facts to be stated; and holding also that it is sufficient if the notice of the call states those facts.

irregularities are disregarded, and will not invalidate the call.[1] The substantial fact must exist that the proper corporate officers voted or declared that payment be required. Hence the elements of a call seem to be that it shall be by the proper persons acting officially; and that a resolution, susceptible of legal proof,[2] be passed that a certain amount, either the whole or part,[3] of the subscriptions for stock shall be paid in. If the statute prescribes the form of the call this form must be followed.[4] A call which prescribes that payment may be in cash or by land contract is too indefinite

Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863), to the effect that the place must be stated. A call made in a new name, legally assumed by the corporation, is binding on subscribers who knew of the change of name. Shackleford *v.* Dangerfield, L. R. 3 C. P. 407 (1868). A call need not name any time, place, or person to whom payment must be made. Unless otherwise specified the call is payable on demand at the office of the company and to an officer authorized to receive payment. Western Imp. Co. *v.* Des Moines Nat. Bank, 103 Iowa, 455 (1897).

1 Irregularities are no defense. The remedy is to revoke or set aside the call. "Calls *in fact* made, means that if made, and notice be given, . . . a party shall not wait to take advantage of any irregularity at the trial." *Re* British Sugar Ref. Co., 3 K. & J. 408 (1857); Southampton Dock Co. *v.* Richards, 2 Railw. Cas. 215, 234 (1840); s. c., 1 Man. & Gr. 448. See also Shackleford *v.* Dangerfield, L. R. 3 C. P. 407 (1868). An error in the call may be corrected and cured by a subsequent call made after the first liability accrued but before suit. Philadelphia, etc. R. R. *v.* Hickman, 28 Pa. St. 318 (1857). A director who participated in making the call cannot set up informalities for the purpose of defeating it. Hays *v.* Pittsburgh, etc. R. R., 38 Pa. St. 81 (1860). Payment and acquiescence in informality as to one call waives it as to another call. Macon, etc. R. R. *v.* Vason, 57 Ga. 314 (1876).

2 A call by the directors is valid although no entry of the resolution is made in the minutes of the directors' meeting. Hays *v.* Pittsburgh, etc. R. R., 38 Pa. St. 81 (1860). An entry of the resolution, made by the secretary in the book containing the minutes, is sufficient. Fox *v.* Allensville, etc. Turnp. Co., 46 Ind. 31 (1874). An authorized subsequent call is competent proof of the validity of a previous call. Bavington *v.* Pittsburgh, etc. R. R., 34 Pa. St. 358 (1859). The corporate books are competent to prove both the call and the mode of payment. Bavington *v.* Pittsburgh, etc. R. R., 34 Pa. St. 358 (1859); Comfort *v.* Leland, 3 Whart. (Pa.) 81 (1837).

3 The call may be for the whole subscription. Fox *v.* Allensville, etc. Turnp. Co., 46 Ind. 31 (1874). May be for the whole or for part. Haun *v.* Mulberry, etc. Co., 33 Ind. 103 (1870); Stone *v.* Great Western Oil Co., 41 Ill. 85 (1866); Spangler *v.* Indiana, etc. R. R., 21 Ill. 276 (1859); Ross *v.* Lafayette, etc. R. R., 6 Ind. 297 (1855). Even though it be expressly provided that only a certain sum shall be assessed at one time, yet several assessments, each one not in excess of the stated sum, may be ordered by a single vote. Penobscot R. R. *v.* Dummer, 40 Me. 172 (1855); Penobscot, etc. R. R. *v.* Dunn, 39 Me. 587 (1855).

4 Germania Iron Min. Co. *v.* King, 94 Wis. 439 (1896).

to sustain a suit, inasmuch as it does not prescribe the terms upon which the land contracts will be received and does not state at whose option payment may be so made.[1] The validity of a call by an English corporation is determined by English law so far as formalities are concerned,[2] but not where it violates settled principles of the common law.[3]

§ 116. *Time, place, amount, and person to whom payable.*—The time and place and person to whom calls are to be paid need not necessarily be designated or fixed by the persons authorized to make the call.[4] These are duties which may be performed by other officers of the corporation, and frequently either the president or treasurer of the corporation performs this work. The time of payment should be reasonable,[5] as also should be the place. A provision in the by-laws that the subscriptions should be called in at certain times only may be modified. A company cannot contract not to alter its by-laws.[6] If no place or person to receive payment is designated, it is to be paid to the treasurer at his office.[7] The amount called need not be made payable in one sum at one time, but may be made due in instalments.[8]

1 North, etc. Co. *v.* Bishop, 103 Wis. 492 (1899), the court saying in regard to a call, "the chief requisites are that it should be impartial and uniform, and sufficiently definite to enable the stockholder to comply with its requirements."

2 American Pastoral Co. *v.* Gurney, 61 Fed. Rep. 41 (1894).

3 Bank of China *v.* Morse, 168 N. Y. 458 (1901).

4 See § 115, note 4, *supra*. The directors themselves may fix the time, place, and manner of payment, even at a meeting subsequent to the meeting ordering a call. The call may be prospective. The directors may order that on a certain date a call payable at a later date shall be made. Sheffield, etc. Ry. *v.* Woodcock, 7 M. & W. 574 (1841). The subscription itself may regulate the time of payment. New Jersey Midland Ry. *v.* Strait, 35 N. J. L. 322 (1872); Roberts *v.* Mobile, etc. R. R., 32 Miss. 373 (1856). Even though the statute provides otherwise. Iowa, etc. R. R. *v.* Perkins, 28 Iowa, 281 (1869).

5 Fairfield County Turnp. Co. *v.* Thorp, 13 Conn. 173 (1839). The time between payments of instalments is entirely within the discretion of the directors, there being no provision regulating the subject. Hall *v.* United States Ins. Co., 5 Gill (Md.), 484 (1847).

6 Malleson *v.* National, etc. Corp., [1894] 1 Ch. 200.

7 A resolution of the directors that the instalments should be paid in "at the times therein designated imports that payments should be made to the treasurer, who is the proper and only officer to receive and keep the moneys of the corporation." Danbury, etc. R. R. *v.* Wilson, 22 Conn. 435 (1853). As to a tender to the president, see Mitchell *v.* Vermont, etc., Co., 67 N. Y. 280 (1876). Directors in making a call should specify the place of payment. Provident, etc. Co. *v.* Wilson, 25 Q. B. Rep. (Can.) 53 (1866).

8 Northwestern Ry. *v.* McMichael, 6 Exch. 273 (1851); Birkenhead, etc. Ry. *v.* Webster, 6 Exch. 277 (1851);

§ 117. *Notice of calls—Cases holding it not necessary.*—There is a wide and irreconcilable difference of opinion among the authorities on the question whether notice of a call must be given to a stockholder before suit can be brought for the collection of a call.

Frequently either the charter, or a statute, or the by-laws of the corporation, require notice to be given; and in such cases notice is, of course, necessary in order to sustain suit.[1] But where there is no provision in the charter, or statute, or by-laws, or subscription itself, prescribing that notice of calls shall be given to the stockholders, the weight of authority holds that no notice is necessary, and that an action to collect the call may be maintained without averring or proving such a notice.[2]

Ambergate, etc. Ry. *v.* Norcliffe, 6 Exch. 629 (1851), not following Stratford, etc. Ry. *v.* Stratton, 2 B. & Ad. 519 (1831). In Birkenhead, etc. Ry *v.* Webster, as reported in 6 Exch. 277 (1851), the court says: "We are unanimously of opinion that a call payable by instalments is good, although debt will not lie for one instalment until all the instalments are due and payable." In Hays *v.* Pittsburgh, etc. R. R., 38 Pa. St. 81 (1860), the court held that the directors by one resolution could call in the balance of the subscriptions, making the call payable in instalments, due at different times. To the same effect, see Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863); Lewis's Case, 28 L. T. (N. S.) 396 (1873). Where the resolution of the directors specifies that the call shall be made on September 16th following, and shall be payable in instalments at specified times thereafter, the date of the call is September 16th, and a stockholder who transfers his stock after September 16th but before the instalments are payable, is liable for such instalments. Campbell *v.* American, etc. Co., 125 Fed. Rep. 207 (1903).

1 In many of the states there exist statutes, very similar in their terms, that notice shall be given of calls, and that in case of non-payment the stock may be forfeited. These statutes have received different interpretations in different states. The usual construction is that the notice required therein refers only to the forfeiture proceedings, and does not necessitate notice before bringing a suit at law for the collection of the call. Smith *v.* Indiana, etc. Ry., 12 Ind. 61 (1859); Lake Ontario, etc. R. R. *v.* Mason, 16 N. Y. 451, 464 (1857). In other states such a statute is construed to require notice before suit. Hughes *v.* Antietam Mfg. Co., 34 Md. 316 (1870); Granite Roofing Co. *v.* Michael, 54 Md. 65 (1880); Dexter, etc. Co. *v.* Millerd, 3 Mich. 91 (1854). Illinois River R. R. *v.* Zimmer, 20 Ill. 654 (1858), holds that a statute regulating notice of calls does not release the stockholder.

2 Wilson *v.* Wills Valley R. R., 33 Ga. 466 (1863); Eppes *v.* Mississippi, etc. R. R., 35 Ala. 33 (1859); Grubb *v.* Mahoning Nav. Co., 14 Pa. St. 302 (1850); Gray *v.* Monongahela Nav. Co., 2 W. & S. (Pa.) 156 (1841); Grubbs *v.* Vicksburg, etc. R. R., 50 Ala. 398 (1873); Eakright *v.* Logansport, etc. R. R., 13 Ind. 404 (1859); Johnson *v.* Crawfordsville, etc. R. R., 11 Ind. 280 (1858); New Albany, etc. R. R. *v.* McCormick, 10 Ind. 499 (1858); Fisher *v.* Evansville, etc. R. R., 7 Ind. 407 (1856); Ross *v.* Lafayette, etc. R. R., 6 Ind. 297 (1855); Hill *v.* Nisbet, 100 Ind. 341 (1884); Smith *v.* Indiana, etc. Ry., 12 Ind. 61 (1859). In the last case the court

§ 118. *Notice of calls—Cases holding it necessary.*—There is, however, strong authority for the rule that notice of calls must be given before suit is brought for their collection.[1] The reason for this rule seems to accord with sound legal principles and with business expediency. It is a well-established principle of law that, when the facts or circumstances upon which the performance of a contract depends lie more particularly in the knowledge of the promisee than the promisor, the former must give the latter notice. Hence it would seem that since a subscription is not due absolutely, but only on call, and the time, place and amount of the call is fixed by persons other than the subscribers, the better and more reasonable rule would be that notice of the call should be required and must be given.

§ 119. *Methods of serving notice of calls.*—The manner and mode of giving notice has given rise to some controversy. Unless provision is expressly otherwise, the notice must be given by handing to the subscriber a written notice, or by informing him orally that the call has been made, giving the amount, time, place, and person to whom payment is to be made.[2] Where the notice is served,

said: "These decisions rest upon the ground that the contract to pay by instalments is in effect a promise to pay on demand, and that the demand involved in the suit itself was alone sufficient." Notice of calls is required by the Pennsylvania railroad act. McCarty *v.* Selingsgrove, etc. R. R., 87 Pa. St. 332 (1878). In New York, since no call is necessary, no notice is necessary. *Cf.* Macon, etc. R. R. *v.* Vason, 57 Ga. 314 (1876). If notice of a call is given some time before a suit is brought, it is immaterial that the directors authorized the commencement of suit at the time notice was given. People's etc. Bank *v.* Rauer, 2 Cal. App. 445 (1906).

1 Wear *v.* Jacksonville, etc. R. R., 24 Ill. 593 (1860); Spangler *v.* Indiana, etc. Ry., 21 Ill. 276 (1859). *Cf.* Peake *v.* Wabash R. R., 18 Ill. 88 (1856), holding that notice is unnecessary. In the case of Carlisle *v.* Cahawba, etc. R. R., 4 Ala. (N. S.) 70 (1842), the court says that notice must be given, since "the times, amount of instalments, and manner of payment were all to be prescribed by the president and directors of the corporation, depended upon their volition and action, and consequently were more properly within their knowledge." See also Scarlett *v.* Academy of Music, 43 Md. 203 (1875); s. c., 46 Md. 132; Essex Bridge Co. *v.* Tuttle, 2 Vt. 393 (1830); Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863); Miles *v.* Bough, 3 Q. B. 845 (1842); Edinburgh, etc. Ry. *v.* Hebblewhite, 6 M. & W. 707 (1840); Alabama, etc. R. R. *v.* Rowley, 9 Fla. 508 (1861). In Hughes *v.* Antietam Mfg. Co., 34 Md. 316 (1870), the court says: "To say that it [notice] is unnecessary, because the subscribers, who may be living in different parts of the country, and perhaps the state, are presumed in law to know all that is done by the directory, seems to us to be raising a presumption against the truth itself."

2 The notice need not be written. Verbal notification suffices. Smith *v.* Tallassee, etc. Co., 30 Ala. 650, 666 (1857). Notice to pay to the treas-

not personally, but by mail, the notice is effective only in case it is actually received.[1] Whether it was so received is a question for the jury.[2] A publication of a notice in a newspaper is not binding and effectual unless it be proved that the subscriber who is sued actually read the notice as published.[3] A personal notice is suf-

urer sufficiently indicates the place of payment. It is understood to be at his office. Muskingum, etc. Co. *v.* Ward, 13 Ohio, 120 (1844). *Contra*, Dexter, etc. Co. *v.* Millerd, 3 Mich. 91 (1854). It must be proved to have been signed by authorized persons. Miles *v.* Bough, 3 Q. B. 845 (1842). Notice to various parties in the neighborhood is not sufficient. New Jersey Midland Ry. *v.* Strait, 35 N. J. L. 322 (1872). No particular form of notice is necessary. The only question is "whether the notice gives the shareholder to understand that a call has been made, and that he is required to pay the amount on a given day." Shackleford *v.* Dangerfield, L. R. 3 C. P. 407 (1868).

1 "Constructive notice by the mail is not a personal notice, although in some cases, by express statutory provision, it is sufficient to bind parties." Hughes *v.* Antietam Mfg. Co., 34 Md. 316 (1870). Notice of a call for the payment of a subscription must be served personally and service by mail is insufficient, unless the by-laws authorize service in that manner. North, etc. Co. *v.* Bishop, 103 Wis. 492 (1899).

2 A notice of a call may be by mail. If the subscriber denies that he received it, the question is for the jury. Braddock *v.* Philadelphia, etc. R. R., 45 N. J. L. 363 (1883). Only the person actually mailing the notice can testify to that fact. Jones *v.* Sisson, 72 Mass. 288 (1856).

3 In Alabama, etc. R. R. *v.* Rowley, 9 Fla. 508 (1861), the court says such a mode of notice "might be attended with irreparable injury to innocent parties." See also *dictum* in Lake Ontario, etc. R. R. *v.* Mason, 16 N. Y. 451 (1857). In Schenectady, etc. Co. *v.* Thatcher, 11 N. Y. 102 (1854), where the charter prescribed notice by publication or by mail, a director who aided in giving the notices was held to have had personal notice and to be bound. "Personal service of due notice is clearly more advantageous to the defendant than either an advertisement in a newspaper or a notice sent by mail." See also Lexington, etc. R. R. *v.* Chandler, 54 Mass. 311 (1847). See also § 130, *infra*. Notice in a newspaper is not good notice unless the statute so prescribes. People's, etc. Assoc. *v.* Furey, 47 N. J. Eq. 410 (1890).

In the case of Lincoln *v.* Wright, 23 Pa. St. 76—1854 (not a corporation case), Judge Jeremiah Black said that a notice by publication in a newspaper was no notice unless actually read by the person charged with the notice. "It must be proved that he read it; otherwise it is no stronger than proof that the fact was orally and publicly uttered at a place where he was not present." On the other hand, in Hall *v.* U. S. Ins. Co., 5 Gill (Md.), 484 (1847), notice of a call by newspaper was held sufficient. The court said: "There is no proportionate object attained for the great inconvenience, labor, and expense incident to 'personal notice.' The substitution of such newspaper publications in lieu of personal notice has so long been an universal usage, and of a notoriety equal to that of the publication of newspapers themselves, that the custom of doing so has become a part of the law of the land." See also Louisville, etc. Co. *v.* Meriwether, 5 B. Mon. (Ky.) 13 (1844), to the same effect, and

ficient, although the charter, statute, or by-laws provide for notice by publication.[1] An express promise of the subscriber to pay a call which has been already made is presumptive evidence that he had notice of that call.[2] Notice by publication, given under the authority of a statute, charter, or by-law, must strictly comply with the provisions prescribed as to the time and formalities.[3] The by-laws of a company may provide that notice of a call shall be given by posting the same at the office of the company, so far as stockholders are concerned who have not left their address with the company.[4] It has been held in England that after a stockholder is dead and the company has knowledge of that fact, notice of an assessment on his stock cannot be served so as to bind his estate; neither can a notice

dictum in Danbury, etc. R. R. *v.* Wilson, 22 Conn. 435, 455 (1853), and §§ 130, 131, 727 *infra*.

1 Even though the by-laws require notice of assessment to be given by publication, yet if no attention is ever paid to the by-law and actual notice is given of an assessment and the stockholder objects to the assessment on another ground, but not on that ground, he cannot thereafter raise the objection on that ground. Grand Valley, etc. Co. *v.* Fruita Imp. Co., 86 Pac. Rep. 324 (Col. 1906). In the case of Mississippi, etc. R. R. *v.* Gaster, 20 Ark. 455 (1859), the statute prescribed sixty days' notice by publication. Actual personal notice was given, and no publication was had. The court sustained the notice and said: "One of the criterions by which to determine whether the requirements of a statute are imperative or merely directory is that those acts which are of the essence of the thing required to be done are imperative, while those which are not of the essence are directory. . . . The giving of sixty days' notice is imperative and must be strictly complied with, because it is of the essence of the thing required to be done; the mode of doing so is directory, because not of the essence, and may be either by publication in the manner prescribed by the charter or by actual personal notice." *Cf. semble*, in Tomlin *v.* Tonica, etc. R. R., 23 Ill. 429, 436 (1860).

2 Miles *v.* Bough, 3 Q. B. 845 (1842); Fairfield County Turnp. Co. *v.* Thorp, 13 Conn. 173 (1839).

3 Where twenty days' notice was required, proof of sending notice is insufficient. The time of sending must be proved. Cole *v.* Joliet Opera House Co., 79 Ill. 96 (1875). Notice by publication "at least sixty days" is satisfied by *one* publication sixty days or more before the time of payment. Muskingum, etc. Co. *v.* Ward, 13 Ohio, 120 (1844); Fox *v.* Allensville, etc. Turnp. Co., 46 Ind. 31 (1874). Fifty-nine days is insufficient where sixty days is prescribed. Macon, etc. R. R. *v.* Vason, 57 Ga. 314 (1876). The printed notice must be put in evidence. Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863). A copy of the first insertion and the testimony of the publisher that the other insertions were duly made are *prima facie* evidence of publication. Unthank *v.* Henry County Turnp. Co., 6 Ind. 125 (1855). The secretary of the corporation cannot, by a certificate, prove publication of notice. Tomlin *v.* Tonica, etc. R. R., 23 Ill. 429 (1860).

4 Nashua Sav. Bank *v.* Anglo-American, etc. Co., 189 U. S. 221 (1903).

threatening forfeiture of his stock for non-payment. Neither can the notice be served upon the executors.[1]

§ 120. *Demand, waiver, pleadings, etc.*—After notice has been given, no demand is necessary before bringing a suit to collect the subscription.[2] The subscriber may, by his acts or express agreement, waive the call itself, or informalities in its making, or notice thereof.[3] It is immaterial that other shareholders have had no notice of the call.[4] The proof of calls and of notice, when required, must be clear and complete.[5] The pleadings in an action on calls must allege the various facts which complete the obligation of the subscriber to pay.[6] Proof of a call duly made makes out a *prima*

1 Allen *v.* Gold Reefs, etc., [1899] 2 Ch. 40.

2 Penobscot R. R. *v.* Dummer, 40 Me. 172 (1855); Goodrich *v.* Reynolds, 31 Ill. 490 (1863); Winter *v.* Muscogee R. R., 11 Ga. 438 (1852). *Cf.* Spangler *v.* Indiana, etc. R. R., 21 Ill. 276 (1859), holding that one demand made for several assessments suffices.

3 State Bank Bldg. Co. *v.* Pierce, 92 Iowa, 668 (1894); Macon, etc. R. R. *v.* Vason, 57 Ga. 314 (1876). A stockholder who as a director and president participated in making calls cannot object to the regularity of such calls. Graebner *v.* Post, 119 Wis. 392 (1903). Payment of part of a subscription is no waiver of the right to have a call made for the balance before payment. Grosse Isle Hotel Co. *v.* I'Anson, 43 N. J. L. 442 (1881). The vote of a city to pay a call is no waiver of its invalidity. Pike *v.* Bangor, etc. R. R., 68 Me. 445 (1878). The waiver must be clearly proved. Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863). A director participating in a call cannot object thereto. York Tramways Co. *v.* Willows, L. R. 8 Q. B. D. 685 (1882). Where a subscriber, upon receiving notice of a call, denies that he is a stockholder, he thereby waives further notice. Cass *v.* Pittsburgh, etc. Ry., 80 Pa. St. 31 (1875), 95 Pac.Rep.39.

4 Newry, etc. Ry. *v.* Edmunds, 2 Exch. 118 (1848); Shackleford *v.* Dangerfield, L. R. 3 C. P. 407 (1868).

5 Scarlett *v.* Academy of Music, 43 Md. 203 (1875); s. c., 46 Md. 132. This case holds also that calls may be proved by reading extracts from the minutes of the directors' meetings without putting the books in evidence. Where a meeting of the board of directors could not authorize suit to collect assessments because the assessments were not yet due, an adjourned meeting of that meeting cannot authorize such suit, all of the directors not being present at the adjourned meeting and no new notice thereof having been given. Bank of National City *v.* Johnston, 133 Cal. 185 (1901).

6 The company must allege that the instalments are all due and payable, where several are sued on. Bethel, etc. Co. *v.* Bean, 58 Me. 89 (1870). At common law the count set out in the declaration should be not on the contract of subscription, but in *indebitatus assumpsit* for calls or instalments due. Peake *v.* Wabash R. R., 18 Ill. 88 (1856). For the customary averments, see Spangler *v.* Indiana, etc. R. R., 21 Ill. 276 (1859). For the defendants' pleading, see South Eastern Ry. *v.* Hebblewhite, 12 A. & E. 497 (1840). The call and notice may be pleaded in general language in the complaint. Walter, etc. Co. *v.* Robbins, 56 Minn., 48 (1893). In a suit by a corporation to collect a call the corporation need

facie case against a subscriber.[1] A stockholder sued on a call cannot defend on the ground that the call was invalid. His remedy is a suit to set aside the call.[2]

not allege that the defendant was a stockholder when the call became due, and need not allege any agreement by the defendant to pay the call. American Alkali Co. *v.* Campbell, 113 Fed. Rep. 398 (1902). It is sufficient to allege that the defendant holds stock which has never been paid up. The defense that the defendant did not subscribe for the stock or did not agree to pay for it, or that he is not liable, must be set up in the answer. Atlantic T. Co. *v.* Osgood, 116 Fed. Rep. 1019 (1902).

As to the proofs, see §§ 55, 72, *supra*.

1 Crawford *v.* Roney, 126 Ga. 763 (1906).

2 Campbell *v.* American, etc. Co., 125 Fed. Rep. 207 (1903).

CHAPTER VIII.

FORFEITURE OF SHARES FOR NON-PAYMENT.

§ 121. The various remedies.
122, 123. The remedy by forfeiture and sale of stock is by statutory authority only.
124. The remedy by forfeiture is cumulative.
125, 126. Forfeiture relieves the stockholder whose shares are forfeited from liability to the corporation.
127, 128. The same rule prevails as to corporate creditors.
129. Statutory formalities and general method of forfeiture.
§ 130. Notice in cases of forfeiture.
131. Notice is not the same thing as forfeiture.
132. Tender, by stockholder, before forfeiture.
133. Surplus after valid forfeiture belongs to the corporation—Purchase by the corporation—Liability of the purchaser of forfeited stock.
134. Equity will relieve a stockholder from an unauthorized forfeiture—Action at law for damages.

§ 121. *The various remedies.*—When a subscriber fails or refuses to pay for the shares of stock for which he has subscribed, the corporation generally has several methods of enforcing the contract. First, there is the common-law action to collect the subscription as a debt. This remedy always exists, except in a few states where it is available only when the subscription itself or the charter creates a liability to pay.[1] The corporation may sue on the subscription, obtain judgment, and then proceed to sell the stock under an execution levied to collect the judgment.[2] Second, the corporation may bring an action at law for breach of contract, the measure of damages being the difference between the value of the stock at the price which the subscriber was to pay and the market value at the date of the refusal to pay.[3] A third and very important remedy is that of forfeiture. It is the subject of this chapter. It is effected in one of two ways: the forfeiture may be by a strict foreclosure of the stockholder's stock—that is, the taking of his stock by the corporation itself; or it may be by a public sale of the stock for non-payment of the subscription.[4]

§§ 122, 123. *The remedy by public sale of stock is by statutory authority only.*—In addition to the remedy of an action at law to compel payment of a subscription for stock, there frequently is

1 See § 74, *supra*.

2 Chase *v.* East Tenn. etc. R. R., 5 Lea (Tenn.), 415 (1880).

3 Rand *v.* White Mountains R. R., 40 N. H. 79 (1860).

4 Quoted and approved in Thomson's Succession, 46 La. Ann. 1074 (1894).

given to the corporation the right to sell the subscriber's stock for non-payment of his subscription and apply the proceeds to the payment of that subscription. This is what is generally known as a forfeiture of the stock. It is not a common-law remedy, and, consequently, can be resorted to by the corporation only when power to make the sale is given to the corporation by statute or by the act of incorporation.[1] It has been held, however, that the right to forfeit may, however, be created by the consent of the stockholders, and be indorsed on the certificates of stock.[2]

The authority to forfeit shares for non-payment of the subscription cannot be created by a by-law.[3] Such a forfeiture would be wholly void, and transfers based thereon would confer no rights upon the transferee.[4]

§ 124. *The remedy by forfeiture is cumulative.*—Frequently when a corporation is authorized by statute to forfeit shares for non-payment of the subscription, the question arises whether the statutory remedy of forfeiture is exclusive, thereby preventing a resort to the common-law remedy of an action of *assumpsit* on the

1 Westcott *v.* Minnesota Min. Co., 23 Mich. 145 (1871); Minnehaha, etc. Assoc. *v.* Legg, 50 Minn. 333 (1892); Budd *v.* Multnomah St. Ry., 15 Oreg. 413 (1887). In the last case the statute gave the corporation power to make by-laws for forfeiture of stock. There being no by-law, a forfeiture was attempted by a resolution of the board of directors. *Held*, this could not be done. Barton's Case, 4 De G. & J. 46 (1859), is similar and stronger, as public notices and advertisements were made of the threatened forfeiture. Perrin *v.* Granger, 30 Vt. 595 (1858); Clarke *v.* Hart, 6 H. L. Cas. 633 (1858); Stanhope's Case, L. R. 1 Ch. App. 161 (1865). In Kelk's Case, L. R. 9 Eq. 107 (1869), the forfeiture was provided for in deed of settlement, and hence regular. If the corporation purchases at forfeiture sale, as it may by statute in California, execution against the corporation cannot be levied on such stock. Robinson *v.* Spaulding, etc. Co., 72 Cal. 32 (1887).

2 Weeks *v.* Silver Islet, etc. Co., 55 N. Y. Super. Ct. 1 (1887). See also § 522, *infra*.

3 *Re* Long Island R. R., 19 Wend. 37 (1837); s. c., 32 Am. Dec. 429; Kirk *v.* Nowill, 1 T. R. 118 (1786). *Cf.* Kennebec, etc. R. R. *v.* Kendall, 31 Me. 470 (1850); Rosenback *v.* Salt Springs Nat. Bank, 53 Barb. 495, 506 (1868). A by-law allowing forfeiture of stock is not valid as against a stockholder who was such before the by-law was passed. March *v.* Fairmount Creamery Assoc., 32 Pa. Sup. 517 (1907).

4 *Re* Long Island R. R., 19 Wend. 37 (1837). Yet, where such a power was conferred by a by-law adopted at a meeting of the stockholders, a stockholder whose stock has been declared forfeited under the by-law, and who is shown to have assented to the by-law, will not be heard to question the validity of the forfeiture. He is estopped. Lesseps *v.* Architects' Co., 4 La. Ann. 316 (1849). The corporation cannot, by a by-law, forfeit shares temporarily, until penalties or fines shall have been paid. Adley *v.* Reeves, 2 Maule & S. 53 (1813), by Lord Ellenborough. *Cf.* Cartan *v.* Father Matthew, etc. Soc., 3 Daly (N. Y.), 20 (1869); Pentz *v.* Citizens',

contract. It is the well-established rule that it does not.[1] A grant of the power to declare a forfeiture of the shares of a subscriber for non-payment of calls does not, by implication, deprive the corporation of its option of remedies;[2] and the corporation may, in its discretion, upon the failure of the subscriber to pay for his stock, either proceed against him by suit to collect the unpaid calls, or may forfeit his shares of stock. The corporation, by such a statute, is given its choice of remedies, and may pursue either. The remedy by forfeiture is additional. In legal language the remedy by forfeiture is cumulative.[3]

It is to be borne in mind, however, that in the New England states

etc. Co., 35 Md. 73 (1871). But only the stockholder can object to a forfeiture on the ground that it is by by-law. Detweiler *v.* Breckenkamp, 83 Mo. 45 (1884). *Cf.* §§ 131, 134, *infra.* As to the effect of acquiescence or waiver by the stockholder, see §§ 129, 134, *infra.*

1 A sale or forfeiture of the subscriber's stock is not a condition precedent to a suit to collect the unpaid subscription. Nashua Sav. Bank *v.* Anglo-American, etc. Co., 189 U. S. 221 (1903).

2 Quoted and approved in Campbell *v.* American, etc. Co., 125 Fed. Rep. 207 (1903).

3 Quoted and approved in American Alkali Co. *v.* Campbell, 113 Fed. Rep. 398 (1902); San Joaquin, etc. Co. *v.* Beecher, 101 Cal. 70 (1894); Denver Chamber, etc. *v.* Green, 8 Colo. App. 420 (1896); Atlantic Dynamite Co. *v.* Andrews, 97 Mich. 466 (1893); Puget Sound, etc. R. R. *v.* Ouellette, 7 Wash. 265 (1893); Delaware, etc. Canal *v.* Sansom, 1 Bin. (Pa.) 70 (1803); Instone *v.* Frankfort Bridge Co., 2 Bibb (Ky.), 576 (1812); Rensselaer, etc. Co. *v.* Barton, 16 N. Y. 457, note (1854); Lake Ontario, etc. R. R. *v.* Mason, 16 N. Y. 451 (1857); Buffalo, etc. R. R. *v.* Dudley, 14 N. Y. 336 (1856); Tutwiler *v.* Tuskaloosa, etc. Co., 89 Ala. 391 (1890); Harlæm Canal Co. *v.* Seixas, 2 Hall (N. Y. Super. Ct.), 504 (1829); Rensselaer, etc. Co. *v.* Wetsel, 21 Barb. 56 (1855); Sagory *v.* Dubois, 3 Sandf. Ch. 466 (1846); Troy, etc. R. R. *v.* McChesney, 21 Wend. 296 (1839); Herkimer Mfg. Co. *v.* Small, 21 Wend. 273 (1839); Ogdensburgh, etc. R. R. *v.* Frost, 21 Barb. 541 (1856); Northern R. R. *v.* Miller, 10 Barb. 260 (1851); Troy, etc. R. R. *v.* Tibbits, 18 Barb. 297 (1854); Troy, etc. R. R. *v.* Kerr, 17 Barb. 581 (1854); Jenkins *v.* Union Turnp. Co., 1 Caines' Cas. 86, 95 (1804); Goshen, etc. Co. *v.* Hurtin, 9 Johns. 217 (1812); McDonough *v.* Phelps, 15 How. Pr. 372 (1856); Freeman *v.* Winchester, 18 Miss. 577 (1848); Hartford, etc. R. R. *v.* Kennedy, 12 Conn. 499 (1838); Mann *v.* Cooke, 20 Conn. 178 (1850); Connecticut, etc. R. R. *v.* Bailey, 24 Vt. 465 (1852); Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863); New Hampshire, etc., R. R. *v.* Johnson, 30 N. H. 390 (1855); White Mountains R. R. *v.* Eastman, 34 N. H. 124, 147 (1856); Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491 (1859); Hightower *v.* Thornton, 8 Ga. 486, 502 (1850); Hughes *v.* Antietam Mfg. Co., 34 Md. 316 (1870); Beene *v.* Cahawba, etc. R. R., 3 Ala. (N. S.) 660 (1842); Selma, etc. R. R. *v.* Tipton, 5 Ala. (N. S.) 787 (1843); Gratz *v.* Redd, 4 B. Mon. (Ky.) 178 (1843); Boston, etc. R. R. *v.* Wellington, 113 Mass. 79 (1873). [Compare with this case Worcester Turnp. Corp. *v.* Willard, 5 Mass. 80 (1809); Andover, etc. Co. *v.* Gould, 6 Mass. 40 (1809); New

the right to forfeit stock for non-payment of assessments does not imply a right in the corporation to sue for such assessments. The latter right does not exist at all unless it is given by statute or by the express promise of the subscriber.[1] But where both remedies exist, the corporation has its election which remedy to pursue.[2]

An assessment levied by stockholders upon themselves in a national bank in accordance with the order of the comptroller cannot be collected by suit, inasmuch as a remedy is given by the act of congress, such remedy being a sale of the stock itself.[3]

§§ 125, 126. *Forfeiture relieves the stockholder whose shares are forfeited from liability to the corporation.*—Although a corporation having the right to declare a forfeiture of shares for non-payment of calls may generally, at its option, either forfeit the stock or bring an action to collect the amount due, it does not follow that it can forfeit the stock and then bring an action for the unpaid calls, or any part thereof that may remain unsatisfied by the forfeiture. The corporation, when a stockholder is in default, may pursue either the one remedy or the other, in its discretion; but it cannot forfeit the stock and afterwards sue at law. The first remedy, when exercised, excludes the second.[4] In order, however, to

Bedford, etc. Corp. *v.* Adams, 8 Mass. 138 (1811); City Hotel *v.* Dickinson, 72 Mass. 586 (1856); Mechanics', etc. Co. *v.* Hall, 121 Mass. 272 (1876).] Mexican Gulf Ry. *v.* Viavant, 6 Rob. (La.) 305 (1843); New Orleans, etc. Co. *v.* Briggs, 27 La. Ann. 318 (1875); Greenville, etc. R. R. *v.* Cathcart, 4 Rich. L. (S. C.) 89 (1850); Klein *v.* Alton, etc. R. R., 13 Ill. 514 (1851); Peoria, etc. R. R. *v.* Elting, 17 Ill. 429 (1856); Kirksey *v.* Florida, etc. Co., 7 Fla. 23 (1857); Tar River Nav. Co. *v.* Neal, 3 Hawks (N. C.), 520 (1825); Stokes *v.* Lebanon, etc. Co., 6 Humph. (Tenn.) 241 (1845); South Bay, etc. Co. *v.* Gray, 30 Me. 547 (1849); Franklin Glass Co. *v.* Alexander, 2 N. H. 380 (1821); s. c., 9 Am. Dec. 92, and note, pp. 96–104. Even though by the statutes under which an English corporation is organized the company has a lien on the stock for unpaid assessments and may forfeit the stock for non-payment, yet this does not prevent a suit to collect the assessment. Nashua, etc. Bank *v.* Anglo-American, etc. Co., 189 U. S. 221 (1903). A subscriber for stock cannot avoid liability to the corporation by setting up that the corporation has a lien on the stock therefor and may enforce it. Lankershim, etc. Co. *v.* Herberger, 82 Cal. 600 (1890). The corporation may sue for the whole subscription and need not sue merely for the deficiency that would result from selling the stock. International, etc. Assoc. *v.* Walker, 83 Mich. 386 (1890). For a learned discussion of the general question how far the jurisdiction of a court of equity may be affected by statutes conferring similar jurisdiction upon the courts of law,—an inquiry germane to the matter of the present section—see note to Payne *v.* Bullard, 23 Miss. 88 (1851), in 55 Am. Dec. 74, 77.

1 See § 74, *supra.*

2 See §§ 125, 126, *infra.*

3 Hulitt *v.* Bell, 85 Fed. Rep. 89 (1898).

4 Small *v.* Herkimer Mfg. Co., 2

bar the remedy of an action on the contract, the forfeiture must be complete and actual. Consequently, a mere threat that a forfeiture will be made if the call be not paid on or before a day named, or an unsuccessful attempt to sell the stock, will not be sufficient to bar the action.[1] So long as the stockholder's right to the shares and to the immunities and emoluments attached thereto remains, his obligation to pay is not extinguished.[2] Under the California statute which renders stockholders personally liable for an assessment on their stock after the stock has been advertised for sale, the stockholders are not liable before such stock has been advertised for sale.[3]

There is, however, a line of cases in which a contrary rule is sustained. In these cases it is held that the forfeiture of shares of stock is like the foreclosure of a mortgage; and that, just as a mortgagee may have judgment against the mortgagor for a deficiency, so may a corporation have its action of *assumpsit* against a subscriber whose stock, having been forfeited, has failed to sell for enough to pay his entire indebtedness to the corporation on the subscription.[4] This rule is held to apply equally to original subscribers or their

N. Y. 330 (1849), reversing Herkimer Mfg. Co. *v.* Small, 21 Wend. 273 (1839); s. c., 2 Hill, 127 (1841); Northern R. R. *v.* Miller, 10 Barb. 260, 271 (1851); Ogdensburgh, etc. R. R. *v.* Frost, 21 Barb. 541 (1856); Mills *v.* Stewart, 41 N. Y. 384 (1869); Macauly *v.* Robinson, 18 La. Ann. 619 (1866); Allen *v.* Montgomery R. R. 11 Ala. 437 (1847); Athol, etc. R. R. *v.* Prescott, 110 Mass. 213 (1872); Mechanics, etc. Co. *v.* Hall, 121 Mass. 272 (1876). With these later Massachusetts cases compare Andover, etc. Co. *v.* Gould, 6 Mass. 40 (1809); Franklin Glass Co. *v.* White, 14 Mass. 286 (1817); Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863); Macon, etc. R. R. *v.* Vason, 57 Ga. 314 (1876); Ashton *v.* Burbank, 2 Dill. 435 (1873); s. c., 2 Fed. Cas. 26. A mere by-law cannot give to the corporation power to collect by suit from the stockholder after a forfeiture of the stock for non-payment has been made. Mandell *v.* Swan, etc. Co., 154 Ill. 177 (1895). Where stock in a national bank is sold on account of a stockholder failing to pay the assessment levied upon it under section 5205 of the United States Revised Statutes, the sale is illegal unless the stock brings the amount of the assessment. Merchants' Nat. Bank, etc. *v.* Fouche, 103 Ga. 851 (1898).

1 See cases cited *supra* and § 131, *infra*.

2 Instone *v.* Frankfort Bridge Co., 2 Bibb (Ky.), 576, 581 (1812). *Cf.* Buffalo, etc. R. R. *v.* Dudley, 14 N. Y. 336, 347 (1856). It has been held, also, that an action to collect a subscription, when prosecuted to judgment, is a bar to the remedy by forfeiture. Giles *v.* Hutt, 3 Exch. 18 (1848).

3 Shively *v.* Eureka, etc. Co., 129 Cal. 293 (1900). A statutory right of the corporation to waive the completion of forfeiture and bring suit in lieu thereof is strictly construed. National, etc. Co. *v.* Chappellet, 88 Pac. Rep. 506 (Cal. 1906).

4 Carson *v.* Arctic Min. Co., 5 Mich. 288 (1858); Danbury, etc. R. R. *v.* Wilson, 22 Conn. 435 (1853).

transferees; and any stockholder is liable, under this rule, for the balance due upon assessments, after deducting the amount realized at the forfeiture sale.[1] It has been held that a by-law cannot render subscribers liable for any deficiency left on the sale of the stock upon non-payment of calls.[2] In England the certificate of incorporation may provide that a stockholder whose stock has been forfeited for non-payment of calls shall be liable for calls unpaid before forfeiture.[3] The common-law rule in England seems to be the same as in the United States.[4]

1 Merrimac Min. Co. *v.* Bagley, 14 Mich. 501 (1866). Quoted and approved in Thomson's Succession, 46 La. Ann. 1074 (1894). *Cf.* Hartford, etc. R. R. *v.* Kennedy, 12 Conn. 499 (1838); Brockenbrough *v.* James River, etc. Co., 1 Patton & H. (Va.) 94 (1855); Mann *v.* Currie, 2 Barb. 294 (1848). It is sometimes so provided expressly by statute or by the charter of the company. Brockenbrough *v.* James River, etc. Co., 1 Patton & H. (Va.) 94 (1855); Danbury, etc. R. R. *v.* Wilson, 22 Conn. 435, 456 (1853); Great Northern Ry. *v.* Kennedy, 4 Exch. 417 (1849); Mann *v.* Cooke, 20 Conn. 178 (1850). But see Athol, etc. R. R. *v.* Prescott, 110 Mass. 213 (1872); Kennebec, etc. R. R. *v.* Kendall, 31 Me. 470 (1850); Allen *v.* Montgomery R. R., 11 Ala. 437 (1847); Stokes *v.* Lebanon, etc. Co., 6 Humph. (Tenn.) 241 (1845); Mills *v.* Stewart, 41 N. Y. 384 (1869). Or that any stockholder whose shares shall have been forfeited for non-payment of assessments shall nevertheless be liable to pay to the company all calls owing on such shares at the time of the forfeiture. This seems to be a common provision in the articles of association of English companies. Creyke's Case, L. R. 5 Ch. App. 63 (1869). But in such a case interest is not collectible. Stocken's Case, L. R. 5 Eq. 6 (1867); aff'd L. R. 3 Ch. App. 412. It is otherwise in ordinary defaults. Gould *v.* Oneonta, 71 N. Y. 298 (1877); Rikhoff *v.* Brown, etc. Co., 68 Ind. 388 (1879). Where forfeited stock is re-issued for cash at par, corporate creditors have no claim against the first subscriber. First, etc. Bank *v.* Peoria Watch Co., 191 Ill. 128 (1901).

2 Mandel *v.* Swan, etc. Co., 154 Ill. 177, 186 (1895). *Contra*, Elizabeth, etc. Mills *v.* Dunston, 121 N. C. 12 (1897).

3 Ladies', etc. Assoc. Ltd. *v.* Pulbrook, 81 L. T. Rep. 300 (1899); aff'd, [1900] 2 Q. B. 376.

4 Such, also, seems to be the rule in England. King's Case, L. R. 2 Ch. App. 714 (1867); Knight's Case, L. R. 2 Ch. 321 (1867); Snell's Case, L. R. 5 Ch. 22 (1869). By statute in England the right to forfeit and the right to sue may be exercised together; and shares may be forfeited for non-payment of calls, whether those calls have been sued for or not. Great Northern Ry. *v.* Kennedy, 4 Exch. 417 (1849); Inglis *v.* Great Northern Ry., 1 Macq. (Sc. App.) 112 (1852). But there is a line of cases in England where, by the terms of the deeds of settlement, only an option is given to sue *or* to forfeit, and it is then held that the corporation is concluded by its election. Inglis *v.* Great Northern Ry., *supra*, where, notwithstanding the forfeiture and cancellation of shares and the issue of new ones, the right to recover in an action for calls was held to remain unimpaired in the company. See also Birmingham, etc. Ry. *v.* Locke, 1 Q. B. 256 (1841); Edinburgh, etc. Ry. *v.* Hebblewhite, 6 M. & W. 707 (1840); London, etc. Ry. *v.* Fairclough, 2 Man. & Gr. 674 (1841).

§§ 127, 128. *The same rule prevails as to corporate creditors.*— In the absence of fraud and collusion it is a settled rule that, where a corporation has authority to declare a forfeiture of stock for non-payment of calls, and a forfeiture is regularly declared, such formal declaration puts an end to the liability of the stockholder, and corporate creditors cannot subsequently hold such an expelled or released stockholder liable.[1] This is the rule even though the debt was contracted by the company before the stock was forfeited.[2] The same principle of law that prevents the corporation from suing on a subscription after the stock has been forfeited prevents the corporate creditors also from doing the same. But, on the other hand, inasmuch as fraud vitiates all acts into which it enters, a forfeiture of stock by collusion between a stockholder and the board of directors of the corporation will not release him from liability to contribute in the event of the insolvency of the company.[3] In such a case the creditors may invoke the interposition of a court of equity to prevent the consummation of an inchoate forfeiture, or to set aside one already accomplished.[4] Hence, it is well settled that the power of

1 Mills *v.* Stewart, 41 N. Y. 384 (1869); Allen *v.* Montgomery R. R., 11 Ala. 437, 450 (1847); Macauly *v.* Robinson, 18 La. Ann. 619 (1866); Woollaston's Case, 4 De G. & J. 437 (1859); *Ex parte* Beresford, 2 Macn. & G. 197 (1850); Kelk's Case, L. R. 9 Eq. 107 (1869); Dawes's Case, L. R. 6 Eq. 232 (1868); Snell's Case, L. R. 5 Ch. App. 22 (1869). Nor, on the other hand, can the stockholder claim, after the forfeiture, any of the rights of stockholdership. St. Louis, etc. Co. *v.* Sandoval, etc. Co., 116 Ill. 170 (1886). In a suit in equity by a corporate creditor against stockholders for unpaid subscriptions, subscribers who did not pay the 10 per cent. required by statute to make them stockholders need not be joined as parties defendant nor subscribers whose shares have been forfeited. Ford *v.* Chase, 118 N. Y. App. Div. 605 (1907).

2 Mills *v.* Stewart, 41 N. Y. 384 (1869).

3 Slee *v.* Bloom, 19 Johns, 456 (1822); Mills *v.* Stewart, 41 N. Y. 384 (1869); Walter's Second Case, 3 De G. & Sm. 244 (1850); Richmond's Case, 4 K. & J. 305 (1858); Spackman's Case, 11 Jur. (N. S.) 207 (1865); aff'd L. R. 3 H. L. 371; Stanhope's Case, L. R. 1 Ch. App. 161 (1866); Stewart's Case, L. R. 1 Ch. App. 511 (1866); Gower's case, L. R. 6 Eq. 77 (1868). It is no defense to a suit for an assessment by order of the directors that after the company became insolvent the board of directors passed a resolution that the stock should be forfeited and sold. Union Sav. Bank *v.* Rinaldo, 92 Pac. Rep. 873 (Cal. 1907).

4 Germantown, etc. Ry. *v.* Fitler, 60 Pa. St. 124 (1869). See also Grand Rapids Sav. Bank *v.* Warren, 52 Mich. 557 (1884). The fact that the corporation might have forfeited the stock but in fact did not is no defense as against the corporate creditors. If a transaction between a shareholder and the directors is irregular, but is alleged to have been acquiesced in, it is incumbent upon the stockholder to support such allegation by showing that the transaction was fully made known to the general body of the stockholders. Spackman's Case, 11 Jur. (N. S.) 207

forfeiture cannot lawfully be exercised for the purpose of enabling members to escape from their liability on their stock, either to the corporation or its creditors.[1] A stockholder, by mere abandonment of his shares, cannot forfeit them himself, and thus, by his own act, discharge himself from his obligation on the subscription.[2]

§ 129. *Statutory formalities and general method of forfeiture.*— The general method of forfeiting stock for non-payment of calls is usually prescribed in detail by the statute authorizing the forfeiture. In the earlier cases there may be observed some tendency to hold that a substantial, in distinction from a strict, compliance with the requirements of the statute is all that is necessary to a valid forfeiture.[3] But in later cases, English[4] and American,[5] it is

(1865); aff'd L. R. 3 H. L. 371. A stockholder whose stock is forfeited in a building association for non-payment of dues, as authorized by the charter, cannot recover back the money paid by him. Freeman *v.* Ottawa, etc. Assoc., 114 Ill. 182 (1885).

1 Spackman *v.* Evans, L. R. 3 H. L. 171 (1868); Stanhope's Case, L. R. 1 Ch. App. 161 (1866); Richmond's Case, 4 Kay & J. 305 (1858); Manisty's Case, 17 Sol. Jour. 745 (1873); Gower's Case, L. R. 6 Eq. 77 (1868); *Ex parte* Jones, 27 L. J. Ch. 666 (1858); Hall's Case, L. R. 5 Ch. App. 707 (1870); Mills *v.* Stewart, 41 N. Y. 384 (1869). *Cf.* Dixon *v.* Evans, L. R. 5 H. L. 606 (1872); Belhaven's Case, 11 Jur. (N. S.) 572 (1865); s. c., 12 L. T. (N. S.) 595 (1865); 3 De G. J. & S. 41; Clarke *v.* Hart, 6 H. L. Cas. 633 (1858); Garden Gully, etc. Co. *v.* McLister, L. R. 1 App. Cas. 39 (1875); Sweny *v.* Smith, L. R. 7 Eq. 324 (1869); Chouteau *v.* Dean, 7 Mo. App. 211 (1879). *Cf.* Bedford R. R. *v.* Bowser, 48 Pa. St. 29 (1864). Forfeiture cannot be for the benefit of the stockholder. Common *v.* McArthur, 29 Canada S. C. Rep. 239 (1898).

2 Rockville, etc. Turnp. Co. *v.* Maxwell, 2 Cranch, C. C. 451 (1824); s. c., 20 Fed. Cas. 1079. For sundry illustrations of what will or will not justify a forfeiture, see, particularly, Sweny *v.* Smith, L. R. 7 Eq. 324 (1869); Stocken's Case, L. R. 3 Ch. App. 412 (1867); Kelk's Case, L. R. 9 Eq. 107 (1869); Thomas's Case, L. R. 13 Eq. 437 (1872). It is no defense that defendant supposed he could pay the balance of his subscription or have a forfeiture of the stock at his option. Ross *v.* Bank of Gold Hill, 20 Nev. 191 (1888).

3 Catchpole *v.* Ambergate, etc. Ry., 1 El. & B. 111 (1852); Nolan *v.* Annabella Gold Min. Co., 6 Wyatt, W. & A'B. (Australian Cts. of Mines), 38 (1869). *Cf.* Woollaston's Case, 4 De G. & J. 437 (1859); Knight's Case, L. R. 2 Ch. App. 321 (1867).

4 Clark *v.* Hart, 6 H. L. Cas. 633 (1858); Johnson *v.* Lyttle's Iron Agency, 46 L. J. (Ch.) 786 (1877). *Cf.* Knight's Case, L. R. 2 Ch. App. 321 (1867); Garden Gully, etc. Co. *v.* McLister, L. R. 1 App. Cas. 39 (1875); London, etc. Ry. *v.* Fairclough, 2 Man. & G. 674 (1841). In England a forfeiture may be made after a call, and before the call is due. The call is "owing" from the time when it is made. Faure, etc. Co. *v.* Phillipart, 58 L. T. Rep. 525 (1888), where the forfeiture was made on two calls, one past due and one not yet due.

5 Portland, etc. R. R. *v.* Graham, 52 Mass. 1 (Shaw, C. J., 1846); Germantown, etc. Ry. *v.* Fitler, 60 Pa. St. 124 (1869); Eastern Plank-road *v.* Vaughan, 20 Barb. 155 (1855); aff'd 14 N. Y. 546; York, etc. R. R. *v.* Ritchie, 40 Me. 425 (1855); Lewey's

plainly declared, and it may be taken as a settled rule, that the validity of the forfeiture and sale of the stock of a subscriber in arrears depends upon a strict and formal compliance with the requirements of the enabling statute.[1]

Thus, a sale of the stock at private sale, when a sale by public auction was prescribed, has been held to invalidate the forfeiture.[2] There must be a properly constituted board of directors to declare a

Island R. R. *v.* Bolton, 48 Me. 451 (1860); Downing *v.* Potts, 23 N. J. L. 66 (1851); *Re* Long Island R. R., 19 Wend. 37 (1837); Mitchell *v.* Vermont Copper Min. Co., 40 N. Y. Super. Ct. 406 (1876); aff'd 67 N. Y. 289; Occidental, etc. Assoc. *v.* Sullivan, 62 Cal. 394 (1882). *Cf.* Johnson *v.* Albany, etc. R. R., 40 How. Pr. 193 (1870); rev'd on another point in 54 N. Y. 416; Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863); Perrin *v.* Granger, 30 Vt. 595 (1858). A forfeiture of stock by sale at public auction for failure to pay assessments, made before the amount of stock required by statute to be subscribed before the assessment can be levied has been subscribed, may be set aside by a suit in equity, and the statute of limitations applicable to suits to set aside forfeitures on the ground of irregularities does not apply. A pledgee of the stock may maintain such a suit. Herbert, etc. Bank *v.* Bank of Orland, 133 Cal. 64 (1901). In forfeiting stock every condition precedent must be strictly and literally complied with. Where an irregular forfeiture is made in 1878, and is discovered by the stockholder in 1885, he need not take active remedies, but may wait and claim a share in the assets upon distribution. Where notice of calls must be published in two cities before forfeiture, publication in one city only is insufficient. Morris *v.* Metalline Land Co., 164 Pa. St. 326 (1894). A corporation cannot sell stock for failure to pay calls where the by-laws do not provide the mode of sale, and where the statute authorizing such sale prescribes that it shall be in accordance with the by-laws. Clise Inv. Co. *v.* Washington Sav. Bank, 18 Wash. 8 (1897). See 95 Pac. Rep. 662.

[1] Quoted and approved in Corcoran *v.* Sonora, etc. Co., 8 Idaho 651 (1902), where the statute required the proceedings to be recorded in a corporate book and this had not been done, and hence the court held that the assessment and sale was illegal. Where a statute requires that a call or assessment shall specify where it is payable, a forfeiture for non-payment is void if the statute is not strictly complied with. Ruck *v.* Caledonia, etc. Co., 92 Pac. Rep. 194 (Cal. 1907). See also Garden Gully, etc. Co. *v.* McLister, L. R. 1 App. Cas. 39 (1875); Germantown, etc. Ry. *v.* Fitler, 60 Pa. St. 124 (1869).

[2] Lewey's Island R. R. *v.* Bolton, 48 Me. 451 (1860). As to what is, in general, sufficient to satisfy the requirements of the rule that powers of forfeiture are to be construed strictly and exercised or pursued strictly, see Giles *v.* Hutt, 3 Exch. 18 (1848); Catchpole *v.* Ambergate, etc. Ry., 1 El. & B. 111 (1852); Birmingham, etc. Ry. *v.* Locke, 1 Q. B. 256 (1841); Graham *v.* Van Diemen's Land Co., 1 Hurl. & N. 541 (1856); Sweny *v.* Smith, L. R. 7 Eq. 324 (1869); Stocken's Case, L. R. 3 Ch. App. 412 (1867); Keik's Case, L. R. 9 Eq. 107 (1869); Thomas's Case, L. R. 13 Eq. 437 (1872); Gower's Case, L. R. 6 Eq. 77 (1868). It has, however, been held in an English case—Knight's Case, L. R. 2 Ch. App. 321 (1867)—that, when it is a matter of mere form rather than of substance that has not been strictly followed in pro-

forfeiture of stock.[1] It is held, in general, that, in the absence of statutory provisions as to order or details, the mode of forfeiture must be reasonable and just.[2] The forfeiture may be regularly effected by a resolution of the board of directors, ordering a sale of all stock on which assessments shall remain unpaid at a day named in the future.[3]

After forfeiting the stock the company cannot disregard the forfeiture and hold the stockholder liable as a stockholder on the ground that its proceedings were irregular.[4] Even though the statutes

ceedings to forfeit shares, the forfeiture will not necessarily be thereby invalidated.

1 Garden Gully, etc. Co. *v.* McLister, L. R. 1 App. Cas. 39, 55 (1875). A stockholder may enjoin a forfeiture on the ground that the directors were illegally elected. Moses *v.* Tompkins, 84 Ala. 613 (1888). A stockholder cannot enjoin the sale of his stock for non-payment of an assessment on the ground that an amendment to the charter increasing the number from seven to nine had not been filed with the secretary of state, as required by statute, it being shown that at corporate meetings he had voted for nine directors and had accepted certificates of stock signed by the president and secretary elected by nine directors. Jackson *v.* Crown Point, etc. Co., 21 Utah, 1 (1899). In a suit brought by a stockholder to set aside a sale of the stock for non-payment of an assessment, the court may investigate the legality of the title of the directors to their office, and if they have not taken an oath as required by statute the assessment made by them is illegal. Schwab *v.* Frisco, etc. Co., 21 Utah, 258 (1900).

2 Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863); Mitchell *v.* Vermont Copper Min. Co., 67 N. Y. 280 (1876).

3 Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863). See also Woollaston's Case, 4 De G. & J. 437 (1859). Under such a resolution a sale of the stock is not necessary to complete the forfeiture, where the effect of the forfeiture is to release the stockholder from any future liability, and where he is not entitled to the surplus, if any there be, after sale. Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863). It is, however, said elsewhere that a general resolution, not specifying the stock which is forfeited, but merely assuming to forfeit any and all stock whose owners are in arrears, does not affect a valid forfeiture. Johnson *v.* Albany, etc. R. R., 40 How. Pr. 193 (1870); rev'd on another point in 54 N. Y. 416. When, after default made in the payment of assessments, notice is given by the corporation that the shares of owners in arrears will be forfeited unless full payment of what is due be made by a day named, there is a presumption that the subsequent proceedings of the company looking to perfecting the forfeiture are valid and regular. Knight's Case, L. R. 2 Ch. App. 321 (1867), holding that where, by the articles of association, provision is made for forfeiture by resolution with notice upon default, the court will assume that the requisite steps have been taken to make a valid forfeiture, even though it does not appear that such resolution was passed or that notice was sent. The notice is a notice that the forfeiture has already been declared, not that it will be made on further default. That notice is a condition precedent.

4 Patterson *v.* Brown, etc. Co., 3 Colo. App. 511 (1893).

In Austin's Case, 24 L. T. (N. S.) 932 (1871), it is said that a corpo-

authorize a board of directors to waive a forfeiture after the forfeiture has been completed, yet they cannot waive it except with the consent of the stockholder.[1] Where both the stockholder and the corporation acquiesce in a forfeiture, although irregular, corporate creditors cannot subsequently object.[2] It is a well-established rule that a forfeiture of shares, where the forfeiture was irregular or defective in its form, is not void, but voidable, and that, by subsequent knowledge and acquiescence, the stockholder and the company are alike estopped to deny its validity.[3] Under the California code a corporation may by suit foreclose a lien which it has on its stock.[4]

ration, after forfeiting shares, cannot set the forfeiture aside, and hold the owner liable as a subscriber, on the ground that the notice given him was irregular. It is for the subscriber alone to raise that objection to the validity of the forfeiture.

1 *Re* Exchange Trust Ltd., [1903] 1 Ch. 711.

2 Crissey *v.* Cook, 67 Kan. 20 (1903). Where stock is sold by the corporation for non-payment of an assessment, levied at a meeting of the board of directors where a quorum is not present, the sale may be set aside, unless the stockholders have acquiesced in the sale and the stock has passed into *bona fide* hands. Hatch *v.* Lucky Bill Min. Co., 25 Utah, 405 (1903).

3 Quoted and approved in Crissey *v.* Cook, 67 Kan. 20 (1903); King's Case, L. R. 2 Ch. App. 714, 731 (1867); Woollaston's Case, 4 De G. & J. 437 (1859); Webster's Case, 32 L. J. (Ch.) 135 (1862); Knight's Case, L. R. 2 Ch. App. 321 (1867); Kelk's Case, L. R. 9 Eq. 107 (1869); Austin's Case, 24 L. T. (N. S.) 932 (1871); Prendergast *v.* Turton, 1 Y. & C. (Ch.) 98 (1841). *Cf.* Lyster's Case, L. R. 4 Eq. 233 (1867); Teasdale's Case, L. R. 9 Ch. App. 54 (1873); Phosphate, etc. Co. *v.* Green, L. R. 7 C. P. 43 (1871). Here the company had power to forfeit shares for non-payment and to compromise debts, but were prohibited from purchasing their own shares. The transaction in issue was held to be such a purchase, and hence *ultra vires*, but the members were estopped by knowledge and acquiescence. In this case it was also said that, to show assent and asquiescence in such a case, it is not necessary or possible to prove the acquiescence of each individual stockholder. It is enough to show circumstances which are reasonably calculated to satisfy the court or a jury that the thing to be ratified came to the knowledge of all who chose to inquire, all having full opportunity and means of inquiry. Houldsworth *v.* Evans, L. R. 3 H. L. 263 (1868); aff'g L. R. 3 Eq. 769; Spackman *v.* Evans, L. R. 3 H. L. 171 (1868). Here the terms of the withdrawal were not in accordance with the deed of settlement, and it was held after

4 Mechanics', etc. Assoc. *v.* King, 83 Cal. 440 (1890). Where the statute authorizes a suit after publication of the intent to forfeit by sale, such suit cannot be brought before such publication. San Bernardino Inv. Co. *v.* Merrill, 108 Cal. 490 (1895). A sale by a corporation of all its property does not entitle the vendee to stock in the corporation which the corporation itself has purchased on a sale for a delinquent assessment and not re-issued. Tulare, etc. Dist. *v.* Kaweah, etc. Co., 44 Pac. Rep. 662 (Cal. 1896).

§ 130. *Notice in cases of forfeiture.*—A notice to the delinquent subscriber that his shares will be forfeited at a day named is generally requisite to effect a forfeiture. The subscriber is entitled to full knowledge of the fact that, unless he pays up within a specified time, he will lose his stock. The requirements of the statute or charter, with respect to the contents of the notice, and the length of time which is to elapse between the notice and the forfeiture, must all be strictly complied with.[1] It is accordingly held that the

years that the party was still liable as a contributor. In Evans *v.* Smallcombe, L. R. 3 H. L. 249 (1868), a member withdrawing under a like arrangement was held not liable on the double ground of lapse of time and a clear presumption of knowledge and acquiescence. In Houldsworth *v.* Evans, L. R. 3 H. L. 263 (1868), an irregularity in the condition of withdrawal was held substantial and the transaction *ultra vires*. (One lord dissented, on the ground that years of acquiescence retrospectively sanctioned it.) In Brotherhood's Case, 31 Beav. 365 (1862), dissentient members were allowed to withdraw, by resolution, upon terms which were certainly *ultra vires*. The master of the rolls said that the transaction might have been set aside at the time; but all parties having had full knowledge, and having acquiesced for more than twelve years, the court would not, after such a lapse of time, touch the transaction. In Lesseps *v.* Architects' Co., 4 La. Ann. 316 (1849), the court regarded a general acquiescence in a by-law for a forfeiture, itself *ultra vires*, as a matter of contract, and refused equitable relief. *Cf.* Lindley on Companies, p. 533, where the author says: "If there is power to forfeit, and the shares intended to be forfeited are treated by the company and the shareholders as forfeited, the company will be precluded from afterwards insisting that no forfeiture ever took place." Garden Gully, etc. Co. *v.* McLister, L. R. 1 App. Cas. 39, 55 (1875), holding that mere laches does not, of itself, disentitle the holder of shares to equitable relief against an invalid declaration of forfeiture. See 69 Atl. Rep. 528.

[1] Heaston *v.* Cincinnati, etc. R. R., 16 Ind. 275 (1861); Lewey's Island R. R. *v.* Bolton, 48 Me. 451 (1860); Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536, 546 (1863); Lake Ontario, etc. R. R. *v.* Mason, 16 N. Y. 451 (1857); Sands *v.* Sanders, 26 N. Y. 239 (1863); Mississippi, etc. R. R. *v.* Gaster, 20 Ark. 455 (1859); Hughes *v.* Antietam, etc. Co., 34 Md. 317 (1870); Johnson *v.* Lyttle's Iron Agency, 46 L. J. (Ch.) 786 (1877); Cockerell *v.* Van Diemen's Land Co., 26 L. J. (C. P.) 203 (1857); Watson *v.* Eales, 23 Beav. 294 (1856). *Cf.* Eppes *v.* Mississippi, etc. R. R., 35 Ala. 33 (1859); Schenectady, etc. Co. *v.* Thatcher, 11 N. Y. 102 (1854); Harlæm Canal Co. *v.* Seixas, 2 Hall (N. Y.), 504 (1829); Mitchell *v.* Vermont Min. Co., 40 N. Y. Super. Ct. 406 (1876), aff'd, 67 N. Y. 280; New Albany, etc. R. R. *v.* McCormick, 10 Ind. 499 (1858). *Cf.* Lexington, etc. R. R. *v.* Chandler, 54 Mass. 311 (1847), where notice, provided for by a by-law, was held not a condition precedent, but only directory, and substantial compliance was sufficient. Knight's Case, L. R. 2 Ch. App. 321 (1867), is sometimes wrongly cited, for the reason that there are two notices provided for: (1) notice that forfeiture will be made on default at future time, and (2) notice after forfeiture that it has been made. The former is essential, the latter not. Where a statute authorizes a corporation to forfeit a subscriber's stock for

notice must state correctly the amount due for non-payment of which the stock is to be forfeited.[1] The time, also, within which payment is to be made must be accurately stated,[2] and also the place where the sale is to be made.[3] The mode of giving notice of a contemplated forfeiture of stock is generally specified in the statute authorizing the forfeiture.[4] In England it is held that after a stock-

non-payment on written notice being given, a forfeiture without such written notice is a conversion and the corporation is liable for the difference between the par and market value, less the amount due on the stock. Nicholson, etc. Co. *v.* Urquhart, 32 Tex. Civ. App. 527 (1903).

1 So where the notice stated that unless the amount of a certain call, together with lawful interest from the date of the call, was paid on or before a certain day, the shares would be liable to forfeiture, it was held that, as interest was only payable from the day fixed for payment, and not from the date of the call, the notice was irregular, and that a forfeiture founded on a non-compliance with such a notice was bad. Johnson *v.* Lyttle's Iron Agency, 46 L. J. (Ch.) 786 (1877).

2 A notice that the stock will be forfeited "on Monday, the 9th," when in point of fact the 9th comes on Friday, is not a sufficient notice. Watson *v.* Eales, 23 Beav. 294 (1856).

3 Accordingly, a notice in all other respects regular, which does not state the place of sale, is insufficient, although it names the day of sale, and the auctioneer, who was and had long been an auctioneer in the place at which the notice was dated. Lexington, etc. R. R. *v.* Staples, 71 Mass. 520 (1855). In the absence of a statutory provision as to time, it is said that three days' notice of the time and place of the sale of shares for non-payment of assessments is too short and unreasonable, where the owner of the shares lives at a distance in another state. Lexington, etc. R. R. *v.* Staples, 71 Mass. 520 (1855). In Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863), a thirty days' notice is said to be sufficient and reasonable. And where the charter provided that notice of an assessment should be given to the subscriber thirty days before the order of the directors to sell the shares, a notice thirty days before the sale was held insufficient. Lewey's Island R. R. *v.* Bolton, 48 Me. 451 (1860); Louisville, etc. Co. *v.* Meriwether, 5 B. Mon. (Ky.) 13 (1844). A printed notice in designated newspapers, published in cities where the subscribers reside, is good notice of a call. Louisville, etc. Turnp. Co. *v.* Meriwether, 5 B. Mon. 13 (1844).

4 In Mississippi, etc. R. R. *v.* Gaster, 20 Ark. 455 (1859), it is said that the mode of giving a notice in these cases is directory rather than mandatory, and that where the charter provided that notice be given in certain newspapers, a personal notice would be sufficient. See also Knight's Case, L. R. 2 Ch. App. 321 (1867). So where a by-law provided for notice by letter, it was held that personal notice sufficed. Lexington, etc. R. R. *v.* Chandler, 54 Mass. 311 (1847). But see Lewey's Island R. R. *v.* Bolton, 48 Me. 451 (1860). In general, as to the effect of a notice left at one's residence or place of business, but which never reaches the person for whom it is intended, see Cockerell *v.* Van Diemen's Land Co., 26 L. J. (C. P.) 203 (1857); s. c. aff'd, *sub nom.* Van Diemen's Land Co. *v.* Cockerell, 1 C. B. (N. S.) 732. *Cf.* Birmingham, etc. Ry. *v.* Locke, 1 Q. B. 256 (1841); Graham *v.* Van Diemen's Land Co., 1 Hurl. & N. 541 (1856). See also South Staffordshire Ry. *v.*

holder is dead and the company has knowledge of that fact, notice of an assessment on his stock cannot be served so as to bind his estate; neither can a notice threatening forfeiture of his stock for non-payment. Neither can the notice be served upon the executors.[1]

§ 131. *Notice is not the same thing as forfeiture.*—A notice of a probable or certain forfeiture in the future, or a threat of forfeiture, is not forfeiture, and does not become forfeiture merely by non-payment of the call or assessment within the time specified in the notice.[2] A forfeiture is void if declared for the non-payment of assessments, when all or any one of the assessments were illegal or unauthorized.[3]

§ 132. *Tender, by stockholder, before forfeiture.*—Where the amount due on a subscription for non-payment of which a forfeiture is about to take place is tendered to the proper officer of the corporation at any time before the sale actually takes place,[4]

Burnside, 5 Exch. 129 (1850), and § 119, *supra*.

1 Allen *v.* Gold Reefs, etc., [1899] 2 Ch. 40.

2 Macon, etc. R. R. *v.* Vason, 57 Ga. 314 (1876); Bigg's Case, L. R. 1 Eq. 309 (1865); Cockerell *v.* Van Diemen's Land Co., 26 L. J. (C. P.) 203 (1857); Water Valley Mfg. Co. *v.* Seaman, 53 Miss. 655 (1876), where only a threat was made. *Cf.* § 125, *supra*. But see Knight's Case, L. R. 2 Ch. App. 321 (1867). In Knight's Case it was further provided that the declaration of forfeiture should be at once entered in the register. Entry was duly made of the date of the forfeiture, but not of the declaration itself. All essentials being regular, and there being no strict requirement of a written resolution, the court held the forfeiture valid because the entry of forfeiture could not have been properly made without a resolution of the directors, which would hence be assumed. *Cf.* Birmingham, etc. Ry. *v.* Locke, 1 Q. B. 256 (1841). A mere declaration of forfeiture is not sufficient to effect it, and is no bar to an action on the subscription. Minnehaha, etc. Assoc. *v.* Legg, 50 Minn. 333 (1892). A resolution of forfeiture does not constitute forfeiture, and is no bar to an action. Hays *v.* Franklin, etc. Co., 35 Neb. 511 (1892).

In Walker *v.* Ogden, 1 Biss. 287 (1859); s. c., 29 Fed. Cas. 41, where the articles of a private joint-stock company provided for a forfeiture, but in no express mode, and a forfeiture was declared of certain shares which thereafter remained undistributed. No rights of third parties were vested in consequence; and the court of equity, never favoring forfeitures, decreed that upon payment of the whole amount due, principal and interest, the complainant should be allowed to redeem his stock. The court did not *rule*, but was "inclined to the opinion," that "the mere declaration of the trustees" could not "have the effect to foreclose all Walker's interest," and "that a judicial decree of foreclosure upon a bill filed by the trustee was necessary in order to bar his right to redeem his stock."

3 Stoneham Branch R. R. *v.* Gould, 68 Mass. 277 (1854); Lewey's Island R. R. *v.* Bolton, 48 Me. 451 (1860).

4 Mitchell *v.* Vermont Copper Min. Co., 67 N. Y. 280 (1876); Sweny *v.* Smith, L. R. 7 Eq. 324 (1869), where a bill was filed to annul the forfeit-

the forfeiture is not valid. This rule is just, since, while protecting the corporation and the public, it relieves the stockholder from the hardship of a harsh and summary remedy.

§ 133. *Surplus, after valid forfeiture, belongs to the corporation — Purchase by the corporation — Liability of the purchaser of forfeited stock.* — Upon a sale of the stock forfeited, if the amount realized is more than the debt due the corporation, the surplus belongs to the corporation.[1] The purchaser at the forfeiture sale, if the stock has been only partially paid for, must pay the instalments due and to come due, and if he fail to make these payments the stock must be sold again.[2] It seems, however, that if the corporation purchases the stock itself, it may resell the stock at any

ure, which was made because the tender (although in time and place) was accompanied by a protest. *Held*, the protest did not vitiate the tender. Where a stockholder whose stock in the company is advertised for sale for non-payment of a call, tenders the money to the secretary with interest and cost of advertisement to that date, but the company sells the stock nevertheless, he may by bill in equity compel the company to treat the sale as invalid and issue the stock to him on the above payment. Wilson *v.* Duplin, etc. Co., 139 N. C. 395 (1905).

1 Small *v.* Herkimer Mfg. Co., 2 N. Y. 330 (1849); Great Northern Ry. *v.* Kennedy, 4 Exch. 417, 426 (1849), by Rolfe, B. (ruling on the language of a special act): "It is clear that the declaration of forfeiture is in the nature of a mortgage. The company are not to sell more of the shares than will be sufficient, as nearly as can be ascertained, to pay the arrears of calls, together with interest and expenses; and if there be any surplus, it is to be paid to the defaulter, who has a right to redeem at the last moment before sale. That shows that the forfeited shares are a security only until payment." *Cf.* Freeman *v.* Harwood, 49 Me. 195, 198 (1859), *dictum*. In Tennessee it is held that where stock is only partly paid and the corporation issues a certificate reciting on its face how much is still due, and the holder pledges it, and no transfer to the pledgee is made on the corporate books, the corporation can have a sale of the stock for non-payment of the balance remaining due, but such proportion of the proceeds will be paid to the pledgee as the amount already paid on the stock bears to the par value of the stock. Ingles, etc. Co. *v.* Knoxville, etc. Co., 53 S. W. Rep. 1111 (Tenn. 1899).

2 Sturges *v.* Stetson, 1 Biss. 246, 251 (1858); s. c., 23 Fed. Cas. 311. Where stock is forfeited and sold at a price which does not give the company the full par value of the subscription price of the stock, the purchaser is liable for the unpaid part. Randt, etc. Co. *v.* New Balkie, etc. Lim., 85 L. T. Rep. 780 (1902); aff'd, [1903] 1 K. B. 461. The purchaser of partly paid up shares, which have been forfeited by the company and sold, is liable for the unpaid part when called. New Balkis Eersteling *v.* Randt, etc. Co. Ltd., [1904] A. C. 165. Where the purchaser of stock which the company has forfeited for non-payment of a call is liable for the unpaid part of the par value of the stock, a subsequent collection from the former owner of stock is to be credited. *Re* Randt, etc. Co., [1904] 2 Ch. 468.

price it pleases;[1] but in England it has been held that shares which have been forfeited after being partially paid for can be reissued only at a price equal to the unpaid subscription price or a sum in excess thereof.[2] And even though the purchaser of forfeited stock may not be liable for unpaid calls, yet under the charter he may be unable to vote such stock unless he pays such unpaid calls.[3] Even though the charter of an irrigation company provides that no one shall hold stock except an owner of land to the amount of one acre for each share of stock held by him, yet where the stock is sold for non-payment of assessments the purchaser at such sale is entitled to a transfer on the corporate books although he owns no land. The purchaser may file a bill in equity to determine his rights.[4] Where, by statute, bank stock may be sold for non-payment of assessments, levied upon it to restore the capital stock, the price at which it is sold belongs to the stockholder and not to the bank.[5]

§ 134. *Equity will relieve a stockholder from an unauthorized forfeiture — Action at law for damages.* —The stockholder himself, as well as a corporate creditor, may, in a proper case, invoke the aid of a court of chancery when his stock has been forfeited in an unauthorized or unlawful manner. Usually, in such a case, the stockholder may, by a bill in equity, obtain a decree annulling the forfeiture.[6] Where an illegal assessment has been made, and

1 See § 46, *supra*. Even though a corporation purchases shares of its own stock, which are but partially paid, this does not render the remaining stockholders liable for the balance due on such unpaid shares so purchased. Crawford *v.* Roney, 126 Ga. 763 (1906).

2 Morrison *v.* Trustees, etc., 79 L. T. Rep. 605 (1898).

3 Randt, etc. Co. *v.* Wainwright, [1901] 1 Ch. 184.

4 The court found it unnecessary to pass on the question as to whether such a restriction as to the stock is legal. Spurgeon *v.* Santa Ana, etc. Co., 120 Cal. 71 (1898).

5 Chicago T. & T. Co. *v.* State Bank, 86 Fed. Rep. 863 (1898). On the sale of bank stock for non-payment of an assessment, levied to make good impaired capital stock, as allowed by the Indiana statute, the price at which the stock sells belongs to the stockholder in default. Chicago, etc. Co. *v.* State Bank, 121 Fed. Rep. 58 (1902).

6 Sweny *v.* Smith, L. R. 7 Eq. 324 (1869); Mitchell *v.* Vermont Copper Min. Co., 67 N. Y. 280 (1876); Adley *v.* Whitstable Co., 17 Ves. 315 (1810, by Lord Eldon); Sloman *v.* Bank of England, 14 Sim. 475 (1845); Norman *v.* Mitchell, 5 De G., M. & G. 648 (1854). Thus, a forfeiture of shares for non-payment of calls, declared at a meeting held out of the state in which the company was incorporated, the meeting being in consequence an unlawful meeting, may be set aside upon a proper application to a court of chancery at any time within the period prescribed by the statute of limitations for bringing an action for conversion. Ormsby *v.* Vermont Copper Min. Co., 56 N. Y. 623 (1874).

the stock is about to be sold, a stockholder may enjoin the sale and cause the assessment to be set aside.[1] Even though a stockholder enjoins an assessment and the directors then reduce it, the judgment in the injunction suit is not conclusive against the validity of the reduced assessment.[2] Where the directors of a corporation have misappropriated the funds of the company, created fraudulent debts, levied assessments upon the stock, caused the stock to be forfeited for non-payment, and judgment to be entered on said debts and the property to be sold out, a stockholder may file a bill to set aside all the transactions and to compel the directors to account and to wind up the company.[3] If the corporation refuses to allow a stockholder to examine the books in order that he might ascertain whether he wished to continue to make payments on his stock, a forfeiture by the corporation for refusal to make such payments will be set aside, and such a forfeiture, even before it is set aside, is not a bar to the stockholder's suit to restrain illegal acts on the part of the corporation.[4] But where a person's stock has been sold for failure to pay

An injunction will not be granted to restrain the sale of stock for non-payment of assessments, though notice thereof was illegal, where the plaintiff does not offer to pay the calls. Burham *v.* San Francisco, etc. Co., 76 Cal. 26 (1888). See also Burham *v.* San Francisco, etc. Co., 76 Cal. 24 (1888). Forfeiture may be enjoined. Moore *v.* New Jersey Lighterage Co., 5 N. Y. Supp. 192 (1889). The forfeiture will not be set aside if the organization meeting of the company was illegal, having been held out of the state, inasmuch as the corporation does not legally exist. Smith *v.* Silver Valley Min. Co., 64 Md. 85 (1885). An assessment on irrigation stock to be used for a purpose outside of the charter powers, cannot be collected, and a forfeiture and sale of the stock for failure to pay is void. Seeley *v.* Huntington, etc. Ass'n, 27 Utah, 179 (1904). Where an insane person has been defrauded of stock, and the stock is used to levy an assessment, and the corporation is about to sell his stock for non-payment, an injunction will be granted incident to a suit to set aside the transaction. Weber *v.* Della, etc. Co., 11 Idaho, 264 (1905).

1 Green *v.* Abietine Medical Co., 96 Cal. 322 (1892). Injunction lies against the sale of stock by a corporation for non-payment of assessments which were levied on the stock after the full par value thereon had been paid in, where such assessments were so levied by virtue of a statute which is unconstitutional. Enterprise, etc. Co. *v.* Moffitt, 58 Neb. 642 (1899). Even though the legislature has reserved the right to amend a charter, yet it cannot authorize the corporation to assess stock which was issued as being full-paid and non-assessable. A minority stockholder may enjoin the sale of the stock for non-payment of such an assessment. Garey *v.* St. Joe Mining Company, 91 Pac. Rep. 369 (Utah 1907). See 98 L. T. Rep. 633.

2 Grand Valley, etc. Co. *v.* Fruita Imp. Co., 86 Pac. Rep. 324 (Col. 1906).

3 Jellenik *v.* Huron, etc. Co., 177 U. S. 1 (1899).

4 Buker *v.* Leighton, etc. Assoc.,

an assessment, he cannot maintain a suit in behalf of the corporation against the directors for misconduct, even though such misconduct caused the assessment to be levied.[1] An assessment upon stock levied by a board of directors illegally elected, and a sale of the stock thereunder, does not put an end to the stockholder's suit to oust such board of directors and to set aside such assessment and to set aside contracts made by such board. The complaint is not multifarious.[2] A stockholder may obtain an injunction against the forfeiture where the books of the company are in confusion and the stockholder makes out a *prima facie* case that the company owes him more than the amount due on his subscription.[3]

So, also, equity will sometimes set aside a forfeiture where a forfeiture was declared for non-payment of calls, which, it was shown, were not paid because the stockholder had died, and no administrator had been appointed before the time for payment had fully elapsed.[4] A corporation cannot single out the stock of one stockholder and proceed to sell it for non-payment of assessments, where other stockholders are also in arrears.[5] But it seems that the weight of authority is to the effect that a forfeiture of stock, lawful and regular, for non-payment of assessments, is one of those forfeitures from which equity will not afford relief except in very exceptional cases.[6] When the stockholder has lost his shares by an irregular

164 N. Y. 557 (1900), rev'g 18 App. Div. 548.

1 Hanna *v.* People's Nat. Bank, 76 N. Y. App. 224 (1902); modified on another point in 179 N. Y. 107.

2 Whitehead *v.* Sweet, 126 Cal. 67 (1899). A suit by a stockholder against a promoter in behalf of the corporation, to require him to pay for his stock, and also to recover damages for false representations inducing the plaintiff to purchase stock, and also to enjoin a proposed sale of plaintiff's stock, in order to pay an assessment, is multifarious. Pietsch *v.* Krause, 116 Wis. 344 (1903). A stockholder whose stock is about to be forfeited to pay an illegal assessment, may, in a suit to enjoin such forfeiture, join a cause of action against the directors for illegal salaries and other illegal acts. McConnell *v.* Combination, etc. Co., 30 Mont. 239 (1904). See s. c., 31 Mont. 563 (1905).

3 Schuetz *v.* German, etc. Co., 21 N. Y. App. Div. 163 (1897).

4 Glass *v.* Hope, 16 Grant (Up. Can. Ch.), 420 (1869). *Cf.* Walker *v.* Ogden, 1 Biss. 287 (1859); s. c., 29 Fed. Cas. 41.

5 Hardee *v.* Sunset Oil Co., 56 Fed. Rep. 51 (1893).

6 Sparks *v.* Liverpool Water-works, 13 Ves. 428 (1807); Prendergast *v.* Turton, 1 Y. & C. (Ch.) 98 (1841); Germantown, etc. Ry. *v.* Fitler, 60 Pa. St. 124 (1869); Clark *v.* Barnard, 108 U. S. 436, 456 (1882). Equity will not relieve where, on the reorganization of a company, old stockholders fail to exercise their options for securing new shares before the expiration of a fixed time limit. Vatable *v.* New York, etc. R. R., 96 N. Y. 49, 57 (1884). Equity will not relieve

or unlawful forfeiture, his suit should be for the recovery of his stock, and not for an undivided interest in the property of the company.[1] The suit to set aside the forfeiture must be brought in the state where the corporation is incorporated.[2] Acquiescence or delay, as we have seen, on the part of the stockholder, will usually bar his right in a court of equity to have the forfeiture set aside.[3] If the forfeiture is irregular the party deprived of his stock may collect damages.[4]

from such forfeiture, because to do so would, it is said, be in contravention of the direct expression of the legislative will. Small *v.* Herkimer Mfg. Co., 2 N. Y. 330, 340 (1849). Neither can a stockholder have a forfeiture set aside merely because the calls which he refused to pay were for the purpose of paying debts which the company would not have owed but for the previous misappropriation of the corporate funds by the trustees. Marshall *v.* Golden Fleece, etc. Co., 16 Nev. 156, 179 (1881); Weeks *v.* Silver Islet, etc. Co., 55 N. Y. Super. Ct. 1 (1887); Taylor *v.* North Star, etc. Co., 79 Cal. 285 (1889). In a stockholder's suit to enjoin an assessment and to recover back stock which he sold when he was of unsound mind, the injunction will not lie unless it is shown that the assessment would not have been levied if he still held the stock. Weber *v.* Della, etc. Co., 94 Pac. Rep. 441 (Idaho 1908).

1 Smith *v.* Maine Boys Tunnel Co., 18 Cal. 111 (1861).

2 North State, etc. Co. *v.* Field, 64 Md. 151 (1885); Sudlow *v.* Dutch Rhenish Ry., 21 Beav. 43 (1855). See Wilkins *v.* Thorne, 60 Md. 253 (1883). The courts of Maryland will not issue a *mandamus* to compel a foreign corporation to annul a forfeiture of stock. This is a matter to be litigated in the courts of the state creating the corporation. North State, etc. Co. *v.* Field, 64 Md. 151 (1885).

3 See § 129, *supra*. Even though a forfeiture of stock under the statute is irregularly and illegally made, yet, if for three years, the stockholder acquiesces therein with knowledge, he cannot, after the stock has become valuable, have the sale set aside. Raht *v.* Sevier Mining, etc. Co., 18 Utah, 290 (1898). A forfeiture of stock by sale at public auction for failure to pay assessments, made before the amount of stock required by statute to be subscribed before the assessment can be levied has been subscribed, may be set aside by a suit in equity, and the statute of limitations applicable to suits to set aside forfeitures on the ground of irregularities does not apply. A pledgee of the stock may maintain such a suit. Herbert, etc. Bank *v.* Bank of Orland, 133 Cal. 64 (1901). Where a suit to set aside a forfeiture of stock by the corporation, on the ground of fraud, is compromised, the same stockholder cannot, eight years thereafter, file another suit to set aside the assessment on the ground of frauds unknown to him when the first suit was compromised. Marks *v.* Evans, 62 Pac. Rep. 76 (Cal. 1900). A stockholder who has paid assessments without objection cannot attack a forfeiture of the stock by the corporation for non-payment of subsequent similar assessments on the ground that the assessments were illegal. Boll *v.* Camp, 118 Iowa, 516 (1902). *Cf.* 69 Atl. Rep. 528.

4 *Re* New Chile, etc. Co., L. R. 45 Ch. D. 598 (1890). A corporation is

Where stock is forfeited illegally a person to whom it is then issued with knowledge may be required to give it up.[1]

liable in damages for selling the stock of a stockholder for non-payment of dues where such sale was irregular and illegal, being contrary to the requirements of the by-laws, even though the corporation buys the stock itself at such sale. The fact that a surplus realized at the sale is sent to the stockholder by check and is received by him does not bar his remedy, he being in ignorance of the illegality. Allen *v.* American Building, etc. Assoc., 49 Minn. 544 (1892).

Where at a public sale of stock for non-payment of an assessment, a pledgee of the stock prevented competition by stating that he intended to buy the stock and continue to hold it as security he cannot hold the company liable for refusal to transfer the stock. Young *v.* New Standard, etc. Co., 148 Cal. 306 (1905).

[1] New York, etc. Co. *v.* Great Eastern Tel. Co., 69 Atl. Rep. 528 (N. J. 1908).

CHAPTER IX.

DEFENSE OF PAROL AGREEMENTS AND FRAUDULENT REPRESENTATIONS INDUCING SUBSCRIPTIONS FOR STOCK.

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159. Remedy by action for money had and received.
160. Ratification as a bar.
161, 162. Laches as a bar.
163, 164. Corporate insolvency as a bar.
165. Necessary allegations, contribution, etc.

§ 135. *The subject.*—Parol agreements and fraudulent representations inducing subscriptions to stock have been a prolific source of litigation both in this country and in England. As a defense to actions brought for the collection of subscriptions, and as the basis of suits in equity to set aside subscriptions and compel a repayment of money already paid on such subscriptions, the agreements and representations made to induce persons to subscribe for stock have given rise to intricate principles of law peculiar to this subject.

§ 136. *Definitions.*—A parol agreement includes all representations and stipulations made before or at the time of subscribing, but not included in the written subscription, whereby the corporation is to do something or refrain from doing something in the future. A fraudulent representation, on the other hand, is a statement as to past acts or existing facts, or the omission of such a statement, which amounts to a fraud on one who, relying thereon, subscribes to the stock of the company. Difficulty sometimes arises in determining whether a statement by a corporate agent inducing a subscription is merely a parol agreement or is a fraudulent representation. This question is one which must be decided first of

all; since the rules of law applicable to parol agreements, as a defense to an action on a subscription, differ greatly from those applicable to fraudulent representations.

§ 137. *Oral agreements and executory contracts.*— Where a subscription contract is absolute on its face, it is well settled, both in equity and at law, that parol evidence of previous or contemporaneous negotiations, stipulations, terms, or agreements is not admissible to vary or add to the contract, except for the purpose of proving that the parties, at the time of consummating the agreement, intended and understood that such terms and stipulations would be incorporated in the contract, but omitted the same by accident, fraud or mistake.[1] This rule, forbidding the introduction of parol

[1] Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491 (1859); Kennebec, etc. R. R. *v.* Waters, 34 Me. 369 (1852); Tabor, etc. Ry. *v.* McCormick, 90 Iowa, 446 (1894); Nebraska, etc. Assoc. *v.* Townley, 46 Neb. 893 (1896); Cincinnati, etc. R. R. *v.* Pearce, 28 Ind. 502 (1867); Scarlett *v.* Academy of Music, 46 Md. 132 (1876); Dill *v.* Wabash Valley R. R., 21 Ill. 91 (1859); Merrick *v.* Consumers, etc. Co., 111 Ill. App. Rep. 153 (1902); East Tennessee, etc. R. R. *v.* Gammon, 5 Sneed (Tenn.), 567 (1858); Corwith *v.* Culver, 69 Ill. 502 (1873); Jack *v.* Naber, 15 Iowa, 450 (1863); Thornburgh *v.* Newcastle, etc. R. R., 14 Ind. 499 (1860); Gelpcke *v.* Blake, 15 Iowa, 387 (1863), holding that it is immaterial that the agent acted in good faith; Johnson *v.* Pensacola, etc. R. R., 9 Fla. 299 (1860); Mississippi, etc. R. R. *v.* Cross, 20 Ark. 443 (1859); Ridgefield, etc. R. R. *v.* Brush, 43 Conn. 86 (1875); Phœnix Warehousing Co. *v.* Badger, 6 Hun, 293 (1875); aff'd, 67 N. Y. 294; White Hall, etc. R. R. *v.* Myers, 16 Abb. Pr. (N. S.) 34 (1872). But see Brewers' F. Ins. Co. *v.* Burger, 10 Hun, 56 (1877), holding that where the original subscription contract is verbal and complete, and a part only of it is afterwards reduced to writing, it is competent to prove the whole agreement. *Cf.* Eighmie *v.* Taylor, 98 N. Y. 288 (1885); Emmett *v.* Penoyer, 151 N. Y. 564 (1896). Parol agreements with the agent who procured the subscription are not admissible. Philadelphia, etc. R. R. *v.* Conway, 177 Pa. St. 364 (1896). A person, who by writing has subscribed for stock, cannot set up that he agreed with the president that he was acting merely as agent for others. American, etc. Co. *v.* Bean, 125 Fed. Rep. 823 (1903); rev'd on another point in 134 Fed. Rep. 57. *Cf.* § 68, *supra.* An oral condition to a subscription cannot be set up. Masonic Temple Assoc. *v.* Channell, 43 Minn. 353 (1890). An oral statement that the subscriptions would be collected only after connection had been made with a certain place is no defense. Anderson *v.* Middle, etc. R. R., 91 Tenn. 44 (1891). Parol agreements cannot be added to the written contract. Shattuck *v.* Robbins, 68 N. H. 565 (1896). Where a subscription is absolute upon its face the subscribers' liability cannot be changed by other contemporaneous agreements as between them and creditors who had no notice of such agreements. "Creditors are entitled to the full benefit of the stockholder's contract as he has made and published it in subscribing, executing and filing his subscription to the stock of the corporation." Moore *v.* Universal, etc. Co., 122 Mich. 48 (1899). Where a stockholder has agreed to sell and deposit

evidence to explain, contradict or vary a written instrument, applies to a subscription contract for stock in a corporation. Neither

in a trust company 720 shares, but only deposited 687 shares, and the vendee has on his part deposited the purchase price with the trust company to be paid on the delivery of the 720 shares, the vendor cannot rescind on the ground that there was a contemporaneous oral understanding that 687 shares would be sufficient. Dady *v.* O'Rourke, 172 N. Y. 447 (1902).

In Georgia, under section 3303 of the code, where the subscription does not purport to contain the whole contract, parol evidence is admissible. Hendrix *v.* Academy of Music, 73 Ga. 437 (1884).

In Pennsylvania the case of McClure *v.* People's, etc. Ry., 90 Pa. St. 269 (1879), sustains the general rule, and excludes a parol agreement or condition allowing payment in property. But Rinesmith *v.* People's Freight Ry., 90 Pa. St. 262 (1879); Caley *v.* Philadelphia, etc. R. R., 80 Pa. St. 363 (1876); Miller *v.* Hanover, etc. R. R., 87 Pa. St. 95 (1878); and McCarty *v.* Selinsgrove, etc. R. R., 87 Pa. St. 332 (1878), allow parol evidence to contradict the subscription contract where it is shown that but for the parol agreement the subscription would not have been made; the last two cases saying, however, that the evidence is inadmissible if other stockholders are interested in opposition to such parol agreement. In Pennsylvania it is held that the oral promise of the president of a railroad in taking a deed of a right of way, that a certain crossing would be built, will be enforced, even though it changes the writing, it having been made at the time and used to procure the execution of the writing. Perkiomen R. R. *v.* Bromer, 66 Atl. Rep. 359 (Penn. 1907). This unusual rule probably has its origin in an old English case (Pulsford *v.* Richards, 17 Beav. 87—1853), which holds that a representation is to be considered *fraudulent* when, if the real truth had been stated, it is reasonable to believe the plaintiff would not have entered into the contract. A parol agreement that part payment in contract labor should be allowed was held to be void, inasmuch as it varied the terms of a written agreement. Ridgefield, etc. R. R. *v.* Brush, 43 Conn. 86 (1875). *Contra*, Louisville, etc. R. R. *v.* Thompson, 18 B. Mon. (Ky.) 735 (1857); McConahy *v.* Centre, etc. Co., 1 Pen. & W. (Pa.) 426 (1830), followed in Swatara R. R. *v.* Brune, 6 Gill (Md.), 41 (1847); overruled by Nippenose Mfg. Co. *v.* Stadon, 68 Pa. St. 256 (1871). See also Weber *v.* Fickey, 52 Md. 501 (1879); s. c., 47 Md. 196; Liebke *v.* Knapp, 79 Mo. 22 (1883). A parol condition that others were to sign is not admissible. Minneapolis, etc. Co. *v.* Davis, 40 Minn. 110 (1889). Even though two persons signed the articles of incorporation as incorporators and as subscribers of stock, on condition that the articles would not be used unless a certain other party signed, and even though the latter party did not sign and the articles were filed and the stock subsequently tendered to such signers, which they refused, yet if they took no steps to remove their names as subscribers from the books they are liable as stockholders to corporate creditors on a statutory liability. Rehbein *v.* Rahr, 109 Wis. 136 (1901). But it has been held that a parol agreement herein, made after the subscription, and on a new consideration, is valid. Pittsburgh, etc. R. R. *v.* Stewart, 41 Pa. St. 54 (1861). See also Tonica, etc. R. R. *v.* Stein, 21 Ill. 96 (1859). *Cf.* Bucher *v.* Dillsburg, etc. R. R., 76 Pa. St. 306 (1874); Brewers' F. Ins. Co. *v.* Burger, 10

party is permitted to prove a different contract from that expressed in the written instrument. Under the rule, not even a separate written contemporaneous contract is admissible to change the subscription contract.[1]

§ 138. Thus, an oral agreement that a certain location will be adopted,[2] or that payment may be made in a certain way or at a certain time,[3] or that the subscription shall be merely nominal, for

Hun, 56 (1877). An action for damages for breach of contract lies against the corporation if the agreement amounts to a condition subsequent. See ch. V, *supra*.

1 Quoted and approved in Beals *v.* Buffalo, etc. Co., 49 N. Y. App. Div. 589, 593 (1900). In this case the court held that as against corporate creditors a subscriber cannot evade his liability by showing a separate agreement between himself and the corporation to the effect that the stock was to be delivered to him at a future time, and that in the meantime he was to advance money to the corporation to the amount of the par value of the stock to be repaid to him out of contracts. See also Brownlee *v.* Ohio, etc. R. R., 18 Ind. 68 (1862); White Mountains R. R. *v.* Eastman, 34 N. H. 124 (1856). See also § 191, *infra*. A party sued upon a subscription for stock may show that a letter accompanied the subscription to the effect that he would pay a certain part in cash, which had been done, and pay the balance out of his monthly accounts with the corporation. Elliott *v.* New York Endowment Co., 73 Hun, 519 (1893); aff'd, 148 N. Y. 752. A subscription before incorporation can be enforced by the company only in accordance with the terms on which it was delivered by the subscriber to a promoter to be delivered to the corporation, and hence it may be shown that the stock was to be issued for the good will of the business. Ottawa Dairy *v.* Soreley, 34 Can. S. C. Rep. 508 (1904). A subscription payable to whomsoever might lease premises free of rent to a stock exchange, may be enforced by a corporation thereafter organized for that purpose, and the delivery of the subscription to the person obtaining the same is a sufficient delivery. A separate contract with the then owners of the building which was afterwards acquired by the corporation does not affect such subscription, the corporation having no notice thereof. Merchants', etc. Co. *v.* Chicago, etc. Co., 210 Ill. 26 (1904).

2 North Carolina R. R. *v.* Leach, 4 Jones, L. (N. C.) 340 (1857); Wight *v.* Shelby R. R., 16 B. Mon. (Ky.) 4 (1855); Ellison *v.* Mobile, etc. R. R., 36 Miss. 572 (1858); Mississippi, etc. R. R. *v.* Cross, 20 Ark. 443 (1859); Evansville, etc. R. R. *v.* Posey, 12 Ind. 363 (1859); Eakright *v.* Logansport, etc. R. R., 13 Ind. 404 (1859); Carlisle *v.* Evansville, etc. R. R., 13 Ind. 477 (1859); Miller *v.* Wild Cat, etc. Co., 52 Ind. 51 (1875); s. c., 57 Ind. 241 (1877); Miller *v.* Hanover, etc. R. R., 87 Pa. St. 95 (1878); Gelpcke *v.* Blake, 15 Iowa, 387 (1863); Braddock *v.* Philadelphia, etc. R. R., 45 N. J. L. 363 (1883); Keller *v.* Johnson, 11 Ind. 337 (1858), holding it immaterial that fraud was actually intended. *Contra*, Rives *v.* Montgomery, etc. Co., 30 Ala. 92 (1857). Representations of an agent that the road will be built between the termini laid down in the charter are representations relative to the future, and are not fraudulent though not carried out. Armstrong *v.* Karshner, 47 Ohio St. 276 (1890).

3 Noble *v.* Callender, 20 Ohio St. 199 (1870); Henry *v.* Vermillion, etc. R.

the purpose of inducing others to subscribe,[1] or that the subscription shall be in fact only a pledge of stock by the corporation to the subscriber, or that the stock may be surrendered,[2] or that certain property would be purchased by the corporation,[3] or that the subscriber might keep his stock, but should not be liable for the full par value thereof,[4] or that payment would not be demanded until

R., 17 Ohio, 187 (1848); Methodist E. Church *v.* Town, 49 Vt. 29 (1876); Ridgefield, etc. R. R. *v.* Brush, 43 Conn. 86 (1875); Thigpen *v.* Mississippi Central R. R., 32 Miss. 347 (1856). A lawyer who subscribes for stock on an oral agreement that he should pay in services is nevertheless liable on the stock to corporate creditors where the services have not yet been performed. Caston's Case, 7 Ont. Rep. (Can.) 448 (1884). Even though subscribers claim that their stock was to be paid for by dividends, yet such an agreement is no defense as against creditors. Hawkins *v.* Citizens', etc. Co., 38 Oreg. 544 (1901).

1 Downie *v.* White, 12 Wis. 176 (1860); Wetherbee *v.* Baker, 35 N. J. Eq. 501 (1882); Centre, etc. Co. *v.* McConaby, 16 Serg. & R. (Pa.) 140 (1827); Phœnix Warehousing Co. *v.* Badger, 6 Hun, 293 (1875); aff'd, 67 N. Y. 294; Peychaud *v.* Hood, 23 La. Ann. 732 (1871); Galena, etc. R. R. *v.* Ennor, 116 Ill. 55 (1886); s. c., Cleveland Iron Co. *v.* Ennor, 14 N. E. Rep. 673; Robinson *v.* Pittsburgh, etc. R. R., 32 Pa. St. 334 (1858); Graff *v.* Pittsburgh, etc. R. R., 31 Pa. St. 489 (1858); Mann *v.* Cooke, 20 Conn. 178 (1849); Connecticut, etc. R. R. *v.* Bailey, 24 Vt. 465 (1852); Davidson's Case, 3 De G. & S. 21 (1849), holding it to be a fraud on other subscribers, without requiring proof that there were such; Bridger's Case, L. R. 9 Eq. 74 (1869); aff'd, L. R. 5 Ch. App. 305; New Albany, etc. R. R. *v.* Slaughter, 10 Ind. 218 (1858); Blodgett *v.* Morrill, 20 Vt. 509 (1848); Minor *v.* Mechanics' Bank, 1 Peters, 46 (1828); Bates *v.* Lewis, 3 Ohio St. 459 (1854); Litchfield Bank *v.* Church, 29 Conn. 137 (1860); Mangles *v.* Grand Collier Dock Co., 10 Sim. 519 (1840); Preston *v.* Grand Collier Dock Co., 11 Sim. 327 (1840); Choteau Ins. Co. *v.* Floyd, 74 Mo. 286 (1881). These cases hold that parol agreements are void as a fraud on corporate creditors and on other subscribers, and that the subscription is enforceable absolutely. It is no defense that there was a prior or contemporaneous oral agreement that the stock was not to be issued and the subscriber not to be held liable. Wurtzburger *v.* Anniston Rolling Mills, 94 Ala. 640 (1891). It is no defense that another party had promised the stockholder that the former would pay for the stock. Williams *v.* Benet, 34 S. C. 112 (1891). A person sued as a subscriber cannot set up that he subscribed at the solicitation of another person who agreed to take the subscription off his hands at once. Stutz *v.* Handley, 41 Fed. Rep. 531 (1890); reversed on other grounds, Handley *v.* Stutz, 139 U. S. 417.

2 Melvin *v.* Lamar Ins. Co., 80 Ill. 446 (1875); White Mountains R. R. *v.* Eastman, 34 N. H. 124 (1856). *Cf.* §§ 247, 465, *infra*. Or that the subscriber be released. Gill *v.* Balis, 72 Mo. 424 (1880).

3 Kelsey *v.* Northern Light Oil Co., 45 N. Y. 505 (1871).

4 Custar *v.* Titusville Gas, etc. Co., 63 Pa. St. 381 (1869); Union Mut. L. Ins. Co. *v.* Frear Stone Mfg. Co., 97 Ill. 537 (1881); Upton *v.* Tribilcock, 91 U. S. 45 (1875). A secret agreement that a subscriber for stock prior to incorporation shall not be required to take the stock is no defense as

certain work had been completed,[1] or that the money would be applied to a particular part of the road,[2] or that a certain part of the road would be completed within a certain time,[3] or that the road would be extended to a certain point,[4] or other parol conditions,[5] or

against the corporation. Greater, etc. Co. *v.* Riley, 210 Pa. St. 283 (1904). A subscriber cannot defeat his subscription on the ground that the agent of the company who obtained it told him that he would never be called upon to pay anything. Marles, etc. Co. *v.* Stulb, 215 Pa. St. 91 (1906).

1 La Grange, etc. Co. *v.* Mays, 29 Mo. 64 (1859); Clem *v.* Newcastle, etc. R. R., 9 Ind. 488 (1857), holding that such a promise is contradictory of the legal effect of the subscription; Cincinnati, etc. R. R. *v.* Pearce, 28 Ind. 502 (1867). A call on a subscription cannot be enjoined on the ground that it is in violation of a parol agreement of the promoters as to calls. Christopher *v.* Noxon, 4 Ont. Rep. (Can.) 672 (1883).

2 Smith *v.* Tallassee, etc. Co., 30 Ala. 650 (1857). An action to rescind the purchase of stock lies where the money paid therefor was to be applied to a certain purpose, but was not so applied, but the receiver will not be directed to give up the money. Moore *v.* Robertson, 25 Abb. N. C. 173 (1890).

3 Blair *v.* Buttolph, 72 Iowa, 31 (1887).

4 Low *v.* Studabaker, 110 Ind. 57 (1887). Oral promises and statements that the road would be constructed on a certain route are no defense to a written subscription. Chattanooga, etc. R. R. *v.* Warthen, 98 Ga. 599 (1896).

5 Topeka Mfg. Co. *v.* Hale, 39 Kan. 23 (1888); Marshall Foundry Co. *v.* Killian, 99 N. C. 501 (1888). A subscriber for stock may show that payment therefor was by the conveyance of land or an interest in land. Libby *v.* Mt. Monadnock, etc. Co., 68 N. H. 444 (1896). Where stock is subscribed for, although thereafter it is agreed that the subscription shall be paid by the transfer of property, yet, if no actual transfer is made, a subscriber may be liable, even though he understood that the property had been actually transferred. Crowley *v.* Walton, 23 R. I. 331 (1901). An oral agreement that only one-half of the subscription need be taken and paid for is not legal. Gathright *v.* Oil City, etc. Co., 56 S. W. Rep. 163 (Ky. 1900). A subscriber may show that he was assured that he might withdraw from the subscription if he wished after consulting with another person, and that he actually did so withdraw. Ada, etc. Assoc. *v.* Mears, 123 Mich. 470 (1900). Parol evidence is inadmissible to add to a condition of a conditional subscription. Miller *v.* Preston, 4 N. M. 396 (1888). An oral agreement to take stock in payment of a note is no defense to the note. The corporation must pay it. Tuscaloosa, etc. Co. *v.* Perry, 85 Ala. 158 (1888). Where the agent of the railroad represented that a depot would be constructed at a certain place, a failure to so construct is good ground for enjoining the issue of municipal-aid bonds. Wullenwaber *v.* Dunigan, 30 Neb. 877 (1890). An oral contract that the subscriber was to be allowed to pay in property is good as against other stockholders who assented thereto, but such contract must be clearly proven. Knoop *v.* Bohmrich, 49 N. J. Eq. 82 (1891). Where a note is given in payment for stock, and recites on its face that it is for value received, parol evidence is not admissible to show that the sale was on condition that the stock would afterwards pay a certain dividend, and in case such

executory contracts,—are held to be no defense to an action to collect the subscription.[1] Where, for the purpose of obtaining a subscription, a promise was made in behalf of the corporation that a branch road would be built, it was held that this promise was but an expression of an existing intention which was liable to be changed, and was no defense.[2] It has also been held that a promise which, if carried out, would necessitate an *ultra vires* act by the corporation, is not binding, and is no defense.[3] In a contract of subscription covenants of the company to do certain things with the money are independent and a breach thereof is no defense to the subscription.[4] A person who obtains subscriptions for stock is not personally liable for the failure of the corporation to carry out special terms of the subscription agreement, and a subsequent guaranty that such terms will be carried out is not enforceable, there being no new consideration.[5]

dividend was not paid the note was not to be paid. Dinkler *v.* Baer, 92 Ga. 432 (1893). It is no defense to a railroad stock subscription that defendant was to receive stock in a construction company, or that the control would not change hands, or that the company has sold all its property. Russell *v.* Alabama Midland Ry., 94 Ga. 510 (1894). Where, with a view to organizing a corporation, various parties sign a subscription list on the oral agreement that they might change the amount of their subscriptions, and one who signed for $5,000 notified the chief promoter that he wanted but $2,500, and the corporation, when organized, made calls on him for only $2,500, a corporate creditor cannot hold him for more. White *v.* Kahn, 103 Ala. 308 (1894). Where the capital stock proposed is stated, it is no defense that an attempt was made to increase it and that the subscriber supposed it was to be increased. Glenn *v.* Hunt, 120 Mo. 330 (1894).

1 Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491 (1859); Crossman *v.* Penrose Ferry Bridge Co., 26 Pa. St. 69 (1856); New Albany, etc. R. R. *v.* Fields, 10 Ind. 187 (1858); East Tennessee, etc. R. R. *v.* Gammon, 5 Sneed (Tenn.), 567 (1858); Saffold *v.* Barnes, 39 Miss. 399 (1860); Payson *v.* Withers, 5 Biss. 269 (1873); s. c., 19 Fed. Cas. 29; Goff *v.* Hawkeye Pump, etc. Co., 62 Iowa, 691 (1884); Corwith *v.* Culver, 69 Ill. 502 (1873). *Contra*, Mahan *v.* Wood, 44 Cal. 462 (1872), where the par value of the shares was not what was promised.

2 McAllister *v.* Indianapolis, etc. R. R., 15 Ind. 11 (1860). It is no defense that the subscribers were told that branch offices would be established and that they had not been. Guarantee, etc. Co. *v.* Mayer, 141 Pa. St. 511 (1891). The fact that the company does not use its moneys received from subscriptions, in accordance with a contract, is no defense to another subscriber. Pacific Mill Co. *v.* Inman, etc. Co., 46 Oreg. 352 (1905).

3 Johnson *v.* Crawfordsville, etc. R. R., 11 Ind. 280 (1858), where aid from another railroad was promised; Peters *v.* Lincoln, etc. R. R., 14 Fed. Rep. 319 (1882), where an *ultra vires* lease was promised; Baile *v.* Calvert, etc. Soc., 47 Md. 117 (1877).

4 Pacific Mill Co. *v.* Inman, etc. Co., 46 Ore. 352 (1905).

5 McNaught *v.* Fisher, 96 Fed. Rep. 168 (1899). The subscriber's remedy may be against the person who made

§ 139. *Corporations are chargeable with the fraudulent representations of their agents.*—At an early day in England it was held in a number of cases that corporations were not bound by the frauds of their agents in obtaining subscriptions to stock.[1] This doctrine rested on the theory that the corporation gave the agent no power or authority to commit a fraud, and that, consequently, the fraud rendered the agent liable personally, but did not release or affect the subscription.

§ 140. The modern doctrine, however, both in this country and in England, has completely exploded the theory that corporations are not chargeable with the frauds of their agents in taking subscriptions. The well-established rule now is that a corporation cannot claim or retain the benefit of a subscription which has been obtained through the fraud of its agents. The misrepresentations are not regarded as having actually been made by the corporation, but the corporation is not allowed to retain the benefit of the contract growing out of them, being liable to the extent that it has profited by such misrepresentations.[2] The question of the authority of the agent taking the subscription is immaterial herein. It matters not whether he had any authority, or exceeded his authority, or concealed its limitations.[3] The corporation cannot claim the benefits of his

the agreement which has not been kept. Felgate's Case, 2 De G., J. & S. 456 (1865).

1 Dodgson's Case, 3 De G. & Sm. 85 (1849); Bernard's Case, 5 De G. & Sm. 283 (1852); Gibson's Case, 2 De G. & J. 275 (1858); Holt's Case, 22 Beav. 48 (1856); Felgate's Case, 2 De G., J. & S. 456 (1865); Mixer's Case, 4 De G. & J. 575 (1859), where a prospectus was issued by the directors; Ayre's Case, 25 Beav. 513 (1858), the court holding that the corporation is bound by the misrepresentation only where it expressly authorized the particular statement made. *Cf.* Barry *v.* Croskey, 2 Johns. & Hem. 1 (1861).

2 Western Bank *v.* Addie, L. R. 1 Sc. App. (H. L.) 145 (1867); National Exchange Co. *v.* Drew, 2 Macq. H. L. Cas. 103 (1855); Henderson *v.* Lacon, L. R. 5 Eq. 249 (1867); *Ex parte* Ginger, 5 Ir. Ch. 174 (1856); Montgomery Southern Ry. *v.* Matthews, 77 Ala. 357 (1884). The principles governing these contracts are the same as the principles governing contracts between private individuals. Venezuela Central Ry. *v.* Kisch, L. R. 2 H. L. App. 99 (1867); Anderson *v.* Newcastle, etc. R. R., 12 Ind. 376 (1859); Vreeland *v.* New Jersey Stone Co., 29 N. J. Eq. 188 (1878); Ranger *v.* Great Western Ry., 5 H. L. Cas. 72 (1854); Mackay *v.* Commercial Bank, L. R. 5 P. C. 394 (1874). As regards representations in reference to bonds secured by mortgage and the right of a purchaser of bonds to complain, see Van Weel *v.* Winston, 115 U. S. 228 (1885), and § 830, *infra*.

3 Where subscriptions were obtained by fraudulent statements of the officers, the corporation cannot defend against a bill to rescind by setting up that it was not bound by such representations. Garrison *v.* Technic, etc. Works, 55 N. J. Eq. 708 (1897); s. c., 59 N. J. Eq. 440; Crump *v.* U. S. Min. Co., 7 Gratt. (Va.) 352 (1851). Provided, of

fraud without assuming also the representations which procured those benefits.[1] Parol evidence is admissible to show the fraud, since it does not vary or contradict the contract, but shows that no contract was legally entered into.[2]

§ 141. *The misrepresentations must be by authorized agents.*— False representations by persons who do not act as intermediaries between the corporation and the subscriber in forming the contract cannot bind the corporation nor affect the subscription. They are statements of outside parties.[3] The subscriber may have his action for damages against such persons for deceit, but he cannot charge the corporation with their misrepresentations. Sometimes, also, the misrepresentations even of persons connected with the corporation do not bind the corporation, inasmuch as their powers are purely statutory, or have nothing to do with the taking of subscriptions. Thus, while there has been considerable controversy in this country over the question of fraudulent representations by commissioners having statutory powers to take subscriptions, it is well set-

course, that the misrepresentations were made by persons legally connected with the taking of the subscription. An agent to obtain subscriptions may use the ordinary means of accomplishing the object of his appointment, such as representing the location and quality of the lands, and the like. Sandford *v.* Handy, 23 Wend. 260 (1840). See also Nelson *v.* Cowing, 6 Hill, 336 (1844). A suit in equity lies to rescind where the agent obtaining the subscription falsely represented the amount of stock already subscribed and also the names of the subscribers and also the contracts in immediate prospect. It is immaterial that no express authority was given by the corporation to the agent to make such representations. Talmadge *v.* Sanitary, etc. Co., 31 N. Y. App. Div. 498 (1898). A national bank which sells securities to a person by means of misrepresentations of its president as to the character of the securities, and by means of a breach of trust on his part, is liable for the money so paid to it. Carr *v.* National Bank, etc., 43 N. Y. App. Div. 10 (1899); aff'd, 167 N. Y. 375. False representations of a person obtaining subscriptions is a defense, even though the person was not authorized to obtain subscriptions. Anderson *v.* Scott, 70 N. H. 350 (1900). See s. c., 70 N. H. 534, and § 156, *supra*.

1 Quoted and approved in Mulholland *v.* Washington, etc. Co., 35 Wash. 315 (1904).

2 New York Exchange Co. *v.* De Wolf, 31 N. Y. 273 (1865). In Pennsylvania the peculiar rule prevails that the agent's misrepresentations affect the subscription, and are a defense only when the agent actually had or reasonably appeared to have authority to make representations. Custar *v.* Titusville Gas, etc. Co., 63 Pa. St. 381 (1869). This was the ancient English doctrine long since abandoned.

3 Cunningham *v.* Edgefield, etc. R. R., 2 Head (Tenn.), 23 (1858); Jewett *v.* Valley Ry., 34 Ohio St. 601 (1878). The representations made to him by other subscribers or outsiders are immaterial herein. His remedy is against them personally. Duranty's Case, 26 Beav. 268 (1858); *Ex parte* Frowd, 30 L. J. (Ch.) 322 (1861).

tled that the subscriber is bound to know that the commissioners have no power to make representations, and that the corporation is not bound thereby.[1] A subscriber cannot rescind on the ground of misrepresentations made by a promoter.[2] So, also, it has been held that the representations by the president of the corporation do not bind it where he had no authority to take subscriptions.[3] Where all the stock is sold through the executive committee, the stockholders may be bound by the false representations of such committee.[4] A bank may be chargeable with notice of a fraud perpetrated by some of the directors in issuing the stock of another corporation and taking notes therefor and endorsing the notes and discounting them with the bank.[5] A director has no power, unless specially authorized, to bind the company by a representation.[6] In Indiana it is held that an agent taking subscriptions before the incorporation of the company cannot bind it by his misrepresentations.[7] Misrepresen-

1 Nippenose Mfg. Co. *v.* Stadon, 68 Pa. St. 256 (1871); Bavington *v.* Pittsburgh, etc. R. R., 34 Pa. St. 358 (1859); Wight *v.* Shelby R. R., 16 B. Mon. (Ky.) 4 (1855); Rutz *v.* Esler, etc. Mfg. Co., 3 Ill. App. 83 (1878); Syracuse, etc. R. R. *v.* Gere, 4 Hun, 392 (1875); North Carolina R. R. *v.* Leach, 4 Jones, L. (N. C.) 340 (1857).

2 *Re* Metals Constituents, Limited, [1902] 1 Ch. 707. See 158 Fed. Rep. 969.

3 Crump *v.* U. S. Min. Co., 7 Gratt. (Va.) 352 (1851); Rives *v.* Montgomery, etc. Co., 30 Ala. 92 (1857). In all such cases, however, if the corporation accepts a subscription taken by an unauthorized agent, it cannot retain the subscription and repudiate the representations. It must assume both or neither. A company is bound by a fraudulent statement made by its president. Zang *v.* Adams, 23 Colo. 408 (1897). Material false representations by the president and agent are a good defense to an action on the subscription. Queen City, etc. Co. *v.* McAden, 131 N. C. 178 (1902).

4 Garrett Co. *v.* Appleton, 101 N. Y. App. Div. 507 (1905); aff'd, 184 N. Y. 557.

5 State Bank of Indiana *v.* Mentzer, 125 Iowa, 101 (1904).

6 Milwaukee, etc. Co. *v.* Schoknecht, 108 Wis. 457 (1901). Representations and declarations of a director to procure a bonus from the citizens of a town are ratified by the acceptance of the bonus by the company. Gulf, etc. Ry. *v.* Pittman, 4 Tex. Civ. App. 167 (1893).

7 Miller *v.* Wild Cat, etc. Co., 57 Ind. 241 (1877). In Lynde *v.* Anglo-Italian, etc. Co., [1896] 1 Ch. 178, the court laid down the following rules as to who could bind the company by representations: (1) Where the misrepresentations are made by the directors, or other the general agents of the company entitled to act, and acting on its behalf; (2) where the misrepresentations are made by a special agent of the company while acting within the scope of his authority; (3) where the company can be held affected, before the contract is complete, with the knowledge that it is induced by misrepresentations; (4) where the contract is made on the basis of certain representations, whether the particulars of those representations were known to the company or not, and it turns out that

tations of promoters are no defense.[1] A committee appointed at a public meeting to solicit subscriptions to a proposed corporation do not bind the corporation by their representations, and a subscriber cannot defend on the ground of false statements made by the committee.[2] If there is conflicting testimony as to the authority and status of the agent, the question is to be submitted to the jury.[3]

§ 142. *Corporation not bound by misrepresentations of officers at a public meeting.*—There is a difference of opinion among the authorities as to whether fraudulent representations made by one or more of the company's officers, at a public meeting called to promote the procuring of subscriptions, are chargeable against the corporation where such representations were not expressly authorized by the corporation. In New York, Iowa, Alabama and Louisiana such misrepresentations do not bind the corporation.[4] In Georgia and Wisconsin, on the other hand, such fraudulent representations are held to be admissible in evidence.[5] The former rule seems to accord most with the modern tendency of the decisions, which go very far towards the enforcement of subscriptions after corporate creditors and other subscribers have become interested in the enterprise.

§ 143. *The misrepresentations may arise by prospectuses.*—A prospectus issued by the authority of the directors or the stockholders of a corporation may be relied upon by a person in subscribing for stock; and if the prospectus contains a false representation, and the subscription is made by reason thereof, such representation

some of those representations were material and untrue. The court held that a promoter who was not acting for the company did not bind the company by his statements.

A stockholder may rescind his subscription where he was induced to subscribe by a promoter who realized a secret profit from his option on the sale of land to the corporation, the promoter representing that others were the vendors of the land. Virginia Land Co. *v.* Haupt, 90 Va. 533 (1894).

1 Oldham *v.* Mt. Sterling Imp. Co., 103 Ky. 529 (1898). This subject of the liability of the corporation for the acts of the promoters is fully considered in § 707, *infra*.

2 St. Johns Mfg. Co. *v.* Munger, 106 Mich. 90 (1895).

3 Kelsey *v.* Northern Light Oil Co., 45 N. Y. 505 (1871); Crump *v.* U. S. Min. Co., 7 Gratt. (Va.) 352 (1851).

4 Buffalo, etc. R. R. *v.* Dudley, 14 N. Y. 336 (1856); First Nat. Bank *v.* Hurford, 29 Iowa, 579 (1870); Smith *v.* Tallassee, etc. Co., 30 Ala. 650 (1857), on the ground of a want of authority, which the subscriber is bound to know; Vicksburg, etc. R. R. *v.* McKean, 12 La. Ann. 638 (1857), on the ground that, if the rule were otherwise, "there will be very little security to those who loan money or render assistance to institutions of this kind."

5 Atlanta, etc. R. R. *v.* Hodnett, 36 Ga. 669 (1867); McClellan *v.* Scott, 24 Wis. 81 (1869). The question of representations at a public meeting was submitted to the jury in Weems

is binding upon the corporation.[1] In this class of corporate instruments, however, it is held that some high coloring and even exaggeration is allowable. "In an advertisement of this description some allowance must always be made for the sanguine expectations of the promoters of the adventure; and no prudent man will accept the prospects which are always held out by the originators of every new scheme without considerable abatement."[2] So, also, if the language used in the prospectus admits of two meanings, the subscriber relying on it must ascertain which meaning is intended.[3]

v. Georgia, etc. R. R., 88 Ga. 303 (1892).

1 Oakes *v.* Turquand, L. R. 2 H. L. App. 325 (1867); *Re* Metropolitan, etc. Assoc., [1892] 3 Ch. 1; Ross *v.* Estates Investment Co., L. R. 3 Ch. App. 682 (1868); Reese River, etc. Co. *v.* Smith, L. R. 4 H. L. 64 (1869); Blake's Case, 34 Beav. 639 (1865); Henderson *v.* Lacon, L. R. 5 Eq. 249 (1867). In England it is enacted, by section 38 of the Companies Act, 1867: "Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract." For the application of this important statute, see Gover's Case, L. R. 20 Eq. 114 (1875); aff'd, L. R. 1 Ch. D. 182; Davidson *v.* Tulloch, 3 Macq. 783 (1860); Arkwright *v.* Newbold, L. R. 17 Ch. D. 301 (1881); Twycross *v.* Grant, L. R. 2 C. P. D. 469 (1877); Emma Silver Min. Co. *v.* Lewis, L. R. 4 C. P. D. 396 (1879); Bagnall *v.* Carlton, L. R. 6 Ch. D. 371 (1877); Plympton Min. Co. *v.* Wilkins, 17 Weekly N. 66 (1882); Sulivan *v.* Mitcalfe, L. R. 5 C. P. D. 455 (1880); Cornell *v.* Hay, L. R. 8 C. P. 328 (1873). But a prospectus containing statements based upon a report of the vendor of property to the corporation, which report is appended to the prospectus, is no ground for rescission, even though the report is totally false. All the stockholders and the company relied equally thereon. *Ex parte* Vickers, 56 L. T. Rep. 815 (1887). Several subscribers who have been induced by the same misrepresentations contained in a prospectus to subscribe for stock may join in a suit in equity for the benefit of themselves and others similarly deceived, to set aside their subscriptions. Bosher *v.* Richmond, etc. Co., 89 Va. 455 (1892). See also § 156, *infra*. Where the corporation itself issues a prospectus which is false and which aids to induce a person to buy its stock from the promoter, such person may have the purchase set aside and obtain a money judgment against the corporation and the promoter. Cox *v.* National, etc. Co., 56 S. E. Rep. 494 (W. Va. 1907).

2 Venezuela Central Ry. *v.* Kisch, L. R. 2 H. L. App. 99, 113 (1867).

3 Smith *v.* Chadwick, L. R. 9 App. Cas. 187 (1884); Hallows *v.* Fernie, L. R. 3 Ch. App. 467, 476 (1868), where the court say: "If [the words] may be construed in a different manner by different minds, it will be impossible to test the truth of any one

Unless the representation distinctly refers to what is actually existing at the time, it must be taken to represent what will result when the enterprise is carried out, and will then be merely an expression of opinion. Nevertheless a subscriber may have rescission where the prospectus is not an honest, candid, straightforward document, but suggests that which is untrue and is in a high degree misleading.[1] If the general impression given by a prospectus is false and fraudulent, it is immaterial that no specific statement taken by itself is false.[2] A subscriber can have rescission of his subscription on the ground that false representations were contained in a prospectus issued before the company was formed, where the company afterwards approves of such prospectus.[3] At common law an underwriter cannot obtain damages on the ground that the prospectus did not state all the facts, where he does not prove that he relied on the prospectus.[4] Under the English statute requiring a prospectus to state the important contracts, the subscriber cannot hold the directors liable for omitting a contract unless he proves that it was material and that he was damaged by its omission.[5]

man's assertion that he understood them in the sense in which they involved a misrepresentation." See also §§ 352, 353, *infra*.

1 Quoted and approved in Mulholland *v.* Washington, etc. Co., 35 Wash. 315 (1904). Scott *v.* Snyder, etc. Co., 67 L. T. Rep. 104 (1892).

2 Aaron's Reefs *v.* Twiss, [1896] A. C. 273. Where a person purchases property for the sole purpose of creating a corporation to take it over from him and to pay him therefor an excessive price in cash and stock, netting a large profit to him, the stock being offered to the public, and he causes the incorporation to be made and directors to be named, who are his dummies, he is a promoter and can be held liable by such corporation for the profit he has made, unless he fully disclosed in a prospectus the fact that he had formed the corporation and that he had made such profit. Especially is this the rule where the prospectus gave a false impression. He occupies a fiduciary relation towards the purchasers of the stock. It is immaterial that the directors approved of the transaction with full knowledge. Non-disclosure in such a case is a misfeasance in the nature of a breach of trust. *Re* Leeds, etc., [1902] 2 Ch. 809. As to promoter's liability, see § 651, *infra*.

3 *Re* Metropolitan, etc. Assoc., [1892] 3 Ch. 1.

4 Baty *v.* Keswick, 85 L. T. Rep. 18 (1901).

5 Nash *v.* Calthorpe, [1905] 2 Ch. 237. A prospectus need not state what a person paid for property which he has sold to the company, it appearing that he was the absolute owner of the property when he sold it to the company. Brookes *v.* Hansen, [1906] 2 Ch. 129. In order for a subscriber to collect damages under the English statute against directors for issuing a prospectus which does not mention a corporate contract which had been entered into, he must prove that he would not have taken the shares if he had known of the contract, and that he has sustained damage by its not being mentioned. Macleay *v.* Tait, [1906] A. C. 24. A subscriber to stock in an English corporation does not waive the statutory liability of the directors for not fairly

§ 144. *Or by reports.*—So, also, a report made by the corporate officers to the stockholders may be relied on by one who contemplates subscribing for stock.[1] The corporation cannot say that such reports were intended for the stockholders alone. The law holds that the report is known, and is intended to be known, to all persons who contemplate becoming stockholders, and is the same as though published to the world.[2] A subscriber has a right also to rely on printed statements of the company given to him by the agent to induce him to subscribe.[3]

§ 145. *Misrepresentations amounting to fraudulent representations.*—Any false statement by the authorized agents of a corporation in regard to the past or present status of the corporate enterprise or material matters connected therewith, whereby subscriptions are obtained, is a fraudulent representation.

Thus, a false statement that a certain amount of stock had been subscribed for;[4] or that certain property had been purchased;[5] that

disclosing in a prospectus the preliminary contracts, even though the prospectus stated that certain contracts existed and that the subscribers waived all claims in regard thereto, the basis of this decision being that the prospectus did not fairly disclose what the subscribers waived. Watts *v.* Bucknall, [1902] 2 Ch. 628; aff'd, [1903] 1 Ch. 766.

1 Western Bank *v.* Addie, L. R. 1 Sc. App. Cas. (H. L.) 145 (1867); New Brunswick, etc. Ry. *v.* Conybeare, 9 H. L. Cas. 711 (1862).

2 National Exch. Co. *v.* Drew, 2 Macq. H. L. Cas. 103 (1855); Scott *v.* Dixon, 29 L. J. (Ex.) 62, n.; explained and adopted in Peek *v.* Gurney, L. R. 6 H. L. 377 (1873).

3 Peterson *v.* People's, etc. Assoc., 124 Mich. 573 (1900).

4 Ross *v.* Estates Investment Co., L. R. 3 Ch. App. 682 (1868); Henderson *v.* Lacon, L. R. 5 Eq. 249 (1867). Where a subscription paper was to be binding only in case a certain amount was subscribed, a false representation that the amount had already been subscribed, is sufficient to avoid a subscription made in reliance thereon. Luetzke *v.* Roberts, 130 Wis. 97 (1906). A suit in equity lies to rescind where the agent obtaining the subscription falsely represented the amount of stock already subscribed and also the names of the subscribers and also the contracts in immediate prospect. It is immaterial that no express authority was given by the corporation to the agent to make such representations. Talmadge *v.* Sanitary, etc. Co., 31 N. Y. App. Div. 498 (1898). A statement that £200,000 had been subscribed, when in fact owners of property had contracted to convey the same to the company for £200,000 of stock, is a material misrepresentation. Arnison *v.* Smith, [1889] 41 Ch. D. 348. It is fraud to state that a certain person had subscribed for stock when in fact his stock was given to him. It is not fraudulent that the mine on which the stock is sold would not pay for mining. A bill in equity lies to cancel a conveyance of land to pay for the stock. Coles *v.* Kennedy, 81 Iowa, 360 (1890).

5 Waldo *v.* Chicago, etc. R. R., 14 Wis. 575 (1861); Ross *v.* Estates Investment Co., L. R. 3 Ch. App. 682 (1868). Or that the property contained valuable mines in full operation, and with large daily returns.

the corporate property is unincumbered;[1] that the corporation is solvent and prosperous;[2] that the stock had a certain value;[3] that other stockholders had paid for their stock the same price;[4] that the

Reese River, etc. Co. *v.* Smith, L. R. 4 H. L. 64 (1869). Where a prospectus states that the company has acquired certain stock in other corporations at a price which already shows a profit, but in fact the company does not acquire such stock until several days after the plaintiff subscribed, he may hold the directors liable for the price paid by him. McConnel *v.* Wright, [1903] 1 Ch. 546. A representation that a certain patent-right owned by the company had been tested and found to be valuable, held not a misrepresentation, although it turns out to be worthless. Denton *v.* Macneil, L. R. 2 Eq. 352 (1866). A representation in good faith that title to land was good when in fact it was bad is not a misrepresentation. New Brunswick, etc. Ry. *v.* Conybeare, 9 H. L. Cas. 711 (1862). But a misrepresentation that a government guaranty had been obtained is material. Kisch *v.* Central Ry., 34 L. J. (Ch.) 545 (1865). It is fraud to state that the company has purchased property when in fact it has merely purchased an option which the promoters had, and which they turned in at an extravagant figure. Savage *v.* Bartlett, 78 Md. 561 (1894). Where the secretary and treasurer represent that $50,000 have been paid in, and that a mill had been bought and paid for, and such representations were false, the subscriber may have the subscription set aside and may recover back the land and money which he has turned over to the corporation. Ramsey *v.* Thompson Mfg. Co., 116 Mo. 313 (1893).

1 McClellan *v.* Scott, 24 Wis. 81 (1869); Water Valley Mfg. Co. *v.* Seaman, 53 Miss. 655 (1876).

2 Tyler *v.* Savage, 143 U. S. 79 (1892); Bell's Case, 22 Beav. 35 (1856); Melendy *v.* Keen, 89 Ill. 395 (1878); Western Bank *v.* Addie, L. R. 1 Sc. App. Cas. (H. L.) 145 (1867). A representation that the stock is worth more than par is material when in fact the corporation is insolvent. Deppen *v.* German-American, etc. Co., 70 S. W. Rep. 868 (Ky. 1902); s. c., 72 S. W. Rep. 768. Not so, however, where the directors honestly figured in debts which afterwards turned out to be bad. Jackson *v.* Turquand, L. R. 4 H. L. 305 (1869). Directors were held liable to depositors for fraudulent representations as to the bank's solvency in Seale *v.* Baker, 70 Tex. 283 (1888).

3 Where promoters transfer worthless copyrights for $100,000 common stock and then by misrepresentations as to the value of the preferred stock sell it, in order to raise money for the company, the purchaser may hold them personally liable, even though with each share of preferred stock so sold they contributed one-half of a share of common stock. Grover *v.* Cavanaugh, 82 N. E. Rep. 104 (Ind. 1907).

4 A person induced to subscribe for stock on the representation of the president that the other stockholders had paid for their stock in full may defend against the subscription on the ground that the stockholders had not and were not to pay anything for their stock. Alabama, etc. Works *v.* Dallas, 127 Ala. 513 (1900). It is fraudulent to represent that a subscription is *bona fide* when in fact there was an agreement that the subscriber should pay only half as much as other subscribers. State Bank *v.* Cook, 125 Iowa, 111 (1904). A false statement that none of the stock had been sold at less than par is a material misrepresentation. Hubbard *v.* International, etc., 68 N. J. Eq. 434 (1904).

company was a *bona fide* corporation and not a mere "dummy;"[1] that the directors have subscribed for stock;[2] that certain individuals are directors;[3] or as to the nature of the business to be undertaken;[4] or, in England, where the memoranda or articles of association are different from the prospectus;[5] or that work on the enterprise had reached a certain stage of completion;[6] or that a certain price had been paid for property when in fact a large part of the price went to promoters;[7] or that the objects of the enterprise set forth in the sub-

1 Money paid on a subscription to the stock of a New Jersey corporation may be recovered back, it being shown that such New Jersey corporation was merely a dummy corporation to enable a New York corporation to do business in New Jersey without making a deposit required by the statutes of New Jersey, and it being also shown that it was falsely represented that the New Jersey company was a *bona fide* corporation. Seeber *v.* People's, etc. Assoc., 36 N. Y. App. Div. 312 (1899).

2 Henderson *v.* Lacon, L. R. 5 Eq. 249 (1867).

3 Blake's Case, 34 Beav. 639 (1865); Munster's Case, 14 W. R. 957 (1866). Persons who have accepted are directors, although without the qualification shares. Hallows *v.* Fernie, L. R. 3 Ch. App. 467 (1868). A misrepresentation as to the directors is ground for repudiating the subscription. *Re* Metropolitan, etc. Assoc., 64 L. T. Rep. 561 (1891); [1892] 3 Ch. 1. Where a representation is made that a certain skilled person is to be at the head of the company, but thereafter and before the stock is issued he resigns, a subscriber may have his subscription canceled. *Ex parte* Brown, 95 L. T. Rep. 756 (1906).

4 Blackburn's Case, 3 Drew. 409 (1856). A person who has agreed to turn in property for stock may have the contract annulled on the ground that fraudulent representations were made about the process of manufacture by the corporation. Kelley *v.* Owens, 30 Pac. Rep. 596 (Cal. 1892); S. C. 120 Cal. 502 (1898).

5 Downes *v.* Ship, L. R. 3 H. L. 343 (1868); *Ex parte* Briggs, L. R. 1 Eq. 483 (1866); Peel's Case, L. R. 2 Ch. App. 674 (1867); Lawrence's Case, L. R. 2 Ch. App. 412 (1867); Kincaid's Case, L. R. 2 Ch. App. 420 (1867); Wilkinson's Case, L. R. 2 Ch. App. 536 (1867); Stewart's Case, L. R. 1 Ch. App. 574 (1866); Whitehouse's Case, L. R. 3 Eq. 790 (1867); Tait's Case, L. R. 3 Eq. 795 (1867); *Re* Cachar Co., 36 L. J. (Ch.) 490 (1867); Ship *v.* Crosskill, L. R. 10 Eq. Cas. 73 (1870).

6 Ogilvie *v.* Currie, 37 L. J. (Ch.) 541 (1868); Ashley's Case, L. R. 9 Eq. Cas. 263 (1870). False representations that sufficient funds were at hand to build a specified part of the road, being a different part from that which the defendant required by his subscription to be completed before payment, are immaterial. Blair *v.* Buttolph, 72 Iowa, 31 (1887).

7 Capel *v.* Sim's, etc. Co., 58 L. T. Rep. 807 (1888). A misrepresentation by the president that he had paid $35,000 for property and had turned it in to the corporation for that amount, when in fact he had paid only $12,000 for the property, and a misrepresentation that other stockholders had paid in full for their stock, are material misrepresentations. Alabama, etc. Works *v.* Dallas, 127 Ala. 513 (1900). Where promoters having an option on land obtain subscribers to the stock of a proposed corporation on a prospectus stating that the land was worth $250,000 and that it would only cost $175,000, and it turns out that the promoters realized a secret profit of $30,000 from

scription contract were of a certain nature, the subscriber not reading or hearing, and not being able to read, the contract[1] or other material misstatements of fact,[2] have been held to constitute a fraudulent representation, entitling the subscriber induced thereby to subscribe to the remedies provided for him by law in such cases. In all these cases, however, the distinction between statements relative to the prospects and capabilities of the enterprise, and statements specifically specifying what does or does not exist, must be carefully borne

the $175,000, a subscriber to the stock is not bound to pay unless he has ratified the transaction with full knowledge of the facts, even though the facts do not come to his knowledge for a long time. West End, etc. Co. *v.* Nash, 51 W. Va. 341 (1902). A false statement that patents which had been acquired by the issue of $24,000,000 of full-paid stock and $1,000,000 cash were basic patents, is a material misrepresentation. American Alkali Co. *v.* Salom, 131 Fed. Rep. 46 (1904). Where promoters buy property with a view to organizing a corporation to take it over, and it is taken over with a purchase-money mortgage nearly equal to the price paid, together with a large bonus of stock, yet even though they are the only stockholders, if thereafter the balance of the capital stock was sold to outsiders to whom misrepresentations were made as to the cost of the land, the promoters are liable to the corporation for their profits. The suit must be at law and is barred by the six years' statute of limitations. Pietsch v. Milbrath, 123 Wis. 647 (1904). See also §§ 705–707, *infra*.

1 Wert *v.* Crawfordsville, etc. Co., 19 Ind. 242 (1862). Where a subscriber signs without reading the paper, although he is able to read it and has an opportunity to read it, he cannot defend on the ground that the contents were misrepresented to him. Mower, etc. Co. *v.* Hill, 113 N. W. Rep. 467 (Iowa 1907).

2 See § 350, *infra*. A representation that only $3,000 of stock and $12,000 bonds per mile would be issued is fraudulent where $12,000 of stock and $15,000 of bonds per mile have already been issued. Weems *v.* Georgia, etc. R. R., 84 Ga. 356 (1890); s. c., 88 Ga. 303. A statement of assets that include not only separate items for moving, exhibiting, etc., the aggregate value of the buildings being given also, but also outstanding accounts with no deductions for bad debts; accrued interest with no allowance for interest on liabilities; expenses of perfecting a machine, the latter not yet being a success; and money paid for expenses, it being also included in the value of the property,—is a false statement and sustains an action. Hubbard *v.* Weare, 79 Iowa, 678 (1890). Where the promoters paid to a person who is to act as chairman of the directors, and his firm who underwrote 10,000 shares, a commission of 12,000 shares, the court held that 10,000 of the 12,000 was for the use of his name and only 2,000 shares for the commission, and hence he was liable, at the instance of an investor in the stock, to pay to the corporation the difference between the amount paid for the stock and its actual value the day after an allotment, the transaction not being fully disclosed in the prospectus. A clause in the prospectus that there "may" be various trade contracts and business arrangements and underwriters' agreements, followed by the usual waiver as to them, does not apply to such a contract, inasmuch as the word "may" was misleading. Cackett *v.* Keswick, 85 L. T. Rep. 14 (1901); aff'd, [1902] 2 Ch. 456; Watts

in mind. The former are matters of opinion; the latter are material representations, and are fraudulent if false.[1]

§ 146. *Misrepresentations that are insufficient.*—It is not every misrepresentation that enables a subscriber to set up that he was induced to subscribe by fraud. Mere matters of opinion as to whether the enterprise can be completed, or when it will be completed, or the prospects of profits, cannot be misrepresentations. The subscriber is bound to know that these are all matters of mere conjecture.[2] Thus,

v. Bucknall, [1902] 2 Ch. 628, aff'd [1903] 1 Ch. 766.

1 Whether the statement refers to a "possibility or a contingency, or an intention," or to an existing fact, is a question sometimes for the jury, sometimes for the judge; generally the latter. All the statements, together with the circumstances and history of the matter, are to be considered in deciding whether a misrepresentation was made. It is sufficient if the subscriber relied partly on the misrepresentation. He need not have relied on it exclusively. Edgington *v.* Fitzmaurice, L. R. 29 Ch. D. 459 (1885). See also Nicol's Case, 3 De G. & J. 387, 420 (1858). A statement that the subscriptions are to be used entirely to purchase and improve real estate is a good defense if a part is actually used afterwards to pay promoters. West End, etc. Co. *v.* Claiborne, 97 Va. 734 (1900). The subscriber may, by contract, waive his right to rely on a representation. Brownlie *v.* Campbell, L. R. 5 App. Cas. 925 (1880). *Cf.* Greenwood *v.* Leather, etc. Co. Ltd., [1900] 1 Ch. 421.

2 Swan *v.* Mathre, 103 Iowa, 261 (1897); Brownlee *v.* Ohio, etc. R. R., 18 Ind. 68 (1862); Pickering *v* Templeton, 2 Mo. App. 424 (1876); Hughes *v.* Antietam Mfg. Co., 34 Md. 316 (1870); Hardy *v.* Merriweather, 14 Ind. 203 (1860); Andrews *v.* Ohio, etc. R. R., 14 Ind. 169 (1860); Bish *v.* Bradford, 17 Ind. 490 (1861); Walker *v.* Mobile, etc. R. R., 34 Miss. 245 (1857); Coil *v.* Pittsburgh Female College, 40 Pa. St. 439 (1861). A statement that the profits will be sufficient to pay the subscription price is not fraud. State Bank of Indiana *v.* Mentzer, 125 Iowa, 101 (1904). Statements as to when the road would be completed are not such representations as will avoid a subscription for stock. Jefferson *v.* Hewitt, 95 Cal. 535 (1892); s. c., 103 Cal. 624. Calculations of the company that stock will pay certain dividends do not constitute false representations. Lane *v.* Southern, etc. Assoc., 54 S. W. Rep. 329 (Tenn. 1899). A statement that the stock would be worth par within a certain time is not sufficient to avoid a subscription. Johnson *v.* National, etc. Assoc., 125 Ala. 465 (1900). A representation that a certain plant will be erected is not a misrepresentation. Milwaukee, etc. Co. *v.* Schoknecht, 108 Wis. 457 (1901). A statement that the company intended to buy a certain newspaper and was to have associated press news is not fraudulent, even if not carried out, it being merely an opinion or a statement as to a future event. Shattuck *v.* Robbins, 68 N. H. 565 (1896). A statement in a prospectus that the entire preferred stock must be subscribed and paid for does not authorize rescission on the ground that all of it was not taken, nor does a statement that it has been all taken, such statement being made after the party had subscribed. Bartol *v.* Walton, etc. Co., 92 Fed. Rep. 13 (1899). The fact that statements as to the affairs of the company are not filed as required by statute does not amount to fraud in the sale of stock; nor do representations that the stock will

an honest mistake of judgment, on the part of the directors, as to the collectibility of certain debts, whereby a company represented to be solvent turns out to be insolvent, is not a fraudulent representation. So, also, of a representation as to the value of a patent-right, which, it was stated, would be tested further. On the other hand, a statement made with the intent to defraud the subscriber, but without that effect, is immaterial; mere intent is insufficient.[1] A misstatement as to the contents of the subscription contract which the subscriber signs is immaterial, where he can read but does not.[2] And where false representations are made, but before the subscription is completed the representations are made good by intervening events,

pay twenty per cent. dividends amount to fraud. The question as to validity of stock, having once been litigated, cannot be again raised in an action for deceit in the sale of the stock. The mere act of conspiracy is not sufficient to sustain the action unless damage is shown. Robertson *v.* Parks, 76 Md. 118 (1892). Representations that the stock would be a good investment and pay dividends, etc., constitute no defense. Weston *v.* Columbus Southern Ry., 90 Ga. 289 (1892). Statements that the business will be profitable, etc., are mere "trade talk," and not fraud. Riley *v.* Treanor, 25 S. W. Rep. 1054 (Tex. 1894). In the cases, however, of Gerhard *v.* Bates, 2 El. & Bl. 476 (1853), and Taylor *v.* Ashton, 11 M. & W. 401 (1843), it was held that a false guaranty of the promoters that a certain dividend would result from the enterprise constituted a false representation. *Re* National, etc. Fuel Co., 4 Drew. 529 (1859), held that one sued as a contributory cannot plead fraudulent misrepresentation on the part of the company, although it was arranged between the directors and shareholders that certain shares (of which these were a part) should have a preference. A statement as to the purpose for which the proceeds of bonds will be used by the company is immaterial. A bondholder cannot rescind. Banque, etc. *v.* Brown, 34 Fed. Rep. 162, 198 (1888). See also § 830, *infra*. Stock may be issued before payment by machinery is made. An action by another stockholder for cancellation of the stock on the ground of fraud fails unless there is clear proof that the person agreed that the machinery would succeed. Pendleton Mfg. Co. *v.* Mahanna, 18 Pac. Rep. 563 (Oreg. 1888). See Winget *v.* Quincy, etc. Assoc., 128 Ill. 67 (1889). A false statement as to the purposes of a proposed corporation is held not to be material in Indiana. Shick *v.* Citizens' Enterprise Co., 15 Ind. App. 329 (1896). The fact that a subscriber understood that certain persons controlled the proposed corporation does not make the subscription conditional. Smith *v.* First, etc. Bank, 95 S. W. Rep. 1111 (Tex. 1906).

[1] Keller *v.* Johnson, 11 Ind. 337 (1858); Cunningham *v.* Edgefield, etc. R. R., 2 Head (Tenn.), 23 (1858). Even though the agent of a corporation represents to it that a party owns certain property and will sell it to the corporation for $7,500 in bonds and $30,000 in stock, and the purchase is made on those terms, and the vendor keeps the bonds and gives the stock to such agent, and the agent sells a portion of the stock to a *bona fide* purchaser, yet the latter cannot rescind the sale on the ground of fraud. Foushee *v.* Snyder, 54 S. W. Rep. 730 (Ky. 1900).

[2] Thornburgh *v.* Newcastle, etc. R. R., 14 Ind. 499 (1860).

the subscribers cannot complain.[1] Misrepresentations made to others to induce them to buy the stock are immaterial, where no sale resulted therefrom and no fraud was actually perpetrated.[2] Representations subsequent to the subscription are immaterial.[3] Frauds of the directors which are not the subject of a representation are not to be remedied by the principles of law governing the subject of false representations.[4]

§ 147. *Statements as to questions of law.*—Where a subscription is obtained by a false representation as to the legal effect of the subscription contract, or of corporate rights or liabilities, the subscriber has no remedy. He is bound to take notice of the law.[5] Thus, a misrepresentation as to the extent to which the subscriber would be liable on his stock,[6] or that he may allow his stock to be forfeited,[7] or that payment would not be demanded until the enterprise was partly or wholly completed,[8] is a statement as to the law. It states that something can be done which the law prohibits from being done.

§ 148. *Misrepresentation may be by suppression of the truth.*—The misrepresentation entitling the subscriber to his remedies may consist in the suppression of what is true as well as in the asser-

1 Ship *v.* Crosskill, L. R. 10 Eq. 73 (1870).

2 Darling *v.* Klock, 33 N. Y. App. Div. 270 (1898), aff'd 165 N. Y. 623. A subscriber to stock in an unincorporated association is not relieved from liability, even though some of the subscriptions necessary to make up the amount required by the subscription paper were forgeries and others obtained by false representations, if it be shown that the association accepted the building to construct which it was formed. Haney, etc. Co. *v.* Adaza, etc. Co., 108 Iowa, 313 (1899).

3 Reed *v.* Gold, 102 Va. 37 (1903).

4 Hornaday *v.* Indiana, etc. Ry., 9 Ind. 263 (1857); Heymann *v.* European, etc. Ry., L. R. 7 Eq. 154 (1868).

5 Parker *v.* Thomas, 19 Ind. 213 (1862).

6 Upton *v.* Tribilcock, 91 U. S. 45 (1875), where the representation was that only a certain percentage could be called for. In Upton *v.* Englehart, 3 Dill. 496 (1874); s. c., 28 Fed. Cas. 835, this representation was held to be a defense, where it was made in one state with reference to the laws of another state. See also Accidental, etc. Ins. Corp. *v.* Davis, 15 L. T. 182 (1866), where it was represented that further calls were not contemplated. As against a receiver it is no defense that the corporation agreed that the subscriber need pay only fifty per cent. of the par value of the stock, or that fraudulent representations induced him to subscribe, or that the full capital stock was not subscribed, or that the company was defectively organized, or that the name of the company was different from the one contemplated. Cox *v.* Dickie, 93 Pac. Rep. 523 (Wash. 1908).

7 Northeastern R. R. *v.* Rodrigues, 10 Rich. (S. C.) L. 278 (1857).

8 Clem *v.* Newcastle, etc. R. R., 9 Ind. 488 (1857); New Albany, etc. R. R. *v.* Fields, 10 Ind. 187 (1858). For representation as to the route, see Ellison *v.* Mobile, etc. R. R., 36 Miss. 572 (1858); Wight *v.* Shelby R. R., 16 B. Mon. (Ky.) 4 (1855).

tion of what is false.[1] Where any statement is made at all, it must be a fair and full statement of all the material facts. The corporate authorities, in issuing a prospectus, "are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as facts that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares." [2] A prospectus need not state all the facts, but it must state facts the omission of which would render the prospectus, as it stands, misleading.[3] Thus, an omission to state that a very large sum had been paid for property, the merits of which were fully set forth, has been held to be equivalent to a fraudulent representation.[4] On the other hand, a failure to state that large sums were paid to the directors to induce them to act as such was held not to be a fraudulent omission.[5]

1 "No misstatement or concealment of any material facts or circumstances ought to be permitted. . . . The suppression of a fact will often amount to a misrepresentation." Venezuela Central Ry. *v.* Kisch, L. R. 2 H. L. App. 99, 113, 114 (1867). In Oakes *v.* Turquand, L. R. 2 H. L. Cas. 325, 342 (1867), the court say the prospectus is objectionable, "not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told the character of falsehood."

2 New Brunswick, etc. Ry. *v.* Muggeridge, 1 Dr. & Sm. 363, 381 (1860). Statements that a large part of the capital stock had been taken by the parties themselves, and that the parties themselves would constitute the management of the concern, the concealment of the fact that a large quantity of the stock was to be issued for the good-will of the business, and statements leading to the conclusion that all subscribers for stock stood on an equal footing, constitute material misrepresentations, and will sustain a rescission of the subscription if untrue. Such statements and concealments made to agents or brokers who are selling stock are the same as though made to the subscribers for the stock. Walker *v.* Anglo-American, etc. Co., 72 Hun, 334, 341 (1893). It is no defense that the party taking the subscription concealed the fact that the charter was to allow the company to subscribe for stock in other companies, the subscription being made before the incorporation. Oil City, etc. Co. *v.* Porter, 99 Ky. 254 (1896).

3 McKeown *v.* Boudard, etc. Co., 74 L. T. Rep. 712 (1896), aff'g 74 L. T. Rep. 310.

4 Venezuela Central Ry. *v.* Kisch, L. R. 2 H. L. App. 99 (1867). In Gover's Case, L. R. 1 Ch. D. 182 (1875), under different circumstances, the contrary was held. A subscriber to stock may rescind where a promoter represented that the corporation could purchase property for a certain price without disclosing that the price included a large profit to such promoter. Hall *v.* Grayson, etc. Bank, 36 Tex. Civ. App. 317 (1904).

5 Heymann *v.* European Central Ry., L. R. 7 Eq. 154 (1868). A disclosure need not be made that stock had been given to the directors and promoters in payment for services. Pulsford *v.* Richards, 17 Beav. 87 (1853). Nor as to the amount of stock already subscribed. Vane *v.* Cobbold, 1 Exch. 798 (1848).

Where a prospectus contained a material misrepresentation which induced a person to subscribe, he may maintain a suit to rescind the subscription, even though the prospectus stated that there were certain contracts not mentioned in the prospectus and that the subscribers would be held to have had notice of the same, and even though the subscription contract contained a provision that the subscriber had notice of that which in fact was concealed from him.[1] Failure to state material facts in a prospectus renders directors liable, under the English statute, but they are not liable under the Directors' Liability Act, 1890, for statements which they had reasonable ground to believe to be true.[2]

§ 149. *Misrepresentation may be by statements made without knowledge of their falsity.*—Statements need not be intentionally false in order to amount to a fraudulent representation.[3] A false

1 The misrepresentation in this instance was a misleading and ambiguous statement, and also the non-disclosure of an agreement to which the promoter was a party, such agreement not relating to the formation of the company or his subscription to its stock. The court rescinded the subscription and held the directors personally liable for loss sustained by the subscriber. Greenwood *v.* Leather, etc. Co. Ltd., [1900] 1 Ch. 421. Where the directors do not state in a prospectus a certain contract, which the statute required them to state, it cannot set up as a defense to an action by a shareholder that they acted in good faith and on legal advice. Shepheard, etc. *v.* Broome, [1904] A. C. 342.

2 De La Cour *v.* Clinton, 90 L. T. Rep. 615 (1904). A statement in a prospectus that there are various contracts of the ordinary trade character, and that subscribers are bound to take notice of them, is not a waiver of notice of such contracts on the part of subscribers, under the English statutes. Watts *v.* Bucknall, [1903] 1 Ch. 766, aff'g, [1902] 2 Ch. 628.

3 Corporate agents, making representations in order to obtain subscriptions, are bound to know the truth or falsity of such statements. Reese River, etc. Co. *v.* Smith, L. R. 4 H. L. 64 (1869), aff'g Smith *v.* Reese River Co., L. R. 2 Eq. 264 (1866); Glamorganshire Iron, etc. Co. *v.* Irvine, 4 F. & F. 947 (1866), applying the same rule at law. The English case of Kennedy *v.* Panama, etc. Co., L. R. 2 Q. B. 580 (1867), holds, however, that "where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission, unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration," and that to hold otherwise would be to make a warranty out of the representation. In Edgington *v.* Fitzmaurice, L. R. 29 Ch. D. 459 (1885), the court say that a statement of fact, which the person making does not know the truth of, is, "in the eye of the law, a fraudulent statement as much as if the persons making it had known it to be false." In this country the cases seem to favor a different rule. The party making the representations must be proven "to have had a fraudulent purpose in contemplation, or at least to have known that the statements were untrue." Nugent *v.* Cincinnati, etc. R. R., 2 Disney (Ohio), 302 (1858); Selma, etc. R. R. *v.* Anderson, 51 Miss. 829 (1876); Cunningham *v.* Edgefield, etc. R. R., 2 Head (Tenn.), 23 (1858). See also

statement, made in good faith but in ignorance, is, in a legal point of view, the same as an assertion which the party knew to be untrue.[1] A misrepresentation as to patents may be fraudulent in law, even though the party believed the statement to be true.[2] Money paid on a subscription induced by a material misrepresentation may be recovered back, even though the misrepresentation was innocently made.[3] Thus, where the promoters stated that a certain part of the plant was in full operation, yet if there was no fraud, and that part of the plant was put in operation soon afterwards, the court, instead of setting aside the sale, gave damages for the delay. Misrepresentations, although not fraudulent, were held to be sufficient ground for relief.[4] A prospectus issued by the directors, representing the corporate property as containing valuable mines, all of which was in good faith, but false, is the same as though the statements were made with knowledge of their falsity. Where, however, the statement in good faith was that the corporation had a government contract, which, upon litigation, was found to be untrue, the representation was held not to be fraudulent.[5] An agent who makes representations in good faith is not personally liable if made on behalf of his principal.[6]

§ 150. *Subscriber is not bound to investigate the truth of representations.*—If a subscriber has used reasonable caution and judgment in accepting the statements of corporate agents, it is no answer to his claim that he was induced to subscribe by fraudulent representations, to say that by proper inquiry he might have learned the truth, or by more vigilance he might have discovered the deception.[7] Where the representations are by a prospectus, he is not

Chitty, Contracts, 12th ed., p. 692 *et seq.*, and Montgomery Southern Ry. *v.* Matthews, 77 Ala. 357 (1884). The vigorous case of Henderson *v.* Railroad Co. 17 Tex. 560 (1856), effectively presents the opposite view; and see §§ 156, 356, *infra*. See also 1 Story, Eq. Jur., § 193; Story, Agency, §§ 127, 135, 137, 452.

1 Reese River, etc. Co. *v.* Smith, L. R. 4 H. L. 64 (1869).

2 Foulks, etc. Co. *v.* Thies, 26 Nev. 158 (1901).

3 *Re* Glubb, [1900] 1 Ch. 354.

4 Lagunas, etc. Co. Ltd. *v.* Lagunas Syndicate, Ltd., [1899] 2 Ch. 392.

5 Kennedy *v.* Panama, etc. Co., L. R. 2 Q. B. 580 (1867). A statement by a solicitor of subscriptions that the subscriptions need not be paid until the road is built to a certain distance is no defense, there being no proof that the party making the representation knew it to be untrue. Tanner *v.* Nichols, 80 S. W. Rep. 225 (Ky. 1904).

6 Englesfield *v.* Londonderry, H. L. 26 W. R. 540 (1878).

7 New Brunswick, etc. Ry. *v.* Muggeridge, 1 Dr. & Sm. 363 (1860); Upton *v.* Englehart, 3 Dill. 496 (1874); s. c., 28 Fed. Cas. 835; Venezuela Central Ry. *v.* Kisch, L. R. 2 H. L. App. 99 (1867); *Ex parte* West, 56 L. T. Rep. 622 (1887). *Cf.* Hallows *v.* Fernie, L. R. 3 Ch. App. 467 (1868). See also § 731, *infra*. The subscriber is not bound to investigate the truth of statements which the other party,

obliged to examine documents referred to, even though such examination would have shown the falsity of the representations.[1] It is not incumbent upon him to institute inquiries, and to suspect fraud when all seems fair. But where the means of information are open equally to both parties, the subscriber has no right to rely upon the representations of the corporate agent, unless the latter dissuades the subscriber from investigation.[2] So, also, where the subscriber reads several documents, he cannot rely on representations in one which are corrected and limited by statements in the others, even though he claims to have overlooked such corrections.[3] Where the corporation itself makes the false representations the subscriber is not bound to investigate.[4] Even though false representations were made, yet, if the parties before subscribing have an agent investigate the statements made, they cannot afterwards complain.[5]

§ 151. *Subscriptions induced by fraudulent representations are not void, but only voidable.*—The principle of law that fraud vitiates all contracts applies to a contract of subscription, but this principle means, not that the contract is void *per se* from the formation of the contract, but that the contract is voidable, at the option or election of the person defrauded.[6] Until such election is exercised, the contract is enforceable by both or either of the parties. Hence a subscription to stock, obtained by fraudulent representations, is not void from the time when it was made, nor is it void until it is

with full knowledge of the facts, makes. McClellan *v.* Scott, 24 Wis. 81 (1869). False statements as to who are the other subscribers are no defense where the subscriber has opportunity to ascertain the facts. Haskell *v.* Worthington, 94 Mo. 560 (1888). A subscriber is not bound to suspect fraud. West End, etc. Co. *v.* Claiborne, 97 Va. 734 (1900).

1 Kisch *v.* Venezuela Central Ry., 34 L. J. (Ch.) 545 (1865); Venezuela Central Ry. *v.* Kisch, L. R. 2 H. L. App. 99 (1867). In New York the general principle of law governing cases of misrepresentation is clearly stated to be that "every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith." Mead *v.* Bunn, 32 N. Y. 274 (1865).

2 Jennings *v.* Broughton, 22 L. J. (Ch.) 585 (1853); Walker *v.* Mobile, etc. R. R., 34 Miss. 245 (1857). No rescission can be had, if the subscriber had full opportunity to inform himself and neglected to do so. Chicago, etc. Co. *v.* Summerour, 101 Ga. 820 (1897).

3 Scholey *v.* Venezuela Central Ry., L. R. 9 Eq. 266, n. (1868).

4 American Alkali Co. *v.* Salom, 131 Fed. Rep. 46 (1904).

5 Chicago, etc. Co. *v.* Higginbotham, 29 S. Rep. 79 (Miss. 1901).

6 Oakes *v.* Turquand, L. R. 2 H. L. App. 325 (1867); Upton *v.* Englehart, 3 Dill. 496 (1874); s. c., 28 Fed. Cas. 835; Reese River, etc. Co. *v.* Smith, L. R. 4 H. L. 64 (1869).

ratified and confirmed by the defrauded subscriber, but it is valid until it is expressly rescinded and repudiated by the subscriber.[1] This principle is important in determining the method of rescission, and particularly the time within which a rescission must be made.

§ 152. *Remedies of a subscriber induced to subscribe by fraudulent representations.*— There are, in general, five different remedies which are open to a subscriber induced to subscribe by fraud. He may, upon discovering the fraud, rescind the subscription by notification to the corporate authorities, without taking legal proceedings; or he may wait until sued upon the subscription, and then set up the fraud as a defense to the action at law; or he may file a bill in equity to restrain such suits at law, and to set aside the subscription contract, and also, if he wishes, to recover back payments already made on the subscription; or he may bring an action at law against the parties fraudulently inducing the subscription, and recover damages for the deceit; or he may sue for money had and received. A person who has been induced to transfer property to a corporation in exchange for stock may maintain a mandamus to compel the company to allow him to examine the books, papers and records of the company to ascertain whether certain representations made to him are true, to the effect that all the stock had been issued for full value.[2] An officer who, by false and fraudulent statements, induces parties to subscribe and pay for shares of stock may be criminally liable for obtaining money under false pretenses, even though the money was paid to the corporation and not to him.[3] The agent of a corporation organized for fraudulent purposes, who fraudulently induces a person to purchase stock of the corporation, may be guilty of grand larceny.[4] It is a criminal offense in England for any director, manager, or officer of a corporation to publish false statements with intent to induce persons to purchase stock.[5]

1 Tennant *v.* City of Glasgow Bank, L. R. 4 App. Cas. 615 (1879).

2 State *v.* Pan-American Co., 5 Pen. (Del.) 391 (1904).

3 Commonwealth *v.* Langley, 169 Mass. 89 (1897). An indictment of a person for the unlawful obtaining of money by selling worthless gold mining stock is not good when the stock was paid for not in money, but by check. Lory *v.* People, 82 N. E. Rep. 261 (Ill. 1907).

4 People *v.* Walker, 85 N. Y. App. Div. 556 (1903), aff'd 178 N. Y. 563. In applying the statute in New Jersey making it a criminal offense for a director or officer to make or concur in making any written false statement with intent to deceive, evidence cannot be introduced that the newspapers had denounced the corporation as fraudulent before the alleged fraudulent statement was issued by the directors. State *v.* Ware, 71 N. J. L. 53 (1904).

5 Under this statute a person is liable as a manager for such acts, if he acted as manager, even though he was never appointed. Rex *v.* Lawson, [1905] 1 K. B. 541. In England there

§ 153. *Rescission without legal proceedings.*—It is the duty and the right of directors, without waiting for a bill in equity or other legal proceedings, to revoke a subscription contract, and remove from the stockholders' list the name of a subscriber who reasonably proves that he was induced to subscribe by fraudulent representations chargeable to the corporation, and who requests a rescission of the subscription.[1] The directors are not bound to make a hopeless defense. It is an ordinary business act within the powers of the directors, and their discretion is not to be controlled unless unreasonably exercised. Where, upon such a demand being made by the subscriber, the directors refuse to dissolve the subscription contract, the subscriber need not always resort to a bill in equity to have the contract set aside for fraud.[2] A mere notification to the corporation is generally sufficient.[3]

§ 154. *False representation as a defense to an action at law for calls.*—The most common remedy of a subscriber induced by fraud to subscribe is to wait until the corporation brings suit to collect the subscriptions, and then to set up the fraud as a defense. Nearly all of the cases in this country are cases where this remedy has been adopted.[4] A person who has been induced by fraud to subscribe for

is a statute, under which the court has power, on the application of creditors, to direct the official receiver to prosecute criminally a director for alleged offenses as director, such prosecution to be carried on at the expense of the assets of the company. *Re* London, etc. Corp. Ltd., [1903] 1 Ch. 728.

1 Wright's Case, L. R. 12 Eq. 331 (1871); s. c., L. R. 7 Ch. 55 (1871); Blake's Case, 34 Beav. 639 (1865); Reese River, etc. Co. *v.* Smith, L. R. 4 H. L. 64 (1869), affirming Smith *v.* Reese River Co., L. R. 2 Eq. 264 (1866); *Re* Etna Ins. Co., *Ex parte* Shiels, Ir. R. 7 Eq. 264 (1873); Bath's Case, L. R. 8 Ch. D. 334 (1878). See also Fox's Case, L. R. 5 Eq. 118 (1868).

2 In England mere repudiation, not followed by anything more, is insufficient. *Re* Scottish Petroleum Co., L. R. 23 Ch. D. 413 (1883), where the directors refused to allow the rescission. *Re* Lennox, etc. Co., 62 L. T. Rep. 791 (1890). See also Hare's Case, L. R. 4 Ch. 503 (1869); Steel's Case, 49 L. J. (Ch.) 176 (1879).

3 It is not necessary for a subscriber who has been induced to subscribe by fraudulent misrepresentations to file a bill to have his subscription rescinded. A notice to the company that he rescinds the subscriptions, giving the reasons therefor, is sufficient. Savage *v.* Bartlett, 78 Md. 561 (1894), pointing out the fact also that the English decisions on this subject are controlled by the English statute.

4 "It is a good answer at common law to an action for calls that the defendant was induced to become the holder of the shares by the fraud of the plaintiffs." Bwlch-y-plwm Lead M. Co. *v.* Baynes, 36 L. J. (Ex.) 183 (1867); Deposit, etc. Co. *v.* Ayscough, 6 El. & B. 761 (1856), where the defense failed because it did not state that the defendant had renounced any benefits; Sandford *v.* Handy, 23 Wend. 260 (1840). *Cf.* Upper San Joaquin Canal Co. *v.* Roach, 78 Cal. 552 (1889), holding that this defense

stock may defend on that ground as against corporate creditors, where his name never appeared in the list of stockholders, and no stock was ever issued to him, and he had done nothing to mislead creditors or estop himself.[1] An incorporator and subscriber for the stock may defend against a suit by the corporation to collect the subscription, on the ground that it was fraudulently represented to him that the corporation had certain valuable property, whereas it never had any property and no part of its capital stock had been paid in by any one, and it was a mere paper organization.[2] A subscriber sued on his subscription may set up the defense of false representations and tender back the stock, and even though he has sold some of the stock prior to discovering the fraud, he may have rescission.[3] A transferee of stock cannot set up the defense that the transferrer was induced by fraud to subscribe.[4]

§ 155. *Remedy by bill in equity.*—This is the fairest, safest and most complete remedy that the subscriber has. It is a decisive notice to the corporation and all third parties not to rely upon the subscription in question.[5] It avoids the risk of future corporate insolvency. It is the customary, and it seems favorite, remedy in England, and has been clearly upheld in this country.[6] It ena-

must be set up by way of counterclaim for damages on account of misrepresentations where a note had been given and the stock not returned. A subscriber may defend against notes indorsed by him, in payment of his subscription, on the ground of fraud inducing the subscription. Turner *v.* Grobe, 44 S. W. Rep. 898 (Tex. 1898). See s. c., 24 Tex. Civ. App. 554 (1900).

1 Dieterle *v.* Ann Arbor, etc. Co., 143 Mich. 416 (1906). Persons induced to subscribe for bonds on misrepresentations are not liable to advertisers, even though from the former's subscriptions the advertising expense was to be paid. Barron *v.* International T. Co., 184 Mass. 440 (1903).

2 Metropolitan, etc. Co. *v.* Webster, 193 Mo. 351 (1906).

3 American Alkali Co. *v.* Salom, 131 Fed. Rep. 46 (1904).

4 Berryville, etc. Co. *v.* Lewis, 19 S. E. Rep. 781 (Va. 1894).

5 Quoted and approved in Cox *v.* National, etc. Co., 56 S. E. Rep. 494, 504 (W. Va. 1907).

6 Where a person is induced to subscribe for stock on the fraudulent representations of the president that the company is in a prosperous condition, the person may file a bill in equity to recover back the money; and equity has jurisdiction on the grounds of discovery, account, fraud, misrepresentation and concealment. Both the company and the president individually were made defendants and held liable. Tyler *v.* Savage, 143 U. S. 79 (1892). A person induced to purchase stock and bonds from a corporation, by fraudulent statements in a prospectus as to the value of property for which the bonds and stock have been issued by a Pennsylvania corporation at a fraudulent overvaluation, may maintain a bill in equity to cancel a note given in payment, and to enjoin a suit at law on such note in the hands of a purchaser with notice. Manning *v.* Berdan, 135 Fed. Rep. 159 (1905). For

bles the subscriber to set aside the contract, to enjoin actions at law for calls, and to recover back payments made before discovery of the fraud.[1]

§ 156. The complainant in a bill in equity to set aside a subscription obtained by fraud cannot sue in behalf of himself and others who may wish to come in. But several subscribers, defrauded in the same way, may join in the bill as co-complainants.[2] Fraudulent

an article on rescission for misrepresentation by a promoter before incorporation, see 36 Am. Law Rev. 855. Equity has power to rescind a subscription to stock induced by misrepresentation, even if a remedy exists at law. Hubbard *v.* International, etc. 68 N. J. Eq. 434 (1904). A court of equity has jurisdiction to set aside a subscription for fraud and compel a repayment of the money. Cox *v.* National, etc. Co., 56 S. E. Rep. 494 (W. Va. 1907). A person induced by fraud to subscribe for stock may bring an equitable action to procure a rescission of the contract, a cancellation of her subscription, and the removal of the name from the stock books. The statute of limitations does not begin to run until the fraud is discovered. Bosley *v.* National Machine Co., 123 N. Y. 550 (1890); s. c., 6 N. Y. Supp. 4 (1889); Banque Franco-Egyptienne *v.* Brown, 34 Fed. Rep. 162, 198 (1888); Waldo *v.* Chicago, etc. R. R., 14 Wis. 575 (1861); Henderson *v.* Railroad Co., 17 Tex. 560 (1856); Rawlins *v.* Wickham, 3 De G. & J. 304 (1858). A court of equity has jurisdiction to cancel a subscription of stock on the ground of fraud, and it is not necessary that the subscriber resort to an action of deceit. Negley *v.* Hagerstown, etc. Co., 86 Md. 692 (1898). And see the various English cases in this chapter. See also § 356, *infra*. In the case of Krueger *v.* Armitage, 58 N. J. Eq. 357 (1899), the court of chancery held that the remedy of a stockholder for fraud inducing him to buy stock was at law alone, where the vendee after discovering the fraud instituted insolvency proceedings against the corporation as a stockholder and also delayed in filing his bill for rescission. See 98 L. T. Rep. 633.

[1] But the injunction to restrain the action at law will not be granted if the subscriber delays until the case is about to be tried. Thorpe *v.* Hughes, 3 Myl. & C. 742 (1838). And where the stock has been fully paid, and no injury can come from the delay, equity will not sustain the subscriber's bill to compel repayment, but will send him to a court of law, where a jury may pass upon the question of fraud. Askew's Case, L. R. 9 Ch. 664 (1874). Equity, however, unquestionably has concurrent jurisdiction if it cares to exercise it. Hill *v.* Lane, L. R. 11 Eq. 215 (1870), criticising Ogilvie *v.* Currie, 37 L. J. (Ch.) 541 (1868). See also § 356, *infra*. And will enjoin the collection of the subscription pending the suit. Walsh *v.* Seager, 1 N. Y. St. Rep. 189 (1886), holding, however, that the equitable action will not be enjoined merely because the corporation subsequently becomes insolvent, and a receiver is appointed.

[2] Several subscribers who have been induced by the same misrepresentations contained in a prospectus to subscribe for stock may join in a suit in equity for the benefit of themselves and others similarly deceived, to set aside their subscriptions. Bosher *v.* Richmond, etc. Co., 89 Va. 455 (1892). Several stockholders may join in filing a bill to rescind a subscription for stock on the ground that they were induced to subscribe by false representations that the cor-

intent need not be proved. *Scienter* is not the essence of the action.[1] A vendee may often have relief in equity by reason of misrepresentation based upon mistake or innocent misstatements, where the common-law action of deceit would require much more stringent proof.[2] A person induced by fraud to subscribe for stock may have the subscription canceled, even though he does not show that he has been damaged.[3] The corporation is to be a defendant, and if merely a cancellation of the subscription and an injunction against suits at law are sought, the corporation, it seems, may be the sole defendant. A court of equity in these actions will give complete relief by decreeing that the directors guilty of the fraud shall refund to the subscriber payments made by him before discovering the fraud.[4] This relief dispenses with an action at law for damages

poration had a certain amount of paid-up capital, was out of debt and doing a profitable business, and that the subscribers would be employed. The corporation may be enjoined from transferring its assets in the meantime, and may be compelled to pay back the money paid by complainants. Sherman *v.* American Stove Co., 85 Mich. 169 (1891). A plaintiff may upon the trial be compelled to elect whether he sues to hold the promoters liable for fraud, or whether he sues in behalf of all stockholders and for the benefit of the corporation. Brewster *v.* Hatch, 122 N. Y. 349 (1890). Several stockholders may join in one bill to rescind their subscriptions for fraud, even though the fraud practiced on one differed from that on others. Carey *v.* Coffee, etc. Co., 20 S. E. Rep. 778 (Va. 1894). A transferee of the shares cannot bring the suit. The fraud is personal to the original subscriber. Duranty's Case, 26 Beav. 268 (1858).

1 See § 356, *infra*, and § 149, *supra*.

2 Kountze *v.* Kennedy, 147 N. Y. 124 (1895); Arkwright *v.* Newbold, L. R. 17 Ch. D. 301 (1881). A suit in equity lies to rescind a sale of stock induced by fraudulent representations. Intent to defraud need not be proved. Martin *v.* Hill, 41 Minn. 337 (1889); Freer *v.* Denton, 61 N. Y. 492 (1875); Johnson *v.* Gulick, 46 Neb. 817 (1896). Actual intent to defraud need not be shown in a suit in equity to rescind. As to whether in such a suit similar frauds practiced on others can be shown in evidence, see § 165, *infra*. It has been held by the United States court that, to authorize rescission, the representations must be proven to have been false and made with a fraudulent intent, and that the same were relied on. Bartol *v.* Walton, etc. Co., 92 Fed. Rep. 13 (1899). Even in a suit in equity, if the plaintiff alleges that the directors practiced intentional fraud and deceit, that fact must be proved, or the suit will fail, and it is insufficient to prove recklessness which might amount to fraud, but which was not actual, knowing and intentional fraud. Lyon *v.* James, 97 N. Y. App. Div. 385 (1904), aff'd 181 N. Y. 512.

3 Stern *v.* Kirby, etc. Co., 134 Fed. Rep. 509 (1904). A person who has been induced by fraudulent misrepresentations to exchange stock for other stock may have rescission without proving damage, the suit being very similar to one for specific performance, and it being alleged that the actual value of the stock cannot be shown. Jahn *v.* Reynolds, 115 N. Y. App. Div. 647 (1906).

4 Vreeland *v.* New Jersey Stone Co., 19 N. J. Eq. 188 (1878). Where subscribers bring suit to set aside sub-

for deceit, and when sought for in the bill in equity the guilty directors must be made parties.[1] The bill is not multifarious by reason of its containing prayers for these various kinds of relief.[2]

§ 157. *Remedy by an action at law for deceit.*—An action at law for damages for deceit lies at the instance of a subscriber for stock, fraudulently induced to subscribe, against the persons guilty of the

scriptions and for repayment thereof, for fraud, and join the directors as co-defendants, the directors are not nominal parties. Seddon *v.* Virginia, etc. Co., 36 Fed. Rep. 6 (1888). If the suit is in equity for damages, intent must be shown. Hubbard *v.* Weare, 79 Iowa, 678 (1890). As incidental to the cancellation of a subscription, the subscriber may recover assessments already paid and any other disbursements legally made. McClanahan *v.* Ivanhoe, etc. Co., 96 Va. 124 (1898). A person induced to purchase stock by false statements published by the directors may hold the directors liable either at law or in equity. In the suit in equity, fraudulent intent need not be proved, and the damage may be the difference between the stock as represented to be and the amount realized on distribution by the receiver. Squiers *v.* Thompson, 73 N. Y. App. Div. 552 (1902); aff'd, 172 N. Y. 652. The decree in a suit in equity may be that the guilty party repay the money which the plaintiff paid for the stock and that the plaintiff shall then assign the stock to the defendant. Lyon *v* James, 97 N. Y. App. Div. 385 (1904); aff'd 181 N. Y. 512. Where a corporation organized to do a jewelry business is really a scheme to carry on an illegal and fraudulent investment business, a person defrauded may file a bill in equity to hold the corporation and its officers and stockholders personally liable and enjoin them from disposing of the assets and for discovery. Edwards *v.* Michigan, etc. Co., 132 Mich. 1 (1902). A person induced to subscribe for stock on the representation of an officer that the company had been properly organized, may rescind on the ground that it was not properly organized. An offer to surrender the stock in the petition is sufficient. The officer is not personally legally liable if he made the representation in good faith. Maine *v.* Midland Investment Co., 132 Iowa 273 (1906).

1 Quoted and approved in Mack *v.* Latta, 178 N. Y. 525, 531 (1904), rev'g 83 N. Y. App. Div. 242.

2 Quoted and approved in Cox *v.* National, etc. Co., 56 S. E. Rep. 494, 503 (W. Va. 1907). Nor is it multifarious because it joins such a visit with one by the corporation to compel the directors to account to the corporation for the same fraud. Ashmead *v.* Colby, 26 Conn. 287 (1857). Subscribers to stock may rescind the same on the ground that promoters who sold property to the company had misrepresented the character of the property. This suit may be in equity and is not multifarious, although the relief demanded is a cancellation of the sale of the property and for damages against the vendors and co-conspirators, and also for rescission of the subscription. Such a suit lies, although the subscribers paid in only $150,000 of cash for $450,000 of stock. Rule 94 of the federal courts does not apply to such a case. Barcus *v.* Gates, 89 Fed. Rep. 783 (1898). A bill to cancel a subscription for fraud and also to have a receiver appointed on the ground of mismanagement is multifarious. Emmons *v.* National, etc. Ass'n, 135 Fed. Rep. 689 (1905).

fraud.[1] The fraudulent representation, however, which must be proved to sustain this action must be a more intentional fraud than the one which suffices to rescind the contract. The subscriber must prove that a material false representation was made by the defendant; that the defendant recklessly made it or knew the representation to be false; that the plaintiff subscribed by reason, partially at least, of that representation, and that he was thereby injured.[2] The

1 Clarke *v.* Dickson, 6 C. B. (N. S.) 453 (1859); Miller *v.* Barber, 66 N. Y. 558 (1876); Paddock *v.* Fletcher, 42 Vt. 389 (1869). In England the liability of the directors herein is enforced generally in connection with a suit in equity, and as a part of the equitable decree. This is under a statute. Western Bank *v.* Addie, L. R. 1 Sc. App. Cas. (H. L.) 145 (1867). A false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. In such an action it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person thus benefited. 1 Smith, Lead. Cas. (9th Am. ed.), pp. 320, etc., as applicable to misrepresentations inducing subscriptions. Brewster *v.* Hatch, 10 Abb. N. Cas. 400 (1881); aff'd, 122 N. Y. 349 (1890), sustains an action by subscribers for stock, for damages, for false representations by promoters as to the real cost of property purchased by the latter for the corporation. See also § 651, *infra*. There is no remedy at law or in equity against the estate of a deceased director herein except for property received by him. Peek *v.* Gurney, L. R. 6 H. L. 377 (1873). Subscribers to debentures may recover back the difference between the actual value of the debentures and the price paid. Arnison *v.* Smith, [1889] 41 Ch. D. 348. Where the president misrepresents the condition of the company to a person and thereby induces the latter to extend credit to the company, the president is personally liable in damages to him. Shaw *v.* Gilbert, 111 Wis. 165 (1901). In England recourse against directors by a stockholder who was fraudulently induced to subscribe is given by statute. Thomson *v.* Lord Clanmorris, [1899] 2 Ch. 523, aff'd, [1900] 1 Ch. 718.

2 In the important case of Derry *v.* Peek, L. R. 14 App. Cas. 337 (1889), the House of Lords decided that in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Fraud is proved when it is shown that a false statement has been made (1) knowingly; (2) without belief in its truth; (3) recklessly. But if a man make a false statement honestly believing it to be true, it is not sufficient to support an action of deceit to show that he had no reasonable grounds for his belief. The directors of a tramway company issued a prospectus in which they stated that they were authorized to use steam power, and that by this means a great saving in working would be effected. At the time of making this statement they had not in fact obtained authority to use steam power, but they honestly believed that they would obtain it as a matter of course. *Held* (reversing the judgment of the court below, Peek *v.* Derry, L. R. 37 Ch. D. 541—1888), that they were not liable in an action of deceit brought by a shareholder who had been induced to apply for shares by the statement in the prospectus. Hence it was held

gist of the action is fraudulent intent.[1] It cannot be maintained against the corporation, because the corporation, though liable to refund fraudulently acquired property, is not capable of a fraudulent intent.[2] It has been held, however, that a subscriber, when sued

that in an action for deceit by a misrepresentation in a prospectus as to the net profit on the capital employed, the action being against one who was a promoter, and also one of the vendors, and whose name appeared in the prospectus, and who became a director, the plaintiff must prove (1) that the defendant's statement was untrue; (2) that it was dishonest; (3) that he believed it to be untrue. See also Glasier *v.* Rolls, L. R. 42 Ch. D. 436 (1889), following the House of Lords in Derry *v.* Peek, L. R. 14 App. Cas. 337 (1889). See also Ship *v.* Crosskill, L. R. 10 Eq. Cas. 73 (1870). To sustain an action for deceit the plaintiff must show "that the defendants intended that people should act on the statements, that the statements are untrue in fact, and that the defendants knew them to be untrue, or made them under such circumstances that the court must conclude that they were careless whether they were true or not;" also that the statements were relied upon, acted on, and damage sustained. Edgington *v.* Fitzmaurice, L. R. 29 Ch. D. 459 (1885). Reliance on the misrepresentations must be shown. Priest *v.* White, 89 Mo. 609 (1886).

1 *Scienter* is fixed on the directors, making them liable in damages upon proof of incorrect representations, known to them to be incorrect, knowingly stated by them, and acted on by the plaintiff subscriber. Henderson *v.* Lacon, L. R. 5 Eq. Cas. 249 (1867); Cargill *v.* Bower, L. R. 10 Ch. D. 502 (1878). See also Bale *v.* Cleland, 4 F. & F. 117 (1864); and see p. 166, n. 5, *supra*. There must be an allegation of knowledge and intent to deceive on their part. "Falsely and fraudulently represented" does not properly plead the *scienter*. Mabey *v.* Adams, 3 Bosw. 346 (1858). In case the representations are not fraudulent as against the corporation, they are not sufficient to entitle the subscriber to recover from the directors. Heymann *v.* European Cent. Ry., L. R. 7 Eq. 154 (1868). A subscriber for stock may hold the president liable for false representations made by the latter to other persons with an intent that the plaintiff be induced to act upon them. The false representations of the president that a dividend had been earned bind him, where he paid close attention to its affairs, and where such dividend was made on an improper and untrue statement of assets and liabilities. It must be proven that the defendant president knew that the representations were false, but this may be proven by inference. A stockholder who is induced to make still further subscriptions by reason of misrepresentations of an officer may hold him liable. Hubbard *v.* Weare, 79 Iowa 678 (1890). The directors are personally liable in an action for deceit where a prospectus falsely states that guaranteed dividends were secured by a deposit of certain securities, and a person subscribes for stock relying upon such statements. Knox *v.* Hayman, 67 L. T. Rep. 137 (1892). A person induced to subscribe for stock on the representation of an officer that the company had been properly organized, may rescind if it was not properly organized. An offer to surrender the stock in the petition is sufficient. The officer is not personally legally liable if he made the representation in good faith. Maine *v.* Midland Investment Co., 132 Iowa 273 (1906).

2 Mixer's Case, 4 De G. & J. 575

upon a subscription, may set off damages due to misrepresentations inducing him to subscribe, made by an agent of the corporation in obtaining the subscription.[1] A statute that a person shall not be liable for representations as to the credit of another person, unless the representations are written, applies to representations by a director in regard to the corporation, which lead to a person subscribing to its stock.[2]

§ 158. The directors are not liable to an action for deceit by reason of the frauds of their agents,[3] nor is an innocent director liable for the fraudulent representations of his co-directors—not even though the evidences of their fraud were entered on the corporate books, there being no ground for suspicion on his part.[4] The directors of a bank are not personally liable in a common-law action of

(1859); Duranty's Case, 26 Beav. 268 (1858); Western Bank *v.* Addie, L. R. 1 s. c., App. Cas. (H. L.) 145 (1867); Abrath *v.* Northeastern Ry., L. R. 11 App. Cas. 247 (1886); Houldsworth *v.* City of Glasgow Bank, L. R. 5 App. Cas. 317 (1880); Benjamin, Sales (Bennett's ed. 1888), § 467*a*. See also § 156, *supra*. *Contra*, Peebles *v.* Patapsco Guano Co., 77 N. C. 233 (1877); Barwick *v.* English Joint Stock Bank, L. R. 2 Exch. 259 (1867); Mackay *v.* Commercial Bank, L. R. 5 P. C. 394 (1874), not stock cases, but distinctly holding that a corporation is liable to an action for damages for deceit. Where, however, the old corporation organizes a new corporation, and has the latter build a competing road on a new line, a stockholder of the old who contributed lands, etc. may have an action for damages against it. Chapman *v.* Mad River, etc. R. R., 6 Ohio St. 119 (1856). A person loaning money to an individual and taking bank stock as collateral security cannot hold the bank liable in an action for damages for deceit on the ground that its published statements were false and fraudulent, and that he relied on those statements. Merchants' Nat. Bank *v.* Armstrong, 65 Fed. Rep. 932 (1895). See also article in 1 Ry. & Corp. L. J. 122; Buffalo, etc. Co. *v.* Standard Oil Co., 42 Hun, 153 (1886); also § 44, *supra*. Where a subscriber is told that his money goes to the corporation when in fact it is divided among the promoters, he may sue the corporation for fraudulent representations, even though he has settled with the promoters, he not being aware of the fraud at the time of such settlement. Hunter *v.* French, etc. Co., 96 Iowa, 573 (1896). Even though stock is issued for a nominal consideration, yet if it is donated back to the corporation and sold, the corporation cannot set up that its acts were *ultra vires*, and it may be held liable for fraud in misrepresenting the stock to the purchaser. Krisch *v.* Interstate, etc. Co., 39 Wash. 381 (1905).

1 Owens *v.* Boyd, etc. Co., 95 Va. 560 (1898).

2 Getchell *v.* Dusenbury, 145 Mich. 197 (1906).

3 Weir *v.* Barnett, L. R. 3 Exch. D. 32 (1877); Weir *v.* Bell, L. R. 3 Exch. D. 238 (1878); Eaglesfield *v.* Londonderry (H. L.), 26 W. R. 540 (1878). See also Cargill *v.* Bower, L. R. 10 Ch. D. 502 (1878); Watson *v.* Earl Charlemont, 12 Q. B. 856 (1848); Arthur *v.* Griswold, 55 N. Y. 400 (1874).

4 *Re* Denham, L. R. 25 Ch. D. 752 (1883).

deceit for false statements as to the condition of the bank, unless it is shown that they knew the statements to be false. They are not liable if they in good faith relied upon details furnished by clerks.[1]

A director cannot be held liable for false representations contained in the articles of association, which were made before he became a director.[2] But a director who stands by and allows a co-director to make the false representations is equally chargeable with the injury done thereby.[3] The false representations supporting an action for deceit may have been by corporate reports or prospectuses, or by personal statements.[4] Promotors who make fraudulent representations as to their profits may be held personally responsible.[5] Where a prospectus, offering for sale trustee's transferable certificates, states that such certificates represent stock deposited with the trustee, the stock being in an English corporation, the trustee is personally liable if it turns out that the English corporation had a prior lien on the stock to the full extent of its value.[6] The president of a bank, who has been held liable in damages for deceit in inducing a person to purchase stock from the bank, cannot compel the bank to reimburse him on the ground that the

1 Utley *v.* Hill, 155 Mo. 232 (1900). *Cf.* § 703, *infra.* Directors under the English statute are not liable for a prospectus which they did not authorize. Hoole *v.* Speak, [1904] 2 Ch. 732.

2 Mabey *v.* Adams, 3 Bosw. 346 (1858).

3 Vreeland *v.* New Jersey Stone Co., 29 N. J. Eq. 188 (1878).

4 For a complaint seeking to hold national-bank directors liable for the loss of money deposited, the deposit being induced by erroneous and fraudulent advertisements and reports as to the condition of the bank, see Prescott *v.* Haughey, 65 Fed. Rep. 653 (1895). The treasurer may be liable in an action for fraud and deceit to a purchaser of stock who bought relying on false statements made by him to the public as to profits. Keeler *v.* Seaman, 47 N. Y. Misc. Rep. 292 (1905).

5 See § 705, *infra.* In Franey *v.* Warner, 96 Wis. 222 (1897), where promoters purchased land for $32,727 and sold it to the corporation for $45,000 without divulging the profit, the court held that a stockholder could not rescind his subscription, inasmuch as the corporation was innocent, but that he might have a judgment against the promoters for his *pro rata* share of the profit. See also Franey *v.* Wauwatosa Park Co., 99 Wis. 40 (1898).

6 The trustee was bound to take notice of the lien created by the by-laws of the English corporation. The rule of *caveat emptor* has been relaxed so as to create an implied warranty of title on the part of the seller. Even though the trustee acted as agent, yet, the principal not being disclosed, the trustee is liable. McClure *v.* Central Trust Co., 165 N. Y. 108 (1900). A trust company which issues a prospectus offering for sale stock in a mining corporation, and making in the prospectus misstatements as to the earnings, is liable to purchasers of stock for the difference between its actual value and what its value would have been if the representations had been true. Benedict *v.* Guardian T. Co., 91 N. Y. App. Div. 103 (1904), aff'd, 180 N. Y. 558.

bank had obtained the benefit of the act.[1] By statute in England a director who is held liable for misrepresentations in the prospectus may have contribution from other directors who are equally liable.[2] Promoters may be liable for misrepresentations of their agent in obtaining subscriptions.[3] The vendors of a mining property of a corporation are not liable for the misstatements of such corporation in selling its stock, in order to pay for the mine, even though they knew that a prospectus had been issued and they accepted payment from the corporation.[4] The question of the liability of promoters, generally, is considered elsewhere.[5] The corporation itself, all of whose stock has been issued in payment for a mine, cannot hold a vendor liable for misrepresentations as to the value of the property.[6]

§ 159. *Remedy by action for money had and received.*—Where a subscriber pays his subscription in part or wholly, and afterwards discovers that the representations whereby he was induced to subscribe were fraudulent, he may bring an action at law for money had and received, and recover back from the corporation the money so received.[7]

§ 160. *Ratification as a bar to the subscriber's remedies.*—A subscription contract obtained by fraudulent representations may cease to be voidable and may become absolutely binding by acts of ratification. Any act of the subscriber, inconsistent with an intention to disaffirm the contract, will constitute a ratification of the subscription and a waiver of the right to avoid it by reason of fraud, provided the subscriber knew of the fraud at the time of such ratifying act. Thus, where the subscriber, after knowledge of the fraud,

1 Trimble *v.* Exchange Bank, 62 S. W. Rep. 1027 (Ky. 1901).

2 Gerson *v.* Simpson, [1903] 2 K. B. 197.

3 Milburn *v.* Wilson, 31 Can. S. C. Rep. 481 (1901).

4 Wiser *v.* Lawler, 189 U. S. 260 (1903).

5 See § 651, *infra*. In Nova Scotia, where a subscriber sues a promoter for damages for fraud in obtaining for himself stock and bonds illegally, the suit must be by the corporation, or by the stockholder if the corporation refuses to sue. Weatherbe *v.* Whitney, 30 Nova Scotia Rep. 49 (1897). Such claim cannot be joined with a personal claim for services rendered, etc. Weatherbe *v.* Whitney, 30 Nova Scotia Rep. 104 (1897).

6 Stratton's, etc. *v.* Dines, 126 Fed. Rep. 968 (1904); aff'd, 135 Fed. Rep. 449.

7 Grangers' Ins. Co. *v.* Turner, 61 Ga. 561 (1878); Hamilton *v.* Grangers' Ins. Co., 67 Ga. 145 (1881). But the subscriber cannot retain the stock and also sue. Houldsworth *v.* City of Glasgow Bank, L. R. 5 App. Cas. 317 (1880). See Jarrett *v.* Kennedy, 6 C. B. 319 (1848), where *assumpsit* for money had and received, brought against the directors to compel them to repay money paid on a subscription obtained by fraud, was sustained, without involving the question of a fraudulent intent. See Bruce *v.* Nickerson, 141 Mass. 403 (1886). The

receives dividends, sells part of the stock,[1] instructs his broker to sell,[2] participates in the meetings,[3] pays calls,[4] or, in general, ac-

action for money had and received cannot be brought against other stockholders for the fraud of a promoter. Perry *v.* Hale, 143 Mass. 540 (1887).

[1] But a sale of a part of the stock before the subscriber discovers the fraud is no bar to a rescission as to the rest. *Ex parte* West, 56 L. T. Rep. 622 (1887). A subscriber to stock cannot rescind for fraud, when he has had the stock transferred to his infant children, unless their right thereto is also tendered back. Francis *v.* New York, etc. R. R., 108 N. Y. 93 (1888); aff'g, 17 Abb. N. C. 1. A person purchasing treasury stock may have the purchase rescinded for fraudulent representations. The fact that he dealt in other shares of the same stock is no defense. Mulholland *v.* Washington, etc. Co., 35 Wash. 315 (1904).

[2] *Ex parte* Briggs, L. R. 1 Eq. 483 (1866).

[3] Harrison *v.* Heathorn, 6 Man. & G. 81 (1843); Chaffin *v.* Cummings, 37 Me. 76 (1853). A subscriber who acts as director and manager, and purchases lots from the company, cannot rescind his subscription on the ground that certain newspaper articles prepared by himself and others contain misrepresentations. Raymond *v.* San Gabriel, etc. Co., 53 Fed. Rep. 883 (1893). Where the defrauded party to whom stock has been issued for land does not rescind promptly, but acts as director and allows improvements to be made on the land, he cannot rescind at all. Foley *v.* Holtry, 41 Neb. 563 (1894). This decision, however, was reversed on a rehearing. 43 Neb. 133. A person may defeat notes given for stock which he was induced fraudulently to purchase from the corporation, even though he became and remained cashier for the corporation for over a year after the sale and before he set up the defense, and was a director and voted the stock. He did not necessarily learn the facts from occupying these positions, nor from the fact that he made official reports of the condition of the company. He was not bound to investigate. He tendered the stock back as soon as he discovered the facts. Especially do these rules apply where no creditors or other stockholders' rights have intervened. National Bank *v.* Taylor, 5 S. D. 99 (1894). A person cannot rescind for fraud a purchase of stock from the corporation itself, where, subsequently to discovering the fraud, he attended a stockholders' meeting and voted to assess the stock, and afterwards attended another stockholders' meeting and paid the assessment. Marten *v.* Paul, etc. Co., 99 Cal. 355 (1893). See also § 356, *infra*.

[4] Scholey *v.* Venezuela Central Ry., L. R. 9 Eq. 266, n. (1870). But not where he paid under compulsion. Ayre's Case, 25 Beav. 513 (1858). A payment of a call on a subscription is not a waiver of the defense that the corporation has been formed for different purposes than were represented by the promoters at the time of the subscription, where the subscriber did not know that fact when he paid. Strong *v.* Southwestern, etc. Co., 38 S. W. Rep. 546 (Tex. 1896). A partial payment with full knowledge is a waiver. *Re* Dunlop-Truffault, etc. Co., 75 L. T. Rep. 385 (1896). Where a subscriber, with knowledge of the facts, pays a call and waits a year, he is bound. Ascetelyn, etc. Co. *v.* Smith, 10 Penn. Sup. Ct. 61 (1899). If a subscriber pays an instalment on his stock or participates in a meeting after incorporation, he cannot afterwards set up that the charter did not correspond with the prospectus. West

cepts any corporate benefit or continues to act as a stockholder,[1] he will be held to have waived all objections to the fraud, and to have ratified the subscription contract. A subscriber who for three years was an active director cannot rescind on the ground that fraudulent representations were made to him, nor can other subscribers rescind who subscribed through him as agent.[2] Where the subscriber, after discovering the fraud, serves as a director for two months and sues the president personally for the fraud, he cannot rescind as to the purchase.[3] But mere attendance at a stockholders' meeting is insufficient.[4] And a provision in a contract of subscription to the stock of the company, whereby the subscriber waives notice of all contracts between the promoters and the company, is not binding on the stockholder, if such waiver is tricky and fraudulent.[5]

End, etc. Co. *v.* Claiborne, 97 Va. 734 (1900).

1 Ogilvie *v.* Knox Ins. Co., 22 How. 380 (1859); Chubb *v.* Upton, 95 U. S. 665 (1877); Litchfield Bank *v.* Church, 29 Conn. 137 (1860); Centre, etc. Turnp. Co. *v.* McConaby, 16 Serg. & R. (Pa.) 140 (1827); Mixer's Case, 4 De G. & J. 575 (1859). Waiver of one misrepresentation is not a waiver of others. *Ex parte* Hale, 55 L. T. Rep. 670 (1886). The question of whether the subscriber has been guilty of laches may be submitted to the jury. Newton Nat. Bank *v.* Newbegin, 74 Fed. Rep. 135 (1896). Where a party is induced to subscribe by fraud and gives a note in payment, he can defend against the note on that ground, even though two months have elapsed since he discovered the fraud. He does not waive fraud by the fact that he united with others to buy the company's property. Zang *v.* Adams, 23 Colo. 408 (1897). The fraud may be waived. Wilson *v.* Hundley, 96 Va. 96 (1898). Accepting stock with a knowledge that the amount of stock issued as paid up was not as represented is a waiver of that defense. French *v.* Northwestern Laundry, 132 Iowa 81 (1906).

2 American, etc. Assoc. *v.* Rainbolt, 48 Neb. 434 (1896).

3 Lear *v.* Paige, etc. Co., 42 S. W. Rep. 808 (Tenn. 1897).

4 Stewart's Case, L. R. 1 Ch. App. 574 (1866); Wontner *v.* Shairp, 4 C. B. 404 (1847); *Re* Metropolitan, etc. Assoc., 64 L. T. Rep. 561 (1891).

5 Where a prospectus contained a material misrepresentation which induced a person to subscribe, he may maintain a suit to rescind the subscription, even though the prospectus stated that there were certain contracts not mentioned in the prospectus and that the subscribers would be held to have had notice of the same, and even though the subscription contract contains a provision that the subscriber has notice of that which in fact is concealed from him. The misrepresentation in this instance was a misleading and ambiguous statement, and also the non-disclosure of an agreement to which the promoter was a party, such agreement not relating to the formation of the company or his subscription to its stock. The court rescinded the subscription and held the directors personally liable for loss sustained by the subscriber. Greenwood *v.* Leather, etc. Co. Ltd., [1900] 1 Ch. 421. A "tricky" form of waiver of mention of outstanding contracts referred to in the prospectus does not bind a subscriber to the shares. Tait *v.* MacLeay, [1904] 2 Ch. 631. See also p. 413, note 2, *supra*.

§ 161. *Laches as a bar to the subscriber's remedies.*—Where a subscriber for stock, who was induced to subscribe by fraud, neglects for an unreasonable time after the discovery of the fraud to have his subscription canceled, and, in the meantime, the interests of third persons become involved, and would be injured by the cancellation of such subscription, the subscriber's laches is a bar to relief, and a court of equity will refuse to set aside the subscription.[1] Equity does not allow the subscriber to say, "I will abide by the company if successful, and I will leave the company if it fails."[2] Immediately upon receiving information of the fraud, it is his duty to decide whether he will rescind the contract or waive the fraud.[3] Nevertheless delay is not fatal, unless circumstances and third parties' rights have so changed or been acquired that the rescission would be inequitable. Consequently, the decision of each case depends largely on the facts of the case. Thus, it has been held that a delay of one,[4] three,[5] four,[6] or six months,[7] or of two,[8] three,[9] or six[10] years, was fatal under the circumstances of

1 City Bank *v.* Bartlett, 71 Ga. 797 (1883). Such delay is also a bar in an action at law. Schanck *v.* Morris, 7 Rob. (N. Y.) 658 (1868). But it is no bar that other subscribers may have been induced to subscribe by reason of this subscription. Western Bank *v.* Addie, L. R. 1 Sc. App. Cas. (H. L.) 145 (1867). *Cf.* Parbury's Case, 3 De G. & Sm. 43 (1849).

2 Ashley's Case, L. R. 9 Eq. 263 (1870); *Re* London, etc. F. Ins. Co., L. R. 24 Ch. D. 149 (1883). See also § 356, *infra.*

3 Philadelphia, etc. R. R. *v.* Cowell, 28 Pa. St. 329 (1857), where there was a delay of seven years; Heymann *v.* European Central Ry., L. R. 7 Eq. 154 (1868); Peek *v.* Gurney, L. R. 6 H. L. 377 (1873). The last case overrules Bagshaw *v.* Seymour, 18 C. B. 903 (1856), and Bedford *v.* Bagshaw, 4 H. & N. 538 (1859).

4 Taite's Case, L. R. 3 Eq. 795 (1867), the delay evidently being to see which course would be most profitable.

5 Heymann *v.* European Central Ry., L. R. 7 Eq. 154 (1868).

6 *Ex parte* Lawrence, 36 L. J. (Ch.) 490 (1867); s. c., L. R. 2 Ch. App. 412.

7 Whitehouse's Case, L. R. 3 Eq. 790 (1867).

8 Farrar *v.* Walker, 3 Dill. 506, n. (1875); s. c., 8 Fed. Cas. 1076; Ashley's Case, L. R. 9 Eq. 263 (1870); Peel's Case, L. R. 2 Ch. App. 674 (1867); Kincaid's Case, L. R. 2 Ch. App. 420 (1867); Wilkinson's Case, L. R. 2 C. H. App. 536 (1867).

9 State *v.* Jefferson Turnp. Co., 3 Humph. (Tenn.) 305 (1842).

10 Denton *v.* Macneil, L. R. 2 Eq. 352 (1866). Four years' delay in complaining of the fraud inducing the purchase, after knowledge thereof, is fatal. Cedar Rapids Ins. Co. *v.* Butler, 83 Iowa 124 (1891). Where one stockholder who has been fraudulently induced to subscribe for stock awaits the result of an action by another stockholder brought to rescind his subscription on the same ground, the delay being nearly three years, and then commences suit for the same purpose only after a meeting has been called for a winding

the case, while, under different facts, a delay of two months,[1] or even seven years,[2] was held not to be a bar. A suit by one signer of a reorganization agreement, however, to enforce it, prevents laches being charged against other signers, who do not commence suit until a long time subsequently.[3] Acquiescence or affirmance does not bind the stockholder if induced by a reasonable expectation on his part that the fraud would be remedied.[4] In the remedies by actions at law the statute of limitations governs, and, by analogy, courts of equity are inclined to follow the same period, unless there are equitable reasons to the contrary. In a suit against a director for fraud in inducing subscription, the statute of limitations begins to run from the time of subscription, and the liability is not a penalty, even though the liability is made statutory.[5]

§ 162. The date from which laches begins to run is the time when the subscriber is first chargeable with notice that a fraud has been perpetrated upon him. Mere suspicions or random statements heard in public or in stockholders' meetings do not necessarily constitute notice.[6] But after a subscriber's suspicions are reasonably aroused, it is his duty to investigate at once.[7] The corporation has the burden of proof in asserting that the subscriber had notice and was guilty of laches.[8] The House of Lords in England has recently held that where a subscriber sets up fraud as a defense to an action for calls, he need not show repudiation since he discovered the fraud. On the contrary, the company must show that he adhered to the contract after his knowledge of the fraud.[9]

up, he is guilty of laches, and his remedy is barred. *Re* Snyder, etc. Co., 68 L. T. Rep 210 (1893). Several years' delay is a bar to rescission for fraud. Buker *v.* Leighton, etc. Assoc., 63 N. Y. App. Div. 507 (1901). Where a suit to set aside a forfeiture of stock by the corporation, on the ground of fraud, is compromised, the same stockholder cannot eight years thereafter file another suit to set aside the assessment on the ground of frauds unknown to him when the first suit was compromised. Marks *v.* Evans, 62 Pac. Rep. 76 (Cal. 1900). Delay for seven years in complaining of a fraud is a bar. Phelps *v.* American, etc. Assoc., 121 Mich. 343 (1899).

1 Venezuela Central Ry. *v.* Kisch, L. R. 2 H. L. App. 99 (1867).

2 McClellan *v.* Scott, 24 Wis. 81 (1869).

3 Cox *v.* Stokes, 156 N. Y. 491 (1898).

4 West End, etc. Co. *v.* Claiborne, 97 Va. 734 (1900).

5 Thompson *v.* Lord Clanmorris, [1900] 1 Ch. 718.

6 Venezuela Central Ry. *v.* Kisch, L. R. 2 H. L. App. 99 (1867).

7 Ogilvie *v.* Currie, 37 L. J. (Ch.) 541 (1867); Ashley's Case, L. R. 9 Eq. 263 (1870); Bosley *v.* National Machine Co., 123 N. Y. 550 (1890).

8 Quoted and approved in Virginia Land Co. *v.* Haupt, 90 Va. 533 (1894); *Re* London, etc. Ins. Co., L. R. 24 Ch. D. 149 (1883).

9 Aaron's Reefs *v.* Twiss, [1896] A. C. 273.

§ 163. *Corporate insolvency as a bar to the subscriber's remedies.*—In England the principle has become well established that, after the statutory proceedings for winding up a corporation by reason of corporate insolvency have been commenced, a subscriber cannot rescind his subscription on account of fraud.[1] He is too late. It matters not that he did not discover the fraud until after the winding up has commenced. The rights of corporate creditors prevail, then, over the equities of the subscriber.[2] If, however, he instituted proceedings to rescind the contract before the winding up was commenced, he may be released, although the proceedings are not completed until after such winding up.[3] So, also, where there are several similar cases, and by agreement with the corporate solicitors all the cases are to follow a test case, this agreement prevails, although a winding up is commenced before the test case is fully decided.[4]

1 Wright's Case, L. R. 12 Eq. 331 (1871); Kent *v.* Freehold, etc. Co. L. R. 3 Ch. App. 493 (1868), rev'g, L. R. 4 Eq. 588; Henderson *v.* Royal British Bank, 7 El. & Bl. 356 (1857); Powis *v.* Harding, 1 C. B. (N. S.) 533 (1857); Daniel *v.* Royal British Bank, 1 Hurlst. & N. 681 (1857); Oakes *v.* Turquand, L. R. 2 H. L. App. 325 (1867); Mixer's Case, 4 De G. & J. 575 (1859); Clarke *v.* Dickson, 27 L. J. (Q. B.) 223 (1858). So, also, where there is a voluntary winding up by reason of corporate insolvency. Stone *v.* City, etc. Bank, L. R. 3 C. P. D. 282 (1877); Collins *v.* City, etc. Bank, L. R. 3 C. P. D. 289 (1877). But not if the proceedings for rescission were commenced in good faith and in ignorance of the winding-up proceedings. Hall *v.* Old Talargoch Min. Co., L. R. 3 Ch. D. 749 (1876).

2 Turner *v.* Grangers', etc. Ins. Co., 65 Ga. 649 (1880).

3 Reese River, etc. Co. *v.* Smith, L. R. 4 H. L. 64 (1869) aff'g L. R. 2 Ch. 604; L. R. 2 Eq. 264; rev'g 36 L. J. (Ch.) 385. Where a subscriber is sued on the subscription and he interposes the defense of misrepresentations, the defense, if proved, is good, even though ten days after interposing his defense suit to wind up the company is commenced. *Re* General Railway Syndicate, [1900] 1 Ch. 365; rev'g (1899) 1 Ch. 770. A subscriber is liable on a winding up although he had repudiated the subscription long before on the ground of fraud, and understood that his name had been dropped. *Re* Lennox Publishing Co., 62 L. T. Rep. 791 (1890). If the party institutes legal proceedings to cancel his subscription on the ground of fraud, prior to the commencement of the winding-up proceedings, the insolvency of the company is no bar. Cocksedge *v.* Metropolitan, etc. Assoc., 64 L. T. Rep. 826 (1891); aff'd, 65 L. T. Rep. 432 (1891). The highest court in England in one case intimated that corporate insolvency is a bar to rescission of a subscription for fraud, even though a winding up has not been commenced. Tennent *v.* City of Glasgow Bank, L. R. 4 App. Cas. 615 (1879). See also Burgess's Case, L. R. 15 Ch. D. 507 (1880). But the fact that the company is unable to meet its engagements at the time of rescission is no bar if the subscriber is ignorant thereof. *Ex parte* Carling, 56 L. T. Rep. 115 (1887).

4 Pawle's Case, L. R. 4 Ch. App. 497 (1869); McNiell's Case, L. R. 10 Eq. 503 (1870). But mere attendance

§ 164. In this country the effect of corporate insolvency upon the right of a subscriber to rescind his contract for fraud has not been passed upon so often as in England. The decisions, however, clearly hold that corporate insolvency is, as a rule, a bar to such rescission.[1]

at the meeting where such stipulation is made is sufficient. The subscriber must plainly indicate an intention to abide by the test case. Ashley's Case, L. R. 9 Eq. 263 (1870).

1 Approved in Howard *v.* Turner, 155 Pa. St. 349 (1893), holding that after the corporation has become insolvent and a receiver appointed, it is too late for a party to avoid his subscription on the ground of fraud. Fraud on the part of the officers in inducing the purchase is no defense to the statutory liability after the company becomes insolvent and passes into a receiver's hands. Bissell *v.* Heath, 98 Mich. 472 (1894). After insolvency it is too late to rescind. Olson *v.* State Bank, 67 Minn. 267 (1897); Sheafe *v.* Larimer, 79 Fed. Rep. 921 (1897). Delay in rescinding for a year and a half, with knowledge, is fatal where the corporation has become insolvent in the meantime. Hilliard *v.* Allegheny, etc. Co. 173 Pa.St.1(1896). See160 Fed.Rep.573.

After the company becomes insolvent, and two and a half years have elapsed since the subscription, and during this time the means of discovering the fraud were open to the subscriber, the subscriber cannot rescind for fraud. Martin *v.* South, etc. Co., 94 Va. 28 (1896); s. c. 97 Va. 349; Ruggles *v.* Brock, 6 Hun, 164 (1875); Saffold *v.* Barnes, 39 Miss. 399 (1860). After the corporation becomes insolvent a subscriber cannot repudiate for fraud. Duffield *v.* Barnum, etc. Works, 64 Mich. 293 (1887). After a bank has become insolvent the statutory liability of a stockholder cannot be avoided by the defense of fraud in obtaining his subscription four years prior thereto. Foster *v.* Row, 120 Mich. 1 (1899). A stockholder who delays two and one-half years in bringing suit to cancel a subscription for fraud, and in the meantime has served as director and the company has become insolvent, is barred from relief. Moreover, a receiver of a bank is a necessary party to such a suit by a stockholder to cancel his subscription for fraud, and a suit against him for that purpose, without leave of court, will be dismissed. Earle *v.* Humphrey, 121 Mich. 518 (1899). A subscriber who for three years after learning of the facts delays in bringing a suit for rescission cannot then maintain a suit against the receiver of the corporation. Tierney *v.* Parker, 58 N. J. Eq. 117 (1899). A parol agreement that the stock should be paid for in a certain way is no defense after the corporation becomes insolvent. Roach *v.* Burgess, 62 S. W. Rep. 803 (Tex. 1901). *Cf.* Litchfield Bank *v.* Peck, 29 Conn. 384 (1860). Fraud is no defense as against creditors. Mathis *v.* Pridham, 1 Tex. Civ. App. 58 (1892); McDowall *v.* Sheehan, 13 N. Y. Supp. 386 (1891); rev'd on another point in 129 N. Y. 200. Nor after insolvency. Howard *v.* Glenn, 85 Ga. 238 (1890). See also § 261, *infra*. *Cf.* § 356, *infra*. An action to rescind the purchase of stock lies where the money paid therefor was to be applied to a certain purpose, but was not so applied, but the receiver will not be directed to give up the money. Moore *v.* Robertson, 25 Abb. N. Cas. 173 (1890). After insolvency a subscriber for stock cannot defend on the ground of fraud where he does not show prompt action after discovering the facts. Marion Trust Co. *v.* Blish, 79 N. E. Rep. 415 (Ind. 1906). As against a receiver it is no defense that the cor-

The supreme court of the United States has held that a subscriber to the stock of a national bank cannot, after the bank has become insolvent, avoid his statutory liability on the stock by the defense that he was induced, by fraudulent representations of the bank and its officers, to become a stockholder.[1] Nevertheless, there are strong American cases to the effect that the insolvency of the corporation and the appointment of a receiver do not always bar the right of a subscriber to rescind his subscription on the ground of fraudulent

poration agreed that the subscriber need pay only fifty per cent. of the par value of the stock, or that fraudulent representations induced him to subscribe, or that the full capital stock was not subscribed, or that the company was defectively organized, or that the name of the company was different from the one contemplated. Cox *v.* Dickie, 93 Pac. Rep. 523 (Wash. 1908). See 61 S.E. Rep. 628.

In the bankruptcy courts, under the former bankruptcy law, it was held that insolvency was a bar to the defense of fraud inducing a subscription to stock. Farrar *v.* Walker, 3 Dill. 506; s. c., 8 Fed. Cas. 1076; Michener *v.* Payson, 13 Nat. Bankr. Reg. 49 (1875); s. c., 17 Fed. Cas. 259.

[1] Scott *v.* Deweese, 181 U. S. 202 (1901). In Chubb *v.* Upton, 95 U. S. 665, 667 (1877), the court says it has often been held that the defense of false and fraudulent representations will not prevail against a receiver, especially where there has not been a prompt discovery of the fraud, followed by a repudiation; citing Upton *v.* Tribilcock, 91 U. S. 45 (1875); Webster *v.* Upton, 91 U. S. 65 (1875); Sanger *v.* Upton, 91 U. S. 56 (1875); Ogilvie *v.* Knox Ins. Co., 22 How. 380 (1859). After a national bank becomes insolvent it is too late for a stockholder to rescind a subscription on the ground of fraud occurring many years prior thereto. Scott *v.* Latimer, 89 Fed. Rep. 843 (1898). After the insolvency of a national bank a stockholder cannot avoid liability on the ground that he was induced to subscribe by fraud, unless he shows that there are no creditors who became such while he was a registered stockholder; neither can he set up a counter-claim for damages due to the fraud. Lantry *v.* Wallace, 97 Fed. Rep. 865 (1899); aff'd, 182 U. S. 536. Although a subscriber to national bank stock may have the subscription rescinded for fraud, even after the bank has passed into a receiver's hands, yet he must show diligence and must show that the creditors of the bank did not become such while he held the stock. Wallace *v.* Bacon, 86 Fed. Rep. 553 (1898). It is too late after proceedings to wind up had been commenced, the court holding, however, that in the case at bar the defendant might easily have discovered the fraud prior to the insolvency. Ross, etc. Co. *v.* Southern, etc. Co., 72 Fed. Rep. 957 (1896). A purchaser of national bank stock from the bank itself cannot, after the bank has passed into the hands of a receiver, defend against the statutory liability on the ground of fraud inducing him to purchase unless he proves acts of diligence which negative any charge of negligence, and also proves that no debt was created nor credit given the bank after he became such stockholder. Wallace *v.* Hood, 89 Fed. Rep. 11 (1898), aff'd 182 U. S. 555. A person seeking to rescind after the corporation becomes insolvent must show that he used due diligence after discovering the fraud. Bartol *v.* Walton, etc. Co., 92 Fed. Rep. 13 (1899). See 85 N. E. Rep. 91.

representations.[1] And even after the corporation passes into an assignee's hands a stockholder fraudulently induced by the president

[1] Newton Nat. Bank *v.* Newbegin, 74 Fed. Rep. 135 (1896), aff'g Newbegin *v.* Newton Nat. Bank, 66 Fed. Rep. 701, where the subscriber subscribed in May, 1890, and the bank failed in November, and the subscriber at once instituted proceedings for rescission, and in May, 1891, filed a bill for that purpose and then withdrew the suit on a proposed reorganization, and then in November, 1891, started the suit again, and in December, 1892, the bank failed again. The court held that the suit might succeed, the subscriber not having taken any part in the management and having been a non-resident, and no large corporate indebtedness having been incurred in the meantime. Even though four years have elapsed since a subscription was made, and for three years the company has been in the hands of a receiver, yet a subscriber may rescind, if with due diligence he had not discovered the falsity of representations inducing him to subscribe, it appearing that no other creditor will be injured if his money is repaid to him. Dunn *v.* Candee, 98 N. Y. App. Div. 317 (1904). Under the Kentucky statute a subscriber may repudiate for fraud, even after the corporation has made an assignment for the benefit of creditors, if due care was used to discover the fraud. Kentucky, etc. *v.* Schaefer, 120 Ky. 227 (1905), the court stating that the decision in Deppen *v.* German American, etc. Co., 70 S. W. Rep. 868, to the contrary was modified on the rehearing in 72 S. W. Rep. 768. Even after insolvency a subscriber for increased stock may defend on the ground that the president represented that he had taken a certain amount of the new stock but had not done so, and also on the ground that misrepresentations were made as to the value of the corporate assets. Byers Bros. *v.* Maxwell, 73 S. W. Rep. 437 (Tex. 1903). Where promoters sell a mining prospect to a corporation for its entire capital stock and donate a part to the treasury to be sold as treasury stock, and the property turns out to be worthless, a purchaser of the treasury stock may rescind and recover back his money, although he did not bring suit for nearly two years, but it appeared that he had not known of the fraud, and his suit will lie even though the company is insolvent, it appearing that no active insolvency has occurred. Hinkley *v.* Sac Oil, etc. Co., 107 N. W. Rep. 629 (Iowa 1906).

Where a subscriber subscribes in August, discovers the fraudulent misrepresentations in November, serves notice on the company in January that he repudiates the subscription, an action in behalf of corporate creditors against him to collect fails, the company having assigned in April. Savage *v.* Bartlett, 78 Md. 561 (1894); Ramsey *v.* Thompson Mfg. Co., 116 Mo. 313 (1893), holding that even after insolvency the subscription may be repudiated for fraud. Where a stockholder in an insolvent corporation sets up fraud as a defense, it is for the jury to say whether he rescinded within a reasonable time after the discovery of the fraud. Urner *v.* Sollenberger, 89 Md. 316 (1899). See 84 N. E. Rep. 814.

Even after corporate insolvency fraud is a defense to an action on a subscription, where there is no proof that any debts were incurred by the corporation after such subscription was made. Beal *v.* Dillon, 5 Kan. App. 27 (1896). Even after a receiver is appointed of a bank, a person who was induced to buy stock of the bank by fraudulent statements that the stock was worth par can rescind by suit. Robinson *v.* Dickey, 14 Tex. Civ. App. 70 (1896). Even though the cor-

to take stock by misrepresentations as to the condition of the company may sue the company for damages and join the assignee.[1]

§ 165. *Essential allegations in legal proceedings to remedy a fraud inducing subscription—Contribution.*—The essential allegations, especially in a suit in equity, necessarily vary according to the peculiar facts of each case. Yet there are certain elements common to all the cases. It is necessary to allege that a material misrepresentation of a question of fact was made, setting out fully the fact misrepresented; that the person making the misrepresentation thereby bound the corporation; and that, upon discovery of the fraud, he immediately disaffirmed the contract.[2] The bill must set out in full the facts justifying rescission.[3] That the representation was false cannot be proved by statements made by the directors in stockholders' meetings.[4] The burden of proving that the representation was false, and that the subscriber relied thereon, is upon the subscriber.[5] In New York, proof of other similar contemporaneous frauds is admissible.[6] In a suit at law brought by the receiver of a national bank against a stockholder on his statutory liability, he cannot set up fraud on

poration has become insolvent, yet a subscriber may rescind on the ground that it was misrepresented to him that the company was solvent, especially where only two months have intervened and the stockholder has not been guilty of laches. Park *v.* Kribs, 24 Tex. Civ. App. 650 (1900). See also § 356 *infra*.

1 Dorsey Mach. Co. *v.* McCaffrey, 139 Ind. 545 (1894).

2 Quoted and approved in Armstrong *v.* Karshner, 47 Ohio St. 276 (1890); Bwlch-y-plwm L. M. Co. *v.* Baynes, 36 L. J. (Ex.) 183 (1867); Deposit, etc. Co. *v.* Ayscough, 6 El. & B. 761 (1856); Upton *v.* Englehart, 3 Dill. 496 (1874); s. c., 28 Fed. Cas. 835; Hallows *v.* Fernie, L. R. 3 Ch. App. 467 (1868); Selma, etc. R. R. *v.* Anderson, 51 Miss. 829 (1876),—the last case holding it necessary to allege also that the act misrepresented was not a charter matter. Carey *v.* Cincinnati, etc. R. R., 5 Iowa, 357 (1857), indicates that an allegation that the certificates are brought into court for disposal is proper. See also Oregon Cent. R. R. *v.* Scoggin, 3 Oreg. 161 (1869); Gilfillan *v.* Mawhinney, 149 Mass. 264 (1889).

3 Bartol *v.* Walton, etc. Co., 92 Fed. Rep. 13 (1899).

4 *Re* Devala, etc. Co., L. R. 22 Ch. D. 593 (1883). *Cf.* Philadelphia, etc. R. R. *v.* Quigley, 21 How. 202 (1858). *Contra*, Jarrett *v.* Kennedy, 6 C. B. 319 (1848).

5 Jennings *v.* Broughton, 22 L. J. (Ch.) 585 (1853). A subscription will not be decreed to be canceled unless the proof of fraudulent representations is very clear, especially where the subscription contained special terms in writing. Wenstrom, etc. Co. *v.* Purnell, 75 Md. 113 (1891).

6 Miller *v.* Barber, 66 N. Y. 558 (1876). In Alabama it is not admissible. Montgomery Southern Ry. *v.* Matthews, 77 Ala. 357 (1884). Fraudulent representations to others made about the same time are not admissible as evidence. Roche *v.* Coleman, 42 S. W. Rep. 739 (Ky. 1897); Johnson *v.* Gulick, 46 Neb. 817 (1896). Proof of similar frauds on others is not admissible where it is admitted that the representations were made

the part of the bank in inducing him to subscribe. That defense, if good at all, is available only by a suit in equity. Neither can the defendant set up a counter-claim for the money so paid by him for the stock.[1] As a rule at common law, there can be no contribution enforced as between joint tort feasors.[2]

but denied that they were false. Anderson *v.* Scott, 70 N. H. 534 (1901). See also note 1, p. 1035.

1 Lantry *v.* Wallace, 182 U. S. 536 (1901).

2 See § 749, *infra*. As to contribution among directors under the English statute, see Shepheard *v.* Bray, 95 L. T. Rep. 414 (1906), reversed by consent in 97 L. T. Rep. 729 (1907).

CHAPTER X.

MISCELLANEOUS DEFENSES TO SUBSCRIPTIONS FOR CAPITAL STOCK.

§ 166. Defenses to subscriptions not favored by the courts.
167–170. Release, withdrawal, surrender, cancellation, rescission, or substitution — Subscription revocable by its terms—Payment by dividend.
171. Compromise.
172–175. Non-payment of percentage required by statute.
176–181. Full capital stock not subscribed.
182. Capital stock not definitely resolved upon.
183–186. Irregular incorporation.
187. *Ultra vires* acts.
§ 188. Fraud and mismanagement of directors.
189. Delay and abandonment of enterprise.
190. Failure of corporate enterprise.
191. Secret agreement as to liability —Other subscribers released.
192. No certificates of stock issued.
193. Set-off and counter-claim.
194. Modification of the plan and scope of the enterprise after subscription.
195. Statute of limitations.
196. Ignorance or mistake.
197. Miscellaneous defenses.
198. Waiver of defenses.

§ 166. *Defenses to subscriptions not favored by the courts.*—In the early days of corporate enterprises, especially of railroads, the subscribers to stock rarely realized a profit from their investment, but, on the contrary, lost the whole amount of the subscription which they had made. These subscriptions were generally not called in until after corporate insolvency had occurred. Then the reluctance of the subscriber to pay a subscription from which there was no hope of a return led him to set up all possible defenses to defeat any action for the collection of the amount due from him. Some of these defenses were just, and have been sustained; but most of them have not been allowed. On the theory that, having taken the chances of large gains, the subscriber took also the risk of total loss, and that the hardship of the subscriber was not equal to the superior equities and rights of corporate creditors, the courts have uniformly discountenanced such defenses, and have rigidly enforced the subscriber's liability.

§ 167. *Release, withdrawal, surrender, cancellation, rescission, or substitution — Subscription revocable by its terms — Payment by dividend.*—These terms are frequently used as synonymous, although technically they have different meanings. The term *release*, especially, has led to considerable confusion. It has been applied to cases where the subscriber withdraws his subscription, the contract not

yet having been closed; second, to cases where the subscriber retains his stock, but is not required to pay the full par value thereof; third, to cases where the subscription contract is dissolved by mutual agreement. A subscriber may withdraw from his subscription if the withdrawal is prior to the incorporation. Notice of the withdrawal may be verbal, and may be given to the chief party in the enterprise, who afterwards is made president.[1]

1 Hudson Real Estate Co. *v.* Tower, 161 Mass. 10 (1894); s. c., 156 Mass. 82 (1892). A subscription prior to organization may be withdrawn at any time prior to organization and acceptance. Bryant's, etc. Co. *v.* Felt, 87 Me. 234 (1895). The agreement of a creditor of a corporation to take stock in a proposed reorganized company may be revoked by the creditor at any time before actual performance. Providence, etc. Co. *v.* Kent, etc. Co., 19 R. I. 561 (1896). Where before incorporation it is understood by all parties that a certain subscriber to stock had withdrawn, and he never acts as a stockholder, he cannot afterwards be held liable. Elliott *v.* Ashby, 104 Va. 716 (1905). A person may withdraw from a voluntary subscription at any time before the full amount is subscribed or liabilities incurred or the organization perfected. Lewis *v.* Hillsboro, etc. Co., 23 S. W. Rep. 338 (Tex. 1893). A subscriber to stock may withdraw his subscription before the organization thereof, before the expenditure of any money, and with the consent of the payee. Patty *v.* Hillsboro, etc. Co., 4 Tex. Civ. App. 224 (1893). An underwriter cannot withdraw where the party to whom he gave the power to underwrite for him had an interest in the contract being carried out. *Re* Hannan's, etc. Co. [1896] 2 Ch. 643. A subscriber may withdraw at any time prior to the filing of the articles of incorporation. Auburn, etc. Works *v.* Shultz, 143 Pa. St. 256 (1891); Garrett *v.* Dillsburg, etc. R. R., 78 Pa. St. 465 (1875). A person giving a capital stock note to a proposed insurance company may withdraw therefrom prior to the incorporation of the company where the incorporation was delayed fifteen months and it was represented to the subscriber that the note had been lost. Raegener *v.* Brockway, 58 N. Y. App. Div. 166 (1901), aff'd 171 N. Y. 629. Prior to incorporation a subscriber may withdraw, especially if his subscription was informal and was merely to see what could be done. Plank's Tavern Co. *v.* Burkhard, 87 Mich. 182 (1891). In Pennsylvania a subscriber for stock may withdraw at any time before the charter is applied for. Muncy, etc. Co. *v.* De La Green, 13 Atl. Rep. 747 (Pa. 1888). See also Cook *v.* Chittenden, 25 Fed. Rep. 544 (1885), allowing a withdrawal where no others have subscribed in reliance thereon, nor creditors' debts incurred; Gulf, etc. Ry. *v.* Neely, 64 Tex. 344 (1885), holding that there can be no withdrawal after an acceptance by the corporation. *Cf.* Tilsonburg, etc. Co. *v.* Goodrich, 8 Ontario (Q. B. D.), 565 (1885); Rose *v.* San Antonio, etc. R. R., 31 Tex. 49 (1868); Lake Ontario, etc. R. R. *v.* Mason, 16 N. Y. 451, 463 (1857). See also Gaff *v.* Flesher, 33 Ohio St. 107 (1877); and §§ 56, 72, 84, *supra*. Where a subscription is conditional on the corporation obtaining a certain amount of subscriptions, a subscriber may withdraw at any time before such amount of subscriptions has been obtained. Allen *v.* Hastings, etc. Co., 58 S. E. Rep. 504 (Ga. 1907). A subscriber before incorporation cannot withdraw without the consent of the other subscribers and the corporation may bring suit on the sub-

The term *rescission* is more properly applied to a case of fraudulent representations.[1] Probably the term *cancellation* describes most accurately the dissolution of a subscription contract by the mutual consent of all parties concerned.[2]

§ 168. A subscription contract, like any other contract, may be waived, canceled, or dissolved by the mutual consent of all the parties interested. The interested parties are the subscriber himself, the other stockholders, and the corporate creditors existing at the time of the cancellation. Frequently the directors of the corporation attempt to usurp this right and power of the general stockholders. The well-established rule, however, is that corporate directors have no power to agree with a subscriber that his subscription shall be canceled, unless such power is given to them by charter or statute or the by-laws of the corporation.[3] The cancellation of a subscription

scription. Nebraska, etc. Co. *v.* Lednicky, 113 N. W. Rep. 245 (Neb. 1907).

1 See ch. IX.

2 For a definition of the words "surrender" and "cancellation," see Green's Brice's Ultra Vires (2d ed.), 181, 189; *Re* Dronfield, etc. Co., L. R. 17 Ch. D. 76 (1880); Colville's Case, 48 L. J. (Ch.) 633 (1879). Cancellation cannot be objected to on the ground that it reduces the capital stock. It no more reduces the capital stock than a forfeiture does. *Re* Dronfield, etc. Co., L. R. 17 Ch. D. 76 (1880).

3 The directors have no power to allow a subscriber to cancel his subscription. Hastings Lumber Co. *v.* Edwards, 188 Mass. 587 (1905). In the case of Bedford R. R. *v.* Bowser, 48 Pa. St. 29 (1864), where, just before the expiration of their office, the directors fraudulently released part of the subscribers, the court said: "It is an abuse of their trust, wholly unauthorized, and at war with the design of the charter, to single out some of the stock subscribers and release them from their liability. No such authority in them has ever been recognized." To same effect, Braddock, etc. Ry. *v.* Bily, 11 Penn. Sup. Ct. 144 (1899). The directors have no power to release a subscriber nor to allow him to make additional conditions to his subscription. La Fayette, etc. Corp. *v.* Ryland, 80 Wis. 29 (1891). To the same effect, Rider *v.* Morrison, 54 Md. 429 (1880); Hughes *v.* Antietam Mfg. Co., 34 Md. 316 (1870); Ryder *v.* Alton, etc. R. R., 13 Ill. 516 (1851); Tuckerman *v.* Brown, 33 N. Y. 297 (1865); *Re* Esparto Trading Co., L. R. 12 Ch. D. 191 (1879); *Re* United Service Co., L. R. 5 Ch. App. 707 (1870); *Re* London, etc. Coal Co., L. R. 5 Ch. D. 525 (1877); *Re* Argyle, etc. Co., 54 L. T. Rep. 233 (1885); *Ex parte* Fletcher, 37 L. J. (Ch.) 49 (1867); Addison's Case, L. R. 5 Ch. 294 (1870); Spackman *v.* Evans, L. R. 3 H. L. 171 (1868). But see Thomas's Case, L. R. 13 Eq. 437 (1872), where the directors had power to "enter into, alter, rescind, or abandon contracts;" Richmond's Case, 4 K. & J. 305 (1858), holding that power to forfeit does not give power to cancel; Adams's Case, L. R. 13 Eq. 474 (1872), holding that power to compromise gives no power to cancel, the vice-chancellor saying: "It would be putting into the hands of directors an almost unlimited power. . . . It might happen in cases where it would be impossible to fix fraud on them." A cancellation of

differs little from a purchase by the corporation of shares of its own stock. The rules of law governing such a transaction are stated elsewhere.[1]

shares is void, and the subscriber is liable, though ten years have elapsed. *Re* Argyle, etc. Co., 54 L. T. Rep. 233 (1885). *Cf.* Plate Glass Univ. Ins. Co. *v.* Sunley, 8 El. & Bl. 47 (1857); Kollman's, etc. Co. *v.* Beresford, 2 Macn. & G. 197 (1850); Lord Belhaven's Case, 34 L. J. (Ch.) 503 (1865); *Ex parte* Blake, 34 L. J. (Ch.) 278 (1865); Fox's Case, L. R. 5 Eq. 118 (1868); Dixon's Case, L. R. 5 Ch. App. 79 (1869); rev'd on another point, L. R. 5 H. L. 606 (1872); Burt *v.* Farrar, 24 Barb. 518 (1857); Gregory *v.* Lamb, 16 Neb. 205 (1884); Erskine *v.* Peck, 83 Mo. 465 (1884). See also § 153, *supra.*

The directors may release a subscription payable in property, part of which has been delivered. Nettles *v.* Marco, 33 S. C. 47 (1890). Before organization a subscriber probably can be released by the promoters and his subscription canceled, but after organization the officers have no power to release him and take other subscriptions in his stead. Nothing but a transfer is then available. The officers cannot repay to him the amount paid in by him. He is and remains liable. Cartwright *v.* Dickinson, 88 Tenn. 476 (1890). A subscription which has been fraudulently obtained may be canceled by the directors, and, after four years' acquiescence by the corporation, corporate creditors cannot attack it. McDermott *v.* Harrison, 9 N. Y. Supp. 184 (1890). The express power of the directors to do all things "conductive to the attainment of the objects" for which it was established does not enable them to agree to a cancellation. *Re* Dronfield, etc. Co., L. R. 17 Ch. D. 76 (1880). As against corporate creditors a subscription cannot be canceled, although the work in which the subscription is due can no longer be done. Wheatcroft's Case, 29 L. T. 324 (1873). Sometimes the directors agree in advance to release or cancel a part or all of the subscriber's contract. Such agreements are void, not only as *ultra vires*, but as frauds on other subscribers. Melvin *v.* Lamar Ins. Co., 80 Ill. 446 (1875); Robinson *v.* Pittsburgh, etc. R. R., 32 Pa. St. 334 (1858); Minor *v.* Mechanics' Bank, 1 Pet. 46, 65 (1828); Jewett *v.* Valley Ry., 34 Ohio St. 601 (1878); White Mountains R. R. *v.* Eastman, 34 N. H. 124 (1856). See also Pickering *v.* Templeton, 2 Mo. App. 425 (1876); Downie *v.* White, 12 Wis. 176 (1860); Blodgett *v.* Morrill, 20 Vt. 509 (1848); Davidson's Case, 3 De G. & S. 21

1 See §§ 251, 309, 310, etc., *infra.* A plan whereby the corporation takes back the stock and issues certificates of indebtedness for it is invalid as against creditors. The latter are entitled to the assets in preference to the former. Heggie *v.* People's Building, etc. Assoc., 107 N. C. 581 (1890). In England a surrender of a stock subscription is legal only when a forfeiture of the same would be legal, and is the same as a purchase by the company of its own stock, and hence is illegal, and the subscriber still remains liable. Bellerby *v.* Rowland, etc. Co., [1902] 2 Ch. 14. Even though a corporation purchases shares of its own stock, which are but partially paid, this does not render the remaining stockholders liable for the balance due on such unpaid shares so purchased. Crawford *v.* Roney, 126 Ga. 763 (1906). A cancellation and repayment is illegal. Mayfield *v.* Alton Ry., 100 Ill. App. 614 (1901), aff'd, 198 Ill. 528.

It is legal for a corporation, by common consent, to issue to its stockholders full-paid stock to the amount of cash actually paid in on a larger subscription, the first subscription being canceled, provided the arrangement is made before debts are incurred.[1] Where a person

(1849); Bridger's Case, L. R. 9 Eq. 74 (1869), aff'd L. R. 5 Ch. App. 305; Litchfield Bank *v.* Church, 29 Conn. 137 (1860). Where, however, the issue itself is *ultra vires*, being fictitious paid-up stock, the directors may agree to a cancellation. Barnett's Case, L. R. 18 Eq. 507 (1874). Or in the case of an *ultra vires* stock dividend. Hollingshead *v.* Woodward, 35 Hun, 410 (1885); aff'd, 107 N. Y. 96 (1887). They may cancel it for mistake in registering the wrong person. *Ex parte* Keightley, 9 Weekly Notes, 18, 47 (1874.) See Hartley's Case, L. R. 10 Ch. 157 (1875). The agreement of a stockholder to surrender his stock in liquidation of an unpaid assessment is without consideration and does not bind a purchaser of the certificate. Hill *v.* Atoka Coal Co., 21 S. W. Rep. 508 (Mo. 1893). See subsequent decision in 124 Mo. 153. The directors have no power to cancel a subscription, or any part of it, except upon the consent of all the stockholders. Gathright *v.* Oil City, etc. Co., 56 S. W. Rep. 163 (Ky. 1900). The president has no authority to release a subscription, and moreover any release must have a sufficient consideration. United Growers Co. *v.* Eisner, 22 N. Y. App. Div. 1 (1897). The secretary cannot accept a surrender and cancellation of the subscription. Minnehaha, etc. Assoc. *v.* Legg, 50 Minn. 333 (1892). In England an express power given by the articles of association of the corporation may authorize cancellation by the directors. Colville's Case, 48 L. J. (Ch.) 633 (1879); Snell's Case, L. R. 5 Ch. 22 (1869); Wright's Case, L. R. 12 Eq. 331 (1871), reversed in L. R. 7 Ch. App. 55 (1871); Teasdale's Case, L. R. 9 Ch. 54 (1873); Whiteley's Case, 60 L. T. Rep. 807 (1889). Healey, Companies' Law & Pr. (3d Eng. ed.), p. 110, says: "There is no inherent power in directors to accept a surrender of shares, nor is the acceptance of a surrender a matter lying between the majority and minority. Every shareholder must expressly . . . or impliedly join in the release; though a company may be precluded by knowledge and acquiescence from disputing the validity of the surrender." Citing many cases, and discussing what constitutes notice and acquiescence.

[1] Quoted and approved in Vrooman *v.* Vansant, etc. Co., 215 Pa. St. 75 (1906). Hill *v.* Silvey, 81 Ga. 500 (1889). A stockholder objecting to partially-paid stock being called in and full-paid stock being issued to the amount already paid up should file a bill for an injunction. It is no defense to the collection of the amount already called on the stock first issued. American Alkali Co. *v.* Campbell, 113 Fed. Rep. 398 (1902). Where a corporation has allowed a subscriber to cancel his subscription, neither the corporation nor its assignee can afterwards enforce the subscription, even though corporate creditors might do so. Hence, where the stockholders had paid sixty per cent. of their subscription, and subsequently full-paid stock for the sixty per cent. was issued and the remaining forty per cent. canceled, the assignee for the benefit of the creditors of the corporation cannot collect the remaining forty per cent. Lellyett *v.* Brooks, 62 S. W. Rep. 596 (Tenn. 1901). Where the capital stock is reduced, and subscribers cancel unpaid subscriptions, and take paid-up stock to the extent of their payments on the

owns partly paid-up stock, the company may agree that the amount already paid shall be applied on a part of the stock, thereby making that part fully paid-up stock. A transferee of such paid-up stock is not liable thereon, even though he took title with full knowledge of the facts.[1] The payment of a subscription in whole or in part by a dividend is considered elsewhere.[2]

§ 169. A subscriber for stock in a corporation cannot obtain a cancellation of his subscription except by the unanimous consent of the other subscribers.[3] Even a majority of the stockholders cannot

old stock, old corporate creditors may hold them liable on the former. *Re* State Ins. Co., 14 Fed. Rep. 28 (1882).

It is legal for the corporation to make an agreement with stockholders whereby the latter surrender their stock upon which they have paid twenty per cent., and receive full-paid stock to the amount of twenty per cent. of the stock surrendered. A receiver cannot attack this agreement even in behalf of creditors. Republic L. Ins. Co. *v.* Swigert, 135 Ill. 150 (1890). Although the directors cannot, yet the stockholders, by unanimous consent, may allow subscriptions to be reduced one-half by cancellation of one-half, creditors' rights not intervening. Glenn *v.* Hatchett, 91 Ala. 316 (1890). A corporation cannot collect the full amount of a subscription which by unanimous consent of the stockholders at an informal meeting has been cancelled in part. Sheldon Canal Co. *v.* Miller, 90 S. W. Rep. 206 (Tex. 1905). By unanimous consent of the stockholders, there being no creditors at the time, a corporation may release the stockholders from the payment of the unpaid part of their subscriptions, the outstanding certificates being canceled and new certificates for the amount fully paid being issued, the balance remaining in the treasury as unissued stock. Vrooman *v.* Vansant, etc. Co., 215 Pa. St. 75 (1906).

1 Neelon *v.* Thorold, 22 S. C. of Canada, 390 (1893), rev'g 18 App. R. 658, and aff'g 20 O. R. 86. Where calls to the amount of fifty per cent. have been paid, the president cannot agree with a stockholder that he should be released from one-half of his subscription and take full-paid stock for the remainder. Fuches *v.* Hamilton, etc. Co., 10 Ont. (Can.) 497 (1886). A subscriber for $1,000 of stock who pays in $200, being twenty per cent., and then transfers $200 of full-paid stock to another, is still liable for the remaining $800. It is immaterial that the old certificates, showing that twenty per cent. had been paid, were returned to the corporation, and only $200 of stock re-issued. This does not amount to a reduction of the stock to twenty per cent. Putnam *v.* Hutchison, 4 Kan. App. 273 (1896).

2 See § 544, *infra*. A bonus paid by citizens may be used by subscribers for stock to make a partial payment on their stock, unless the bonus was made directly to the corporation. McDermott *v.* Squier, 124 Mich. 523 (1900).

3 Kidwelly Canal Co. *v.* Raby, 2 Price, 93 (1816); Lake Ontario, etc. R. R. *v.* Mason, 16 N. Y. 451, 463 (1857); Hughes *v.* Antietam Mfg. Co., 34 Md. 316 (1870); Johnson *v.* Wabash, etc. Co., 16 Ind. 389 (1861); United Soc. *v.* Eagle Bank, 7 Conn. 456 (1829); Bishop's Fund *v.* Eagle Bank, 7 Conn. 476 (1829); Selma, etc. R. R. *v.* Tipton, 5 Ala. (N. S.) 787 (1843); Chicago, etc. Co. *v.* Summerour, 101 Ga. 820 (1897). Where the president of an insurance company

withdraw and refuse to proceed.[1] By unanimous consent, however, of the stockholders a subscription may be canceled, and a subsequent creditor of the corporation cannot complain.[2] A surrender may

subscribes for new stock in order to keep the company going, payment to be by cancelling the note of the company which he holds, he cannot afterwards withdraw from the subscription, the company having accepted it even though no certificate was issued to him. Betts *v.* Connecticut, etc. Co., 76 Conn. 367 (1904). A subscription for capital stock of a corporation cannot be canceled without the consent of all the stockholders, except for fraud or mistake. Pacific Fruit Co. *v.* Coon, 107 Cal. 447 (1895). Where a person subscribes for stock, and then an oral arrangement is made with the other stockholders, by which the former is to be released and the latter are to carry on the business, and the latter then sell their stock after assigning to one of their number certain corporate assets, including the subscription above named, such subscription cannot be enforced. Cusick *v.* Bartlett, 91 Me. 153 (1898). Where there are only five stockholders and no creditors, and no business has been done, the five may release each other from their subscriptions, and one of them who subsequently obtains control of the association cannot cause the corporation to enforce such subscriptions. Non-Electric, etc. Co. *v.* Peabody, 21 N. Y. App. Div. 247 (1897). The plea in defense need not allege that the other stockholders assented to the cancellation. Gelpcke *v.* Blake, 19 Iowa, 263 (1865). A subscriber cannot withdraw except with the consent of all the persons who have subscribed. Chicago, etc. Co. *v.* Lyon, 10 Okl. 704 (1901). Where, however, by the articles of association, acts of the directors ratified at stockholders' meetings were to be valid, a cancellation so ratified is legal, and the unanimous consent is not necessary. Marshall *v.* Glamorgan, etc. Coal Co., L. R. 7 Eq. 129 (1868). Where property is sold to a corporation for stock, and other stockholders are dissatisfied, the bargain may be rescinded. The stockholder will then no longer be liable. Morgan *v.* Lewis, 46 Ohio St. 1 (1888). Cancellation is a question of fact. If there is no record of it, and the stockholder continues to act, he is bound. Topeka Mfg. Co. *v.* Hale, 39 Kan. 23 (1888). An offer or agreement to subscribe is revoked by death, where it has not yet been accepted by the corporation. Wallace *v.* Townsend, 43 Ohio St. 537 (1885); Sedalia, etc. Ry. *v.* Wilkerson, 83 Mo. 235 (1884). The company may be compelled to issue a certificate to one who acquires his interest by the death of the original subscriber. State *v.* Crescent City, etc. Co., 24 La. Ann. 318 (1872).

1 Busey *v.* Hooper, 35 Md. 15 (1871).

2 Quoted and approved in Scottish, etc. Co.'s Receiver *v.* Starks, 117 Ky. 609 (1904); Shoemaker *v.* Washburn, etc. Co., 97 Wis. 585 (1897). *Cf.* § 42, *supra.* By the unanimous consent of stockholders, there being no creditors, a subscriber may be released from his subscription. Such cancellation may be oral, and if in accordance with the laws of the state where the company transacts all its business it is immaterial that it is not in accordance with the statutes of the state where the company was incorporated. Scottish, etc. Co.'s Receiver *v.* Starks, 117 Ky. 609 (1904). In the case of Skinner *v.* Smith, 134 N. Y. 240 (1892), $40,000 of stock was issued for letters patent. Afterwards, with the consent of all the stockholders, the transaction was rescinded, the stock being returned and the pat-

mean a giving up of partly paid stock by way of donation.[1] The consent of all the other stockholders need not be express. If the means of notice are sufficient, so as to raise a clear presumption of knowledge and acquiescence, and the arrangement is left unimpeached by any one for many years, no objection can be made. The stockholders are bound by the cancellation.[2] But where a subscription has been canceled, and calls already paid are refunded without the consent of the other stockholders, any stockholder may, by a bill in equity, have the money refunded to the corporation, and the subscriber made liable upon his canceled subscription.[3] Moreover, the directors are personally liable to the corporation for loss occasioned by their improper cancellation of subscriptions.[4] When, however, a subscriber fails to pay his subscription or exercise his rights, it has been held that the corporation may take his subscription as abandoned and allow others to fill it.[5] An alteration, however, of the subscription list by substitution of different stockholders

ents re-transferred. A license to manufacture under the patents was then transferred to the company for $350,000 in stock. The court found that the transaction was in good faith and with no intent to defraud future stockholders, and that the license was an adequate consideration for the stock. The court held that there was nothing illegal in the transaction.

1 A surrender of partly paid stock by a subscriber, even though made without repayment to him of the amount he has already paid, is illegal in England, inasmuch as it amounts to a purchase by a company of its own stock. Bellerby *v.* Rowland, etc. Co. ,(1901), 2 Ch. 265, aff'd on this point, [1902] 2 Ch. 14.

2 Evans *v.* Smallcombe, L. R. 3 H. L. 249 (1868), aff'g L. R. 3 Eq. 769. So also where the corporation retains the benefits of a cancellation, no objection can be made. Miller *v.* Second, etc. Assoc., 50 Pa. St. 32 (1865). Proof of cancellation need not necessarily be by the corporate records; it may be proved by evidence that the subscriber "was not regarded by himself or by the company as a stockholder." Stuart *v.* Valley R. R., 32 Gratt. (Va.) 146 (1879). The cancellation or release of a subscription may arise by the acquiescence of the stockholders and need not be by a formal action. Tulare, etc. Bank *v.* Talbot, 131 Cal. 45 (1900).

3 Melvin *v.* Lamar Ins. Co., 80 Ill. 446 (1875). Where an agreement was made with all the subscribers excepting one, that they would be released from their subscriptions if they wished, this is a good defense to his subscription. Hall *v.* Grayson, etc. Bank, 36 Tex. Civ. App. 317 (1904).

4 Hodgkinson *v.* National, etc. Ins. Co., 26 Beav. 473 (1859); Bank of St. Mary's *v.* St. John, 25 Ala. 566 (1854). The subscriber, also, may set up this defense. Southern Hotel Co. *v.* Newman, 30 Mo. 118 (1860).

5 Perkins *v.* Union, etc. Co., 94 Mass. 273 (1866). Cancellation may be by the substitution of another person for the subscriber at the latter's request. This occurs where regular transfer is not yet possible. The signature of the first subscriber must be erased and that of his substitute inserted. Otherwise the substitution fails. Ryder *v.* Alton, etc. R. R., 13 Ill. 516 (1851). And see § 62, *supra*.

may release dissenting stockholders.[1] Frequently there is a substitution of one subscriber for another, either by way of a subscriber directing that his stock be issued to some other party,[2] or by a subscriber selling and transferring his interest to another party.[3] Where a subscription is canceled by agreement between a corporation and the subscriber and the stock is then issued to others and fully paid for, the first subscribers are no longer liable, even though the statute provides that stockholders should be liable until the stock is fully paid for.[4] Where a subscription is not paid, and the stock is transferred to the corporation as "treasury stock" and then sold below par, the purchaser is liable for the unpaid par value.[5] Where a subscription for stock is paid, the stockholder is entitled to his stock and past dividends, although for thirty years he has slept on his rights.[6]

§ 170. A cancellation of a subscription, to the detriment of corporate creditors, may be impeached by the latter and set aside.[7]

1 See §§ 53, 62, *supra*.

2 See § 50, *supra*.

3 See § 62, *supra*.

4 First, etc. Bank *v.* Peoria Watch Co., 191 Ill. 128 (1901). A Nebraska receiver of a Nebraska corporation will not be allowed to bring suit in the Iowa courts to enforce the subscription liability of citizens of Iowa to the stock of a Nebraska corporation, where there is no equity in the claim, the fact being that payment for the stock had been made by notes, and afterwards upon a transfer of the stock these notes had been canceled and notes of the transferee taken in exchange therefor. Wyman *v.* Eaton, 107 Iowa, 214 (1899). Where, after a subscription for stock is made, the company contracts to issue all its stock to a contractor in payment for work, and thereupon the subscriber gives up his stock to the company and it is issued to the contractor, the subscriber is not liable on such stock, even though the contractor does not fulfill, and even though the subscriber caused the contract with the contractor to be made. Riverton Water Co. *v.* Hummel, 175 Pa. St. 575 (1896).

5 Alling *v.* Wenzel, 133 Ill. 264 (1890).

6 Where, in 1845, an Indian chief disclosed an iron mine under promise of being compensated, and the officers of the unincorporated company gave him a paper recognizing his right to twelve thirty-one one-hundredths interest, and after incorporation in 1848 eighteen full-paid shares of stock were set aside for the Indians, and twelve of such shares correspond to the twelve thirty-one one-hundredths interest, the descendants of the chief are entitled to the stock, although neither he nor they made any claim thereto until 1877. Back profits may also be recovered. The statute of limitations is no bar. A new corporation assuming the property and liabilities of the old one is liable. Kobogum *v.* Jackson Iron Co., 76 Mich. 498 (1889). To same effect, Bedford County *v.* Nashville, etc. R. R., 14 Lea (Tenn.), 525 (1884).

7 One who is a corporate creditor before the cancellation is made may object to it. Vick *v.* La Rochelle, 57 Miss. 602 (1880); Miller's Appeal, 1 Pa. Sup. Ct. 120 (1881), in which stock in an insurance company was

Especially is this the rule when the cancellation is made after the corporation has become insolvent.[1] A mortgage given to stock-

subscribed for in order to enable the company to undergo an examination by the commissioner, a dividend being paid on it during their holding, and the notes given in payment being published as assets. It was held that although, after the emergency had passed, the stock was taken back by the company and the notes canceled, the subscribers were liable to its creditors, the transaction being looked upon as a fraud upon them. Cancellation by withdrawal is not legal as against corporate creditors existing at the time of the withdrawal, even though all the stockholders assent thereto. Farnsworth *v.* Robbins, 36 Minn. 369 (1887). Where a corporation takes land in payment for stock, then rescinds, and twelve months afterwards becomes insolvent and no complaint is made for sixteen months after the rescission, their action is binding. Sanderson *v.* Ætna, etc. Co., 34 Ohio St. 442 (1879). So, also, if the debt was incurred after the cancellation. Johnson *v.* Lullman, 15 Mo. App. 55 (1884); Erskine *v.* Peck, 13 Mo. App. 280 (1883), aff'd, 83 Mo. 465; Winston *v.* Dorset Pipe, etc. Co., 129 Ill. 64 (1889). The plea in defense, it has been held, need not allege that there were no corporate creditors at the time of the cancellation. Gelpcke *v.* Blake, 19 Iowa, 263 (1865). In England a different rule prevails. "If the company could not question it, neither can a creditor; for he can obtain nothing but what the company can get from the shareholders." *Re* Dronfield, etc. Co., L. R. 17 Ch. D. 76 (1880). A *bona fide* cancellation of a subscription is valid, and corporate creditors cannot have it set aside. Wangerien *v.* Aspell, 47 Ohio St. 250 (1890). Where the directors rescind a subscription at the request of the subscriber, he cannot be made liable five years later. Whiteley's Case, 60 L. T. Rep. 807 (1889). Subscribers whose stock is taken back by the corporation are not liable thereon either at common law or by statute relative to transfers. Alling *v.* Wenzel, 133 Ill. 264 (1890). A fraudulent release by a corporation of an unpaid subscription to an increase in the capital stock of a corporation is void even against a debt arising before the increase. Carter *v.* Union Printing Co., 54 Ark. 576 (1891). This case holds also that a corporate creditor may object to the corporation releasing a stockholder from his stock and repaying to him the subscription which he has paid in. The "trust fund" theory is denied in Hospes *v.* Northwestern Mfg. Co., 48 Minn. 174 (1892). As against a corporate creditor, a subscriber for stock before incorporation cannot withdraw incorporation, even with the consent of other stockholders. Balfour *v.* Baker City Gas Co., 27 Oreg. 300 (1895). In Harmon *v.* Hunt, 116 N. C. 678 (1895), corporate creditors held subscribers liable, although the latter had been allowed to withdraw soon after the organization.

Where a person subscribes for stock payable by its terms in wages, and the directors pay such subscription in full and take the wages, but before the stock is fully paid for by him the corporation becomes insolvent, he cannot recover back the part already paid out of his wages. Lincott *v.* Northwood, etc. Co., 68 N. H. 260 (1895). Even though two persons signed the articles of incorporation

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1 Choteau Ins. Co. *v.* Floyd, 74 Mo. 286 (1881); Gill *v.* Balis, 72 Mo. 424 (1880), holding, also, that it is immaterial that enough subscriptions remain to pay the corporate debts.

holders for money paid in on their subscriptions cannot be enforced as against creditors.[1] Even a statute releasing stockholders from paying one-half of the par value of the stock, and declaring the stock paid up, although but fifty per cent. had been paid thereon, is unconstitutional as regards creditors existing at the time such statute was enacted.[2] In the United States courts it is established that the governing officers of a corporation cannot, by agreement or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing, and for a valuable consideration.[3] A payment in full for stock, followed by an immediate loan of part or all of the purchase price by the corporation back to the subscriber, is a fraud as to creditors and will be set aside.[4] The agreement of the corporation

as incorporators and as subscribers of stock, on condition that the articles would not be used unless a certain other party signed, and even though the latter party did not sign, and the articles were filed and the stock subsequently tendered to such signers, which they refused, yet if they took no steps to remove their names as subscribers from the books they are liable as stockholders to corporate creditors on a statutory liability. Rehbein *v.* Rahr, 109 Wis. 136 (1901). Even though a subscriber for stock surrenders it, yet he is liable thereon, even to subsequent creditors of the corporation. Chrisman, etc. Co. *v.* Independence, etc. Co., 168 Mo. 634 (1902). *Cf.* §§ 42, 46, *supra.*

1 Reed *v.* Helois, etc. Co., 64 N. J. Eq. 231 (1903).

2 Williams *v.* Waters, 97 Md. 113 (1903).

3 "The governing officers of a corporation cannot, by agreement or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration." Potts *v.* Wallace, 146 U. S. 689 (1892); Burke *v.* Smith, 16 Wall. 390 (1872); New Albany *v.* Burke, 11 Wall. 96 (1870). So, also, in Illinois. See Zirkel *v.* Joliet Opera House Co., 79 Ill. 334 (1875). An arrangement by which a subscriber for stock paid the money into the treasury, and this money is then paid out for property, and the parties receiving the money then return it to the subscriber, is not valid. The subscriber is liable to pay over again. Scales *v.* Irwin, 34 Q. B. Rep. (Can.) 545 (1874).

4 Sawyer *v.* Hoag, 17 Wall. 610 (1873). In the case of State *v.* New Orleans, etc. Co. 51 La. Ann. 1827 (1899), the subscribers to the stock of a debenture company paid ninety-five per cent. of their subscription by borrowing that amount from the company on their notes, and thereupon full-paid stock was issued to them, although the statute prohibited the issue of stock until paid for. The state brought suit to set aside the charter and liquidate the company. The court held that under the constitution of Louisiana the incorporation was illegal. The court held also that the charter was illegal, in that the debentures issued were forfeited if deferred payments were not made, and that they provided for cancellation at fifty per cent. on the amount paid, and that they were redeemable in numerical order in six years, and that it would be impossible for the company to pay them. The same conclusion was reached in State *v.* Louisiana, etc. Co., 51 La. Ann. 1795 (1899). A corporation cannot give a mortgage

that a subscriber for its stock may return it "after six months" if he wishes, holds good for a reasonable time after the six months but not for several years.[1] But a subscription to be paid for when the directors find other parties who will agree to purchase the stock from the subscriber is illegal as an attempt to release a subscriber.[2] Instead of subscribing for stock a party may make a contract with a corporation to take the stock with the right to return it and receive back the purchase price within a certain time. Such a contract is legal, and the stock may be returned and the money recovered if corporate creditors' rights do not intervene.[3] The agreement of a

to a subscriber as security for the amount paid in by the latter on his subscription for stock. Boney *v.* Williams, 55 N. J. Eq. 691 (1897). A subscriber cannot defeat his subscription on the ground that the agent of the company, who obtained it, told him that he would never be called upon to pay anything. Marles, etc. Co. *v.* Stulb, 215 Pa. St. 91 (1906).

1 New Haven T. Co. *v.* Gaffney, 73 Conn. 480 (1901).

2 McNulta *v.* Corn Belt Bank, 164 Ill. 427, (1897). Stockholders cannot defeat their liability on stock by setting up that they subscribed in behalf of the corporation itself, and on the secret agreement that they should not be held liable. Barto *v.* Nix, 15 Wash. 563 (1896).

3 Vent *v.* Duluth, etc. Co., 64 Minn. 307 (1896). A different rule exists, however, where such agreement is secret and gives one stockholder an unfair advantage over others. See § 191, *infra*. A corporation in selling its stock may agree to repurchase it at a specified time if the vendee so desires and if the president also makes such agreement he also may be held liable. Ophir, etc. Co. *v.* Brynteson, 143 Fed. Rep. 829 (1906). A corporation is not liable on the agreement of two of its promoters that in case a certain plant was not built within a certain time a subscription would be repaid, even though the promoters were also commissioners to open books and take subscriptions. Russell *v.* Broadus, etc. Mills, 39 S. Rep. 712 (Ala. 1905). An agreement to subscribe for stock which gives to the subscriber the right to cancel the same within a reasonable time is legal, and such cancellation may be had. Holliday *v.* Wright, 134 Mich. 608 (1903). An issue of stock with an agreement of the corporation to take it back at the end of six months, if requested so to do, is legal and the contract enforceable, inasmuch as if the contract was illegal the corporation must rescind and return the consideration. A private corporation may purchase its own stock if the purchase is fair and free from fraud, if the corporation is not insolvent or being dissolved and creditors are not affected. Under such power the corporation may issue stock and agree to take it back in six months, if the purchaser so desires. Porter *v.* Plymouth, etc. Co., 29 Mont. 347 (1904). A corporation may agree with a subscriber to its stock that it will repurchase the same in case it sells its franchises, the corporation being solvent. Wisconsin Lumber Co. *v.* Greene, etc. Co., 127 Iowa, 350 (1904). In the case of Browne *v.* St. Paul, etc. Works, 62 Minn. 90 (1895), an agreement of a corporation with a subscriber for stock to take back the stock at a certain time and refund the money if the subscriber so wished was upheld.

A corporation is bound by the agreement of its agent that a person

corporation to take back its stock at cost at the expiration of two years if the purchaser wishes, becomes void if the corporation is insolvent at that time.[1] A by-law allowing a stockholder to return his stock to the corporation at a fixed value is illegal.[2]

An oral agreement that only one-half of the subscription need be taken and paid for is not legal.[3] But an agreement between a corporation and subscribers for its stock that only a certain portion of the par value of the stock shall be collected by the corporation is binding upon the corporation, although not upon the corporate creditors, unless by statute such agreement may be made a part of the recorded articles of incorporation.[4] A contract between a corporation and a stockholder by which the stockholder is to be repaid before creditors of the corporation are paid is contrary to public policy and void.[5] A building association which has obtained a subscription on an *ultra vires* agreement as to repayment is liable in a suit at law for the money so paid to it.[6] A provision in articles of incorporation filed under a general incorporating act is void, where such provision attempts to exempt the stockholders from liability to corporate creditors on their unpaid subscriptions.[7] A creditor of a company who takes its stock as fully paid up stock in payment of his debt, the

taking stock in the corporation and giving his note in payment may return the stock at any time and be released from payment. Bank of Lyons *v.* Demmon, Hill & D. Supp. (N. Y.) 398 (1844).

Inasmuch as a corporation has power to buy its own stock it may take a subscription for stock at par and agree to repurchase the stock, no creditors or stockholders objecting thereto. Freemont Carriage, etc. Co. *v.* Thomsen, 65 Neb. 370 (1902). Where a subscriber pays his subscription and immediately the money is repaid to him by the corporation in purchase of his stock the transaction is illegal as against creditors. Henderson *v.* Hall, 134 Ala. 455 (1900).

A corporation may issue its stock in payment for property and agree to buy the stock back within four months at its par value. United States, etc. Co. *v.* Camden, etc., 56 S. E. Rep. 561 (Va. 1907).

A corporation has no power to sell stock and agree to take it back within a certain time at the same price. Boley *v.* Sonora, etc. Co., 103 S. W. Rep. 975 (Mo. 1907).

1 McIntyre *v.* Bement's Sons, 146 Mich. 74 (1906).

2 Vercoutere *v.* Golden State Land Co., 116 Cal. 410 (1897).

3 Gathright *v.* Oil City, etc. Co., 56 S. W. Rep. 163 (Ky. 1900).

4 Bent *v.* Underdown, 156 Ind. 516 (1901). See also § 38, *supra*, and § 191, *infra*. A subscriber of money to a corporation, for which the subscriber is to receive "stock, bonds, or other security as may be determined" by the board of directors, is entitled to bonds if the board of directors have so ordered, even though the corporation afterwards became insolvent. Barrow *v.* Smith, 109 Ga. 767 (1900).

5 Guaranty, etc. Co. *v.* Galveston, etc. R. R., 107 Fed. Rep. 311 (1901).

6 Williamson *v.* Eastern, etc. Assoc., 54 S. C. 582 (1899).

7 Van Pelt *v.* Gardner, 54 Neb. 701 (1898).

debt, however, being less than the par value of the stock, is liable for the unpaid par value of such stock in case the company becomes insolvent. But on the other hand, the company not having fulfilled its contract in giving him fully-paid stock he may off set the same amount as the amount still due him from the company.[1] Where a person subscribes for stock and afterwards payment is made in property at a gross overvaluation, the court may hold him liable for the difference between the actual value of the property and the par value of the stock, even though the company went through the form of canceling the subscription and issuing the stock as an original issue for property.[2] A secret agreement by which a subscriber may cancel his subscription may be objected to by other subscribers or by corporate creditors.[3] A scheme by which a corporation purchases its own stock from the subscribers therefor may upon corporate insolvency be attacked by existing creditors or subsequent creditors who had no knowledge of the scheme.[4] As to existing corporate creditors the stockholders cannot avoid liability on a part of their subscriptions by reducing the par value of the stock, but the purchaser of such reduced stock is not liable for the old par value.[5]

§ 171. *Compromise.*—A compromise differs from a cancellation in that the subscriber pays to the corporation a part of the subscription price in order to be released from the balance. The stock is delivered back to the corporation. The corporate authorities—generally the directors—have power to compromise any corporate debt; and if, in the collection of subscriptions, there is reasonable doubt as

1 *Re* Railway, etc. Co., [1899] 1 Ch. 108. In the case of Siegel *v.* Andrews & Co., 181 Ill. 350 (1899), where the purchasers of a patent right for $15,000 organized a corporation and personally subscribed for $100,000 of its stock, and subsequently paid therefor by turning in the patent right, the court held that each stockholder was liable for the par value of his stock less fifteen per cent., and that a judgment creditor might sue any one or more of the stockholders. See ch. III on this subject of payment by property.

In a suit to enforce the liability on watered stock, there may be set off the amount coming to the stockholder on bonds of the company, especially where the stockholder is insolvent. Hebberd *v.* Southwestern, etc. Co., 55 N. J. Eq. 18 (1896).

2 Hebberd *v.* Southwestern, etc. Co., 55 N. J. Eq. 18 (1896).

3 See § 191, *infra.*

4 Alabama, etc. Co. *v.* Hall, 44 S. Rep. 592 (Ala. 1907). See also § 311, *infra.* Where the incorporators organize before the minimum capital is subscribed, they are liable to corporate creditors under the Georgia statute up to the amount of such minimum capital, and it is no defense that before debts were incurred they sold their stock back to the corporation. Walters *v.* Porter, 59 S. E. Rep. 452 (Ga. 1907).

5 Cammack *v.* Levy, 45 S. Rep. 925 (La. 1908).

to the liability of the subscriber,[1] or if the subscriber is insolvent, the corporation may compromise the liability and release a part for the purpose of securing the residue. All that is required is good faith.[2] It has been held that a receiver cannot compromise a subscription; nor can a court of equity give him power so to do, unless all the stockholders are parties to the equitable suit in connection with which the receiver is appointed.[3] A compromise where there is no controversy is a misnomer. The case is then one of release and depends on the power of the directors or stockholders to make it.[4]

§ 172. *Non-payment of a percentage required by statute.*—The charter or statute governing a corporation often prescribes that each subscriber to the capital stock shall, at the time of subscribing, pay to the corporation a fixed sum or a specified proportion of the subscription. These statutes vary somewhat in their provisions, some declaring the subscription to be void unless the percentage is paid, others merely prescribing that it shall be paid.

In the actual taking of the subscriptions it frequently happens that the subscriber has not the ready money requisite, and is allowed

1 Bath's Case, L. R. 8 Ch. D. 334 (1878); Belhaven's Case, 3 De G., J. & S. 41 (1865); s. c., 12 L. T. N. S. 595. Where a stockholder denies that anything is due to the company on his stock and the matter is compromised in good faith, a receiver of the corporation cannot collect anything further on the stock. New Haven T. Co. *v.* Nelson, 73 Conn. 477 (1901). An unaccepted offer of compromise is no defense, and compromises with other stockholders are no defense. Howard *v.* Glenn, 85 Ga. 238 (1890).

2 Philadelphia, etc. R. R. *v.* Hickman, 28 Pa. St. 318 (1857). Power may be given by statute. Pearson's Case, L. R. 7 Ch. 309 (1872), holding that, under the English statute, the court may allow, but cannot compel, a receiver to compromise. Where a stockholder denies his liability, and the directors compromise with him by reducing the amount of his subscription, the compromise is binding on all parties. Whitaker *v.* Grummond, 68 Mich. 249 (1888). The company may compromise, but cannot do so by canceling a part only of the subscription. Livingstone *v.* Temperance, etc. Soc., 17 App. Rep. (Can.) 379 (1890). A stockholder who settles with a corporation for a less sum than the amount due, just before garnishee process is commenced against him, cannot defeat the process in this manner. World's Fair, etc., Co. *v.* Gasch, 162 Ill. 402 (1896).

3 Chandler *v.* Brown, 77 Ill. 333 (1875). The fact that the court authorized the receiver to compromise with some of the stockholders is no defense to others. Hambleton *v.* Glenn, 72 Md. 331 (1890). See also ch. LI, *infra*.

4 Phosphate, etc. Co. *v.* Green, L. R. 7 C. P. 43 (1871); Spackman *v.* Evans, L. R. 3 H. L. 171, 188, 231 (1868). In Dixon *v.* Evans, L. R. 5 H. L. 606 (1872), the subscription was made upon a condition, which remaining unfulfilled, a compromise was made permitting the withdrawal of the subscriber. *Held*, after two appeals, that directors had power to enter into such a compromise, and the subscriber was not held in the winding up.

to subscribe without paying the same. When an attempt is made to collect such a subscription, the subscriber, if the enterprise has resulted disastrously, sets up the defense that he did not pay the statutory percentage, and that the subscription is void and not enforceable. A long list of cases, dating from the early litigation over railroads, has turned upon this defense. In some of the states the defense has been held insufficient; in others a contrary rule prevails; and in still others, first one rule and then the other has been adopted.

§ 173. The decided weight of authority and the most carefully considered cases hold that a subscriber for stock cannot escape the responsibilities of a stockholder by showing that he never paid the percentage or fixed amount required by the charter or statute to be paid at the time of subscribing.[1] He will not thus be permitted to

1 Quoted and approved in Union Water Co. *v.* Kean, 52 N. J. Eq. 111 (1893); Webb *v.* Baltimore, etc. R. R., 77 Md. 92 (1893); Illinois River R. R. *v.* Zimmer, 20 Ill. 654 (1858), holding that the commissioners may waive payment. The court said: "This indulgence is a most ungracious defense, which should not be allowed unless it is strictly required by some inflexible rule of law;" Haywood, etc. Co. *v.* Bryan, 6 Jones, L. (N. C.) 82 (1858), the court saying: "It would be a strange rule which would allow him to take advantage of the other stockholders' forbearance and his own neglect;" Pittsburgh, etc. R. R. *v.* Applegate, 21 W. Va. 172 (1882), declaring that the statute is "to ensure good faith, and to avoid shams in enterprises that so vitally affect the public," but not to change the liability of stockholders to corporations; Minneapolis, etc. Ry. *v.* Bassett, 20 Minn. 535 (1874), where the court said of the statute: "While it confers upon plaintiff the right to insist upon the payment, it does not make the successful exercise of this right indispensable to the validity of the subscription;" Water Valley Mfg. Co. *v.* Seaman, 53 Miss. 655 (1876), where the requirement was provided for in the subscription itself; Barrington *v.* Mississippi Cent. R. R., 32 Miss 370 (1856), where payment was made before the subscription. See also Vicksburg, etc. R. R. *v.* McKean, 12 La. Ann. 638 (1857); Bibb *v.* Hall, 101 Ala. 79 (1893); Albright *v.* Texas, etc. R. R., 8 New Mex. 110 (1895); see s. c., 8 New Mex. 422 (1896); Wight *v.* Shelby R. R., 16 B. Mon. (Ky.), 4 (1855); Smith *v.* Tallassee Plank-road Co., 30 Ala. 650 (1857); Mitchell *v.* Rome R. R., 17 Ga. 574 (1855); Henry *v.* Vermillion, etc. R. R., 17 Ohio, 187 (1848); Chamberlain *v.* Painesville, etc. R. R., 15 Ohio St. 225 (1864); Napier *v.* Poe, 12 Ga. 170 (1852); Fiser *v.* Mississippi, etc. R. R., 32 Miss. 359 (1856); Ryder *v.* Alton, etc. R. R., 13 Ill. 516 (1851), where the subscriber was one of the commissioners; Klein *v.* Alton, etc. R. R., 13 Ill. 514 (1851), where payment was made before the subscription books were closed; Stuart *v.* Valley R. R., 32 Gratt. (Va.) 146 (1879); Southern L. Ins. Co. *v.* Lanier, 5 Fla. 110 (1853); Selma, etc. R. R. *v.* Rountree, 7 Ala. (N. S.) 670 (1845); Spartanburg, etc. R. R. *v.* Ezell, 14 S. C. 281 (1880), where a few subscribers paid in more than their percentage, and enough to make up for those not paying; Oler *v.* Baltimore, etc. R. R., 41 Md. 583 (1874), where the percentage was "payable," the court saying

take advantage of his own wrong and default to the prejudice of others. In some instances the percentage was paid in notes[1] or checks[2] instead of cash; in others, payment in cash was made at some period subsequent to the act of subscribing;[3] in still others,

that this merely made it "due and collectible," like a call. To the same effect, Ashtabula, etc. R. R. *v.* Smith, 15 Ohio St. 328 (1864). Payment by the subscriber's agent is sufficient. Litchfield Bank *v.* Church, 29 Conn. 137 (1860). The following cases hold that non-payment of the required percentage is a good defense: Charlotte, etc. R. R. *v.* Blakely, 3 Strobh. L. (S. C.) 245 (1848); State Ins. Co. *v.* Redmond, 1 McCrary, 308 (1880). The requirement herein was by by-law. People *v.* Chambers, 42 Cal. 201 (1871), holding a check to be insufficient; Farmers', etc. Bank *v.* Nelson, 12 Md. 35 (1857); Taggart *v.* Western Md. R. R., 24 Md. 563, 588 (1866); Wood *v.* Coosa, etc. R. R., 32 Ga. 273 (1861), the statute prescribing that the subscription should be "void." A provision that only ten per cent. of the stock shall be paid up until certain contingencies arise is strictly construed by the courts. Burlington *v.* Burlington Water Co., 86 Iowa, 266 (1892). It is no defense that the corporation commenced business before twenty-five per cent. of its capital stock had been paid in as required by the charter. Naugatuck Water Co. *v.* Nichols, 58 Conn. 403 (1890). It is no defense that the corporation commenced business before one-half of its capital stock had been paid in according to the charter. Maine, etc. Co. *v.* Southern etc. Co., 92 Me. 444 (1899). A purchaser of land from a corporation may object to the title on the ground that the corporation took title before a certain amount of its capital stock had been obtained, as required by statute. Globe Realty Co. *v.* Whitney, 106 La. 257 (1901).

1 Vermont Cent. R. R. *v.* Clayes, 21 Vt. 30 (1848). A bond so given is collectible, as it would be if given to carry out a parol contract for the sale of land void by the statute of frauds. McRae *v.* Russell, 12 Ired. (N. C.) 224 (1851), the court saying that the statute was meant "to protect real stockholders from . . . men of straw. It was, moreover, meant to protect men from the consequences of making such subscriptions, under the influence of momentary excitements, which they could not fulfill." The statute made the subscription void. In the case of Home Stock Ins. Co. *v.* Sherwood, 72 Mo. 461 (1880), payment by note and mortgage was sustained. Hayne *v.* Beauchamp, 13 Miss. 515 (1846), holds that the payment by note amounted to an informal subscription, the statutory subscription being void. Pine River Bank *v.* Hodsdon, 46 N. H. 114 (1865). In Alabama it is held that a subscriber may set up that the company was not legally organized, in that twenty per cent., which the statute required to be paid before incorporation, had been paid in checks which were not to be presented for payment and had not been presented. Haas *v.* Hall, 111 Ala. 442 (1895).

2 People *v.* Stockton, etc. R. R., 45 Cal. 306 (1873), there being funds in the bank to meet it.

3 Payment of a judgment, in an action for one call, estops the subscriber from setting up this defense. Hall *v.* Selma, etc. R. R., 6 Ala. (N. S.) 741 (1844). Although the statute requires that a certain percentage of subscriptions shall be paid upon incorporation, yet one subscriber may pay the proportion of others. Beattys *v.* Town of Solon, 64 Hun, 120 (1892); aff'd, 136 N. Y. 662.

no payment at all was made on the subscription, and suit was brought for the whole amount.[1] A statutory provision that a certain percentage of the capital stock must be paid in before business is commenced is satisfied by turning in property.[2] Where the directors commence business before ten per cent. of the capital is paid in as required by statute, the directors are personally liable as agents transacting business without authority from the principal.[3] In England a failure to pay such a percentage is held not to affect the liability of the subscriber, but to restrict his right of transferring his stock.[4]

§ 174. In New York there has been doubt and a strong tendency to change the rule laid down at an early day by the court. The case of Jenkins *v.* The Union Turnpike Company, in 1804,[5] decided that a failure by the subscriber to pay a required percentage at the time of subscribing was a good defense to an action on the subscription. This decision has been distinguished, questioned, and doubted by the courts.[6] The New York court of appeals, however, has held

1 Quoted and approved in West End, etc. Co. *v.* Claiborne, 97 Va. 734 (1900). In Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491 (1859), the requirement was by by-law, not by charter. The subscription was to be void for non-payment. The court thought otherwise. The effect of non-payment is that "it is due and liable to be called for at any time—payable on demand, whenever needed by the corporation." Greenville, etc. R. R. *v.* Woodsides, 5 Rich. L. (S. C.) 145 (1851), where the subscriber also voted the stock.

2 Fargason *v.* Oxford, etc. Co., 78 Miss. 65 (1900); Beach *v.* Smith, 30 N. Y. 116 (1864), aff'g, 28 Barb. 254. Where ten per cent. of the capital stock must be paid in before business is commenced, payment may be in property. McCandless *v.* Inland, etc. Co. 115 Ga. 968 (1902).

3 Trust, etc Co. *v.* Floyd, 47 Ohio St. 525 (1890). See also § 243, *infra*.

4 East Gloucestershire Ry. *v.* Bartholomew, L. R. 3 Exch. 15 (1867); Purdey's Case, 16 W. R. 660 (1868); McEuen *v.* West London, etc. Co., L. R. 6 Ch. App. 655 (1871)—the statute stating that the stock should not "issue" or "vest" until one-fifth should be paid. See also Morton's Case, L. R. 16 Eq. 104 (1873).

5 1 Caines's Cas. 86, reversing Union Turnp. Co. *v.* Jenkins, 1 Caines's Rep. 381. Even though an original certificate of incorporation is void by reason of an uncertified check having been given in payment of the amount required by statute, yet, if after the check is cashed a so-called amended certificate is filed, the latter stands as an original certificate of incorporation. People *v.* Comrs., 81 N. Y. App. Div., 242 (1903); aff'd, 175 N. Y. 516.

6 Highland Turnp. Co. *v.* McKean, 11 Johns. 98 (1814), the court saying: "It is a little difficult to ascertain the point upon which the court of errors grounded their decision." A subscriber, who is also the commissioner, need not pay the required percentage to himself. In Crocker *v.* Crane, 21 Wend. 211 (1839), payment in checks was held not to be good, they evidently not having been given in good faith. The court said: "Receiving an occasional check might have been a fair substitute." Thorp *v.* Woodhull, 1 Sandf. Ch. 411 (1844),

that if the subscriber merely signs the subscription contract and does not pay the percentage, he may thereby defeat his liability on such subscription.[1] The lower court in New York has held that it is no defense that an amount specified by statute was not paid in

sustains the validity of a bond and mortgage in payment of a subscription in which the percentage had been paid by a worthless check. Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546 (1856), holds it not to be necessary "that each subscriber should pay five per cent. upon his subscription but only that five per cent. on the amount of the stock subscribed should be actually paid" by some one. To the same effect, Lake Ontario, etc. R. R. *v.* Mason, 16 N. Y. 451 (1857), the court saying that the object was "to ensure the organization of real substantial companies in good faith, animated by an honest purpose, and having some degree of ability at least to undertake the proposed improvement." In the case of Rensselaer, etc. Co. *v.* Barton, 16 N. Y. 457, n. (1854), the court, in speaking of the decision in Jenkins *v.* Union T. Co., say: "It may well be doubted whether the reasoning upon which it was based is sound, and whether, were the question to be again directly presented, this court would feel bound to follow it." Black River, etc. R. R. *v.* Clarke, 25 N. Y. 208 (1862), holds that "the subscription one day, with payment the next, would satisfy the statute, and so would actual payment at any period after subscription with intent to effectuate and complete the subscription." See also Beach *v.* Smith, as stated in 30 N. Y. 119 (1864); Ogdensburg, etc. R. R. *v.* Wooley, 3 Abb. App. Dec. 398 (1864). Beach *v.* Smith, 30 N. Y. 116 (1864), affirming s. c., 28 Barb. 254, holds that payment in services performed under a contract with the company suffices. Excelsior, etc. Co. *v.* Stayner, 25 Hun, 91 (1881), holds that payment by check, on which payment is stopped, is insufficient. Syracuse, etc. R. R. *v.* Gere, 4 Hun, 392 (1875), sustains a suit by the corporation to collect such a check. See also Ogdensburg, etc. R. R. *v.* Frost, 21 Barb. 541 (1856). A certified check is good payment. *Re* Staten Island, etc. R. R., 37 Hun, 422 (1885); *Re* Staten Island, etc. R. R., 38 Hun, 381 (1885). Even though an original certificate of incorporation is void by reason of an uncertified check having been given in payment of the amount required by statute, yet if after the check is cashed a so-called amended certicate is filed, the latter stands as an original certificate of incorporation. People *v.* Comrs., 81 N. Y. App. Div. 242 (1903).

[1] New York, etc. R. R. *v.* Van Horn, 57 N. Y. 473 (1874), holding also that a subsequent statute cannot cure such omission to pay, and thereby render the subscriber liable. Even though a corporation accepts a note instead of cash in payment for a subscription, in violation of the statute, which provides that only money, labor done or property actually received shall be accepted in payment for stocks and bonds, yet a bank which discounted such note for a corporation may hold the corporation liable thereon. First Nat. Bank *v.* Cornell, 8 N. Y. App. Div. 427 (1896). In a suit in equity by a corporate creditor against stockholders for unpaid subscriptions, subscribers who did not pay the ten per cent. required by statute to make them stockholders need not be joined as parties defendant nor subscribers whose shares have been forfeited. Ford *v.* Chase, 118 N. Y. App. Div. 605 (1907).

before commencing business,[1] but the latest decision is to the contrary.[2]

§ 175. In Pennsylvania a similar state of doubt has existed. The case of Hibernia Turnpike Co. *v.* Henderson,[3] in 1822, decided that a failure by the commissioners taking subscriptions to stock to require payment of the statutory percentage made the subscription void and not enforceable. Later decisions do not overthrow the rigid rule, but distinguish and practically destroy it by holding that this defense is barred by a subsequent statute curing the defect;[4] or by a waiver in attending corporate meetings and voting;[5] or by transferring the shares;[6] or that the provision applies only to subscriptions taken by the commissioners;[7] or, under the act of 1868, that the percentage must be paid on subscriptions after, but not on those before, incorporation;[8] or that the requirement does not apply to a conditional subscription;[9] or that it is waived by any acts indicating an intent to be bound as a stockholder.[10]

§ 176. *Failure of the corporation to obtain subscriptions to the extent of the full capital stock.*—It is an implied part of a contract of subscription that the contract is to be binding and enforceable against

1 Raegener *v.* McDougall, 33 N. Y. App. Div. 231 (1898). Where subscriptions are with the consent of the subscribers pledged to secure a debt of the corporation, the pledgee may enforce the subscriptions, although the ten per cent. required by the statute to be paid at the time of the subscription was not paid. Knickerbocker T. Co. *v.* Hard, 67 N. Y. App. Div. 463 (1902).

2 A note given in payment for the subscription price of stock is illegal under the New York statute which requires ten per cent. to be paid in cash, where the subscription is a cash subscription, and hence in such a case the entire subscription is void, even though it provided for the employment of the subscriber and for giving him a bonus of stock. Hapgoods *v.* Lusch, 123 N. Y. App. Div. 23 (1907).

3 8 Serg. &. R. 219. See also Leighty *v.* Susquehanna, etc. Turnp. Co., 14 Serg. & R. 434 (1826).

4 Clark *v.* Monongahela Nav. Co., 10 Watts (Pa.), 364 (1840).

5 Erie, etc. Ry. *v.* Brown, 25 Pa. St. 156 (1855), the court saying: "There is no merit in such a defense. . . . The subscriber himself is under the highest moral obligation faithfully to perform the promise he has distinctly made." In Commonwealth *v.* West Chester R. R., 3 Grant's Cas. (Pa.) 200 (1855), the court held that failure to pay the percentage did not render the charter forfeitable.

6 Everhart *v.* West Chester, etc. R. R., 28 Pa. St. 339 (1857).

7 Philadelphia, etc. R. R. *v.* Hickman, 28 Pa. St. 318 (1857). *Contra*, under the act of 1868. See Bucher *v.* Dillsburg, etc. R. R., 76 Pa. St. 306 (1874).

8 Garrett *v.* Dillsburg, etc. R. R., 78 Pa. St. 465 (1875).

9 Hanover, etc. R. R. *v.* Haldeman, 82 Pa. St. 36 (1876).

10 Boyd *v.* Peach Bottom Ry., 90 Pa. St. 169 (1879), holding, however, that payment cannot be by promissory note although a demand note.

the subscriber only after the full capital stock of the corporation has been subscribed. This condition precedent to the liability of the subscriber need not be expressed in the corporate charter nor the subscription itself. It arises by implication from the just and reasonable understanding of a subscriber that he is to be aided by other subscriptions. This rule is supported also by public policy, in that corporate creditors have a right to rely upon a belief that the full capital stock of the corporation has been subscribed.[1] If the corporation com-

[1] The leading case on this defense is Salem Mill-dam Corp. *v.* Ropes, 23 Mass. 23 (1827), and 26 Mass. 187 (1829). In Livesey *v.* Omaha Hotel, 5 Neb. 50 (1876), Judge Redfield in the brief says: "This rule has been held inflexible in all cases both for the security of the public and also of the subscribers;" Shurtz *v.* Schoolcraft, etc. R. R., 9 Mich. 269 (1861); Anvil Min. Co. *v.* Sherman, 74 Wis. 226 (1889); New York, etc. R. R. *v.* Hunt, 39 Conn. 75 (1872); Hale *v.* Sanborn, 16 Neb. 1 (1884); Haskell *v.* Worthington, 94 Mo. 560 (1888); Halsey Fire Engine Co. *v.* Donovan, 57 Mich. 318 (1885); Peoria, etc. R. R. *v.* Preston, 35 Iowa, 115 (1872), the court saying that this is the rule, "unless a contrary intention appears, expressly or by implication, either in the charter or the contract of subscriptions;" Stoneham Branch R. R. *v.* Gould, 68 Mass. 277 (1854), the court saying: "This is no arbitrary rule; it is founded on a plain dictate of justice, and the strict principles regulating the obligation of contracts;" Bray *v.* Farwell, 81 N. Y. 600, 608 (1880), where the court said that the directors "had no authority to go on with insufficient means, and thus wreck the company;" Selma, etc. R. R. *v.* Anderson, 51 Miss. 829 (1876); Hughes *v.* Antietam Mfg. Co., 34 Md. 316, 332 (1870); Topeka Bridge Co. *v.* Cummings, 3 Kan. 55 (1864); Allman *v.* Havana, etc. R. R., 88 Ill. 521 (1878); Temple *v.* Lemon, 112 Ill. 51 (1884); Littleton Mfg. Co. *v.* Parker, 14 N. H. 543 (1844); Hendrix *v.* Academy of Music, 73 Ga. 437 (1884); Stearns *v.* Sopris, 4 Colo. App. 191 (1894); Norwich Lock Mfg. Co. *v.* Hockaday, 89 Va. 557 (1893); Contoocook Valley R. R. *v.* Barker, 32 N. H. 363 (1855); Newburyport Bridge *v.* Story, 23 Mass. 45, note (1827); Belfast, etc. R. R. *v.* Cottrell, 66 Me. 185 (1876); Rockland, etc. Co. *v.* Sewall, 80 Me. 400 (1888); Memphis Branch R. R. *v.* Sullivan, 57 Ga. 240 (1876); Fox *v.* Allensville, etc. Turnp. Co., 46 Ind. 31 (1874); Hain *v.* Northwestern, etc. Co., 41 Ind. 196 (1872), holding also that the corporation in suing must aver that the full capital stock has been subscribed; Central Turnp. Corp. *v.* Valentine, 27 Mass. 142 (1830), holding also that the corporation has the burden of proving subscriptions for the full capital stock; Warwick R. R. *v.* Cady, 11 R. I. 131 (1875), where the charter said that the capital stock should not exceed a specified sum; Fry *v.* Lexington, etc. R. R., 2 Met. (Ky.) 314 (1859), holding also that the corporation must aver full subscription; Lewey's Island R. R. *v.* Bolton, 48 Me. 451 (1860); Lail *v.* Mt. Sterling C. R. Co., 13 Bush. (Ky.), 32 (1877), holds that the corporation need not aver full subscriptions. To the same effect, McKay *v.* Elwood, 12 Wash. 579 (1895). *Cf.* Monroe *v.* Fort Wayne, etc. R. R., 28 Mich. 272 (1873).

Where, also, the corporation is incorporated with a less capital stock than was proposed when the defendant subscribed, he is not bound by the subscription. Santa Cruz R. R. *v.* Schwartz, 53 Cal. 106 (1878). Sub-

mences business before the full capital stock is subscribed, the state may bring an action for the forfeiture of its charter.[1] A subscriber is liable for his proportion of the necessary expenses, preliminary to

scribers are not liable until the whole amount is subscribed. They may recover back what they have paid. Winters *v.* Armstrong, 37 Fed. Rep. 508 (1889). A full subscription is not necessary if the subscriptions are payable to an agent and nothing is said about full subscription. West *v.* Crawford, 80 Cal. 19 (1889). A stockholder may defend on the ground that the amount required by the subscription list to be subscribed shall be subscribed before he is held liable, especially where misrepresentations are made as to the amount which has been subscribed when the defendant subscribed. The question is one for the jury. Spellier, etc. Co. *v.* Leedom, 149 Pa. St. 185 (1892). When the capital is increased after the defendant subscribed he cannot insist on the subscription of the capital stock as increased. Port Edwards, etc. Ry. *v.* Arpin, 80 Wis. 214 (1891). See § 288, *infra*. Subscription of the full capital was held necessary in Exposition, etc. Co. *v.* Canal, etc. Ry., 42 La. Ann. 370 (1890). The question must be clearly raised by the findings, otherwise it will not be considered on appeal. Arthur *v.* Clarke, 46 Minn. 491 (1891). Where stockholders proceed to business before the minimum capital prescribed by statutes is subscribed and before the requisite amount is paid in, they are liable to corporate creditors for such minimum capital. The creditors may sue them and the corporation in the same action. Burns *v.* Beck, etc. Co., 83 Ga. 471 (1889). The defense of non-full subscriptions is available against creditors of the corporation. Exposition, etc. Co. *v.* Canal, etc. Ry., 42 La. Ann. 370 (1890). The text above was approved in Portland, etc. R. R. *v.* Spillman, 23 Oreg. 587 (1893), and Denny Hotel Co. *v.* Schram, 6 Wash. St. 134 (1893). A few cases seem to hold a contrary doctrine. Newcastle, etc. Turnp. Co. *v.* Bell, 8 Blackf. (Ind.) 584 (1847); Oregon Cent. R. R. *v.* Scoggin, 3 Oreg. 161 (1869); York, etc. R. R. *v.* Pratt, 40 Me. 447 (1855); Cheraw, etc. R. R. *v.* White, 10 S. C. 155 (1878). See also Chubb *v.* Upton, 95 U. S. 665, 668 (1877), probably a *dictum*. In the case of Skowhegan, etc. R. R. *v.* Kinsman, 77 Me. 370 (1885), the court seems to hold that, where there is in the subscription an express promise to pay, it is enforceable even though the whole capital stock is not subscribed. If such a condition is expected, the court says it must be inserted in the subscription. It has been held that, where a subscription is made before incorporation, on a paper not fixing the capital stock, a failure to secure full subscription to the capital stock as fixed in the charter is no defense. Belton Compress Co. *v.* Saunders, 70 Tex. 699 (1887). That the full capital stock was not subscribed constitutes no defense where a creditor sues, see Hamilton *v.* Clarion, etc. R. R., 144 Pa. St. 34 (1891). A subscriber to a dairy project is bound to pay, even though the entire capital stock of a corporation to which the dairy is to be transferred is not subscribed, the subscription being not to the proposed corporation but to the builders of the dairy. Ada, etc. Assoc. *v.* Mears, 123 Mich. 470 (1900). An underwriter may be held liable, even though the entire amount is not underwritten, there being nothing in the agreement requiring that. Knickerbocker T. Co. *v.* Davis, 143 Fed. Rep. 587 (1906).

[1] People *v.* National Sav. Bank, 11 N. E. Rep. 170 (Ill. 1889); aff'd, 129 Ill. 618 (1889).

the incorporation and organization of the company.[1] It is no defense that increased capital stock was not fully subscribed for.[2] Where a corporation is authorized to commence business only when a specified amount of stock has been subscribed, and it does commence business prior to such subscription being made, the state may file a bill to forfeit its charter.[3] But, even though a company has commenced business before its capital stock is subscribed in good faith, as required by statute, yet its contracts cannot be attacked on that ground.[4]

§ 177. The act of incorporation may, of course, vary the above rules. Thus, it is well established that, where the charter authorizes the organization of the company, and the commencement of corporate work after a certain amount of capital stock has been subscribed, such a charter provision is equivalent to an express authority to the corporation to call in the subscriptions as soon as this organization is effected and the specified subscriptions obtained.[5] Subscriptions to

1 Salem Mill-dam Corp. *v.* Ropes, 23 Mass. 23 (1827). *Cf.* § 63, *supra.* Even though the full capital stock is not subscribed, and even though the statue prohibits doing business before the entire capital stock is subscribed, subscribers are liable for debts incurred in beginning business. Myers *v.* Sturgis, 123 N. Y. App. Div. 470 (1908).

2 McCoy *v.* World's, etc. Exposition, 186 Ill. 356 (1900). Where, by the charter, there are two hundred shares and only eleven are subscribed, and then the charter is amended, increasing the shares to two hundred and fifty thousand and decreasing the par value thereof, this it not an increase of the capital stock within the rule that such increase need not be wholly subscribed in order to hold the subscribers liable. Gettysburg, etc. Bank *v.* Brown, 95 Md. 367 (1902).

3 State *v.* Debenture, etc. Co., 51 La. Ann. 1874 (1899).

4 City of Spokane *v.* Amsterdamsch Trustees, 22 Wash. 172 (1900).

5 Schenectady, etc. Co. *v.* Thatcher, 11 N. Y. 102 (1854); Rensselaer, etc. Co. *v.* Wetsel, 21 Barb. 56 (1855); Hamilton, etc. Co. *v.* Rice, 7 Barb. 157, 166 (1849); Sedalia, etc. Ry. *v.* Abell, 17 Mo. App. 645 (1885); Lincoln, etc. Co. *v.* Sheldon, 44 Neb. 279 (1895); Perkins *v.* Sanders, 56 Miss. 733 (1879); Hunt *v.* Kansas, etc. Bridge Co., 11 Kan. 412 (1873), the court saying that otherwise there would be no propriety in allowing the organization before the full capital was subscribed; Hoagland *v.* Cincinnati, etc. R. R., 18 Ind. 452 (1862); Hanover, etc. R. R. *v.* Haldeman, 82 Pa. St. 36 (1876); Penobscot, etc. R. R. *v.* Bartlett, 78 Mass. 244 (1858), holding so, even though no contracts for building the road were to be made until a larger subscription was obtained; Boston, etc. R. R. *v.* Wellington, 113 Mass. 79 (1873); Minor *v.* Mechanics' Bank, 1 Pet. 46 (1828); New Haven, etc. R. R. *v.* Chapman, 38 Conn. 56 (1871); Illinois River R. R. *v.* Zimmer, 20 Ill. 654 (1858); Lexington, etc. R. R. *v.* Chandler, 54 Mass. 311 (1847); Willamette Freighting Co. *v.* Stannus, 4 Oreg. 261 (1872); Jewett *v.* Valley Ry., 34 Ohio St. 601 (1878). A vigorous case to the contrary is Galveston Hotel Co. *v.* Bolton, 46 Tex. 633 (1877). The court said: "There were good reasons for organizing the company to be found in the increased facility of

the full amount of the capital stock are held not to be necessary. The defense is not good.

§ 178. Where a subscription specifies how much of the capital stock must be subscribed before payment may be enforced, such specifications are legal and effective, and until they are fully complied with the subscriber is not liable.[1] A subscription of this kind is a conditional subscription.[2] A condition that the subscription shall be payable only when sufficient subscriptions for the corporate purpose have been secured has been held to require funds sufficient to put the enterprise in full operation.[3] On the other hand, a subscription

thereby raising the subscription to the amount fixed for the capital stock, and of other preliminary preparations for the execution of the work, when the subscription should reach that amount." A contrary rule "would render nugatory the most important provision of the charter, which is the amount of its capital stock." When the capital stock is to be fixed by the corporation between two limits, the subscription of the full amount as fixed is a subscription of the full capital stock. Kennebec, etc. R. R. *v.* Jarvis, 34 Me. 360 (1852). There need not be a full subscription where the statutes authorize an organization as soon as one-half is subscribed. Astoria, etc. R. R. *v.* Hill, 20 Oreg. 177 (1890). The statutes may allow the corporation to proceed with business and collect subscriptions before the full capital stock is subscribed. Schloss *v.* Montgomery Trade Co., 87 Ala. 411 (1889). Where calls may be made after one-quarter of the stock has been subscribed, the complaint must allege subscriptions to that amount. San Bernardino Inv. Co. *v.* Merrill, 108 Cal. 490 (1895). Where the statute allows a call after twenty-five per cent. has been subscribed, the full subscription of this twenty-five per cent. is necessary. Ventura, etc. Ry. *v.* Hartman, 116 Cal. 260 (1897). Full subscription is unnecessary where the charter allows the commencement of business "as soon as the directors think fit." Mandel *v.* Swan, etc. Co., 154 Ill. 177 (1895).

1 Where, by its terms, it is not to be binding until a certain amount is subscribed, it is enforceable when that amount is secured, although less than the full capital stock. Bucksport, etc. R. R. *v.* Buck, 65 Me. 536 (1876); s. c., 68 Me. 81. See also Iowa, etc. R. R. *v.* Perkins, 28 Iowa, 281 (1869). Where the by-laws provide that the first issue of stock shall be one-half of the authorized capital stock, a subscriber who has agreed to such by-laws cannot defend on the ground that the entire capital stock has not been subscribed. Anglo-American, etc. Co. *v.* Dyer, 181 Mass. 593 (1902). Organization authorized where "$200 to any one mile" has been subscribed is satisfied by a $200 subscription in general. Fitch *v.* Poplar Flat, etc. Co., 13 S. W. Rep. 791 (Ky. 1890). Where the subscription list or articles of association signed by defendant expressly provide for the commencement of business before the full capital is subscribed, the defense is waived. Arkadelphia Cotton Mills *v.* Trimble, 54 Ark. 316 (1891).

2 See ch. V, *supra*.

3 People's Ferry Co. *v.* Balch, 74 Mass. 303 (1857), the court holding that funds for the land, structures and boats must be in hand before the defendant becomes liable.

to pay "when required" renders the subscribers liable before the full capital stock is subscribed.[1]

§ 179. In England statutory provisions have almost entirely displaced the common-law rule. The principle that a subscriber is not liable until the full capital stock has been subscribed is recognized as having been the original rule at law. An eminent English authority says that, in all the cases in which the subscribers were held bound, they "had entered into a contract which precluded them from maintaining that the subscription of the whole of the originally proposed capital was an express or implied condition to their becoming shareholders." The English courts seem to have no clearly defined rule in this matter, but allow each case to turn largely on its own facts; releasing the subscriber if the discrepancy in the subscriptions is very large, and holding him liable if it is small, or if he in any way has aided the company in beginning business.[2]

1 Cheraw, etc. R. R. *v.* Garland, 14 S. C. 63 (1880).

2 Norwich, etc. Navigation *v.* Theobald, 1 Moody & M. 151 (1828), required full subscription in accordance with a statute. Fox *v.* Clifton, 6 Bing. 776 (1830), (a new trial was granted in 9 Bing. 115) the earliest common-law English case on this subject holds that the subscriber is not liable to corporate creditors unless the full capital stock has been subscribed. Pitchford *v.* Davis, 5 Mees. & W. 2 (1839), also fully agrees with the rule that prevails in this country. Wontner *v.* Shairp, 4 C. B. 404 (1847), sustained a recovery of amounts paid on a subscription, under misrepresentations that the whole stock had been subscribed. Waterford, etc. Ry. *v.* Dalbiac, 4 Eng. L. & Eq. 455 (1851), refused to allow the defense, since the charter allowed the corporation to purchase land before the full capital stock was subscribed. Watts *v.* Salter, 10 C. B. 477 (1850), holds the same, the subscriber having aided in the incorporation, and given the directors power to proceed. Galvanized Iron Co. *v.* Westoby, 21 L. J. Exch. 302 (1852), per B. Parke, says that at common law the subscriber is not liable unless the full capital stock is subscribed. *Contra*, Lyon's Case, 35 Beav. 646 (1866). Johnston *v.* Goslett, 3 C. B. (N. S.) 569 (1857), makes the directors liable to the subscriber for his deposit when they so proceed. London, etc. Ins. Co. *v.* Redgrave, 4 C. B. (N. S.) 524 (1858), holds the subscriber liable, he having aided in the incorporation. Ornamental, etc. Woodwork Co. *v.* Brown, 2 Hurl. & C. 63 (1863), holds the subscriber liable under the statute of 19 and 20 Vict., ch. 47, similar to the American statutes. See also McDougall *v.* Jersey, etc. Co., 10 Jur. (N. S.) 1043 (1864). Peirce *v.* Jersey Waterworks Co., L. R. 5 Exch. 209 (1870), required a certain amount to be subscribed, the charter itself so prescribing. Elder *v.* New Zealand, etc. Co., 30 L. T. Rep. 285 (1874), the most important case on this subject, holds that, where the directors are about to proceed with only one-fourteenth of the capital stock subscribed, a subscriber may apply to the court and have his name removed from the subscribers' list. The court said that the case of McDougall *v.* Jersey, etc. Co., 2 Hem. & M. 528 (1864), would have been decided otherwise had not two-thirds of the stock in that case been subscribed. See also Howbeach Coal Co. *v.* Teague, 5 Hurlst. & N. 151

§ 180. Some difficulty has been experienced in determining what subscriptions shall be counted in ascertaining whether the full capital stock has been subscribed. Conditional subscriptions, the condition to which has not yet been performed by the corporation, are clearly not to be counted among the rest, since such subscriptions may never become enforceable.[1]

The subscriptions of married women, infants, or persons of unsound mind are to be excluded from the count.[2] So, also, the subscriptions of insolvents are excluded, unless at the time of subscribing they were apparently able to pay the subscription.[3] The decision

(1860); *dictum* in *Re* Jennings, 1 Ir. Ch. 654 (1851).

1 Troy, etc. R. R. *v.* Newton, 74 Mass. 596 (1857), the condition being that the subscriber be allowed to pay in construction work; Oskaloosa Agricultural Works *v.* Parkhurst, 54 Iowa, 357 (1880); Brand *v.* Lawrenceville, etc. R. R., 77 Ga. 506 (1887); New York, etc. R. R. *v.* Hunt, 39 Conn. 75 (1872); Cabot, etc. Bridge *v.* Chapin, 60 Mass. 50 (1850), where a subscription payable in other stock at par, when the market value was less, was not counted; Ticonic, etc. Co. *v.* Lang, 63 Me. 480 (1874). Subscriptions payable in property are not to be counted in ascertaining whether the full capital stock is subscribed. California, etc. Co. *v.* Russell, 88 Cal. 277 (1891), holding, also, that an agent's unauthorized subscription is not to be counted, even though subsequently ratified by the principal. Conditional subscriptions, the condition of which cannot be fulfilled until after incorporation, are not to be counted in ascertaining whether the requisite capital stock has been subscribed. Portland, etc. R. R. *v.* Spillman, 23 Oreg. 587 (1893). A subscription on condition that interest shall be paid is counted. Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863). *Cf.* Greenville, etc R. R. *v.* Coleman, 5 Rich. Law (S. C.), 118 (1851). Invalid subscriptions are not counted. Belfast, etc. R. R. *v.* Cottrell, 66 Me. 185 (1876). *Cf.* Swartwout *v.* Michigan Air Line R. R., 24 Mich. 389 (1872); § 79, *supra*, and note 3, p. 468, *infra*.

2 Phillips *v.* Covington, etc. Bridge Co., 2 Metc. (Ky.) 219 (1859), holding that subscriptions of infants, married women, or insolvents are not to be counted unless already paid in. Fictitiously paid-up stock, and stock convertible into corporate bonds, were counted. See also Hahn's Appeal, 7 Atl. Rep. 482 (Pa. 1886), excluding subscriptions of married women. *Cf.* Litchfield Bank *v.* Church, 29 Conn. 137 (1860). Payment of part with knowledge that a married woman's subscription was counted is a waiver. Cornell's Appeal, 114 Pa. St. 153 (1886). It is held in Mississippi, however, that even though by the terms of a subscription agreement it is to be binding only upon so much money being subscribed, and some of the money subscribed is by minors, this is no defense to the adult subscribers, since the minors subscribing are bound after their majority, unless they plead infancy as a defense. Chicago, etc. Co. *v.* Higginbotham, 29 S. Rep. 79 (Miss. 1901).

3 Lewey's Island R. R. *v.* Bolton, 48 Me. 451 (1860); Belfast, etc. R. R. *v.* Brooks, 60 Me. 568 (1872); Denny Hotel Co. *v.* Schram, 6 Wash. St. 134 (1893). The subsequent failure of some of the subscribers is immaterial. Salem Mill-dam Corp. *v.* Ropes, 26 Mass. 187 (1829). Where the subscriber is worth only $5,400 and subscribes for $64,000 of stock,

of the proper corporate authorities that the capital stock has been fully subscribed is conclusive in the absence of proof of fraud or bad faith.[1] It is no defense to an action on a subscription that a part of the subscriptions were made by corporations and were not enforceable. Only the state can raise that objection.[2] Considerable difference of opinion exists as to whether subscriptions payable by their terms in labor or materials or contract work are to be included in the count.[3] It has been held that the necessity of employing this method of carrying out many modern corporate enterprises requires that such subscriptions should be counted if the contract is made in good faith and the contractors are reasonably responsible men.[4] The records of the corporation are sufficient and competent evidence that the full capital stock has been subscribed.[5]

he is apparently unable to pay. Denny Hotel Co. *v.* Schram, 6 Wash. 134 (1893). A corporation need not allege that the subscriptions making up the capital stock were all by solvent people. Shick *v.* Citizens' Enterprise Co., 15 Ind. App. 329 (1896). The fact that the company is unable to collect the minimum subscription required by the charter is no defense unless bad faith in taking the subscription is shown. West End, etc. Co. *v.* Claiborne, 97 Va. 734 (1900). Where a prospectus states that an allotment will be made only after a certain amount has been subscribed, and it turns out that some of the subscriptions were not good, the other subscribers have a right to withdraw. Finance & Issue Ltd. *v.* Canadian, etc. Corporation, Ltd., [1905] 1 Ch. 37.

1 Louisiana, etc. Co. *v.* Kuenzel, 108 Mo. App. 105 (1904).

2 U. S. Vinegar Co. *v.* Foehrenbach, 148 N. Y. 58 (1895). *Contra*, Berry *v.* Yates, 24 Barb. 199 (1857). The defense that part of the subscriptions were by another corporation and illegal, and hence that the full capital stock was not subscribed, is not good as to subscribers who have paid part with knowledge. Cole *v.* Satsop R. R., 9 Wash. 487 (1894). A subscriber cannot defend on the ground that a corporation had subscribed for some of the stock *ultra vires*. McCoy *v.* World's Exposition, 87 Ill. App. 605 (1899). Aff'd, 186 Ill. 356.

3 They certainly are not counted where the contractor failed to complete the work. New York, etc. R. R. *v.* Hunt, 39 Conn. 75 (1872); Troy, etc. R. R. *v.* Newton, 74 Mass. 596 (1857), the court saying: "The receipt of the stock by them depended entirely upon a contingency, as the contractors might fail to do the work, and so no stock be earned;" Oldtown, etc. R. R. *v.* Veazie, 39 Me. 571 (1855), where the contract work was not completed. Stock taken by a construction company for construction work is to be counted. Sweeney *v.* Tennessee etc. R. R., 100 S. W. Rep. 732 (Tenn. 1907). In the case of Ridgefield, etc. R. R. *v.* Brush, 43 Conn. 86 (1875), such subscriptions were counted, the contract for payment in work being parol, and not allowed to vary the apparently absolute subscription. See also note 1, p. 467, *supra*.

4 Phillips *v.* Covington, etc. Bridge Co., 2 Metc. (Ky.) 219 (1859).

5 Quoted and approved in McCoy *v.* World's Exposition, 186 Ill. 356 (1900). Penobscot R. R. *v.* Dummer, 40 Me. 172 (1855); Penobscot R. R. *v.* White, 41 Me. 512 (1856). Unless proof be introduced to destroy their

The directors and stockholders are not liable for corporate debts merely because they commenced business before the capital stock was subscribed unless fraud or a violation of the statutes is involved.[1]

§ 181. A subscriber may waive the defense that the full capital stock of the corporation has not been subscribed. This waiver may be either express or implied from the acts or declarations of the subscriber.[2] Many different facts have been passed upon by the courts, and held either to constitute or not to constitute a waiver of this defense. Thus, it has been held to amount to a waiver for the subscriber to act as a director, attend meetings, and contract corporate debts;[3] or to pay assessments for several years, with full knowledge of all the facts;[4] or to write to the directors, requiring them to call a meeting;[5] or to participate as a stockholder and committeeman for

effect. A call is notice that the full amount has been subscribed. Harlæm Canal Co. *v.* Seixas, 2 Hall (N. Y.), 504 (1829); Harlæm Canal Co. *v.* Spear, 2 Hall (N. Y.), 510 (1829); Litchfield Bank *v.* Church, 29 Conn. 134 (1860), holding that the certificate of the commissioners that the full stock had been subscribed would not be questioned, even though they had counted married women's subscriptions. To same effect, see Lane *v.* Brainard, 30 Conn. 565 (1862); Marlborough Branch R. R. *v.* Arnold, 75 Mass. 159 (1857). If the corporate records are destroyed or lost there should be other clear evidence. Central Turnp. Corp. *v.* Valentine, 27 Mass. 142 (1830).

1 See § 243, *infra*.

2 Macfarland *v.* West Side Imp. Assoc., 56 Neb. 277 (1898); Emmitt *v.* Springfield, etc. R. R., 31 Ohio St. 23 (1876); Hager *v.* Cleveland, 36 Md. 476 (1872); Masonic Temple Assoc. *v.* Channell, 43 Minn. 353 (1890). In Anderson *v.* Middle, etc. R. R., 91 Tenn. 44 (1891), a special agreement was held to be a waiver of the full capital being subscribed, but not as to those who had not signed the agreement. A subscriber by paying calls may waive objections to the full capital stock being subscribed. California, etc. Hotel Co. *v.* Callender, 94 Cal. 120 (1892). The whole capital stock must be subscribed before the subscriptions are enforced, unless the subscription contract provides otherwise. A subscriber may waive this, and the question of waiver is for the jury. Hards *v.* Platte Valley, etc. Co., 35 Neb. 263 (1892), s. c., 46 Neb. 709. Where the subscribers have induced a contractor to proceed on the theory that the full capital has been subscribed, it is no defense that one subscription was invalid. Gibbons *v.* Ellis, 83 Wis. 434 (1892).

3 Hager *v.* Cleveland, 36 Md. 476 (1872). A defendant waives the defense that the full capital stock was not subscribed where he serves as a director, is present when calls are made, votes in favor of buying a building lot, serves on committees, prepares plans, etc. Auburn, etc. Assoc. *v.* Hill, 32 Pac. Rep. 587 (Cal. 1893); aff'd in 113 Cal. 382 (1896).

4 Morrison *v.* Dorsey, 48 Md. 461 (1877). This defense is not waived by payment of calls in ignorance of the facts, where the statute requires a full subscription before business is commenced. Birge *v.* Browning, 11 Wash. 249 (1895).

5 Tredwen *v.* Bourne, 6 M. & W. 461 (1840), holding it to be evidence of waiver.

several months;[1] or to act as president of the corporation.[2] The fact that certain other corporations subscribed for stock of an exposition company, without charter authority so to do, is no defense to another stockholder who stood by without objecting and who does not prove that such subscriptions were not paid.[3] But a subscriber does not waive this defense by paying a deposit;[4] or by attending a meeting;[5] or by participating in preliminary work and paying a statutory percentage required to be paid at the time of subscribing;[6] or by paying assessments for surveys.[7] The presumption is that the

1 Sharpley *v.* Louth, etc. Ry., L. R. 2 Ch. D. 663 (1876). A stockholder who receives and retains a certificate for increased stock cannot, after corporate insolvency, set up that the full increased capital was not subscribed. Butler *v.* Aspinwall, 33 Fed. Rep. 217 (1887); aff'd, 133 U. S. 599. See also § 288, *infra*. By organizing and proceeding, stockholders waive the defense that the full capital stock was not subscribed. Dallemand *v.* Odd Fellows' Sav. Bank, 74 Cal. 598 (1888).

2 Corwith *v.* Culver, 69 Ill. 502 (1873).

3 McCoy *v.* World's, etc. Exposition, 186 Ill. 356 (1900). A subscriber to stock in an unincorporated association is not relieved from liability, even though some of the subscriptions necessary to make up the amount required by the subscription paper were forgeries and others obtained by false representations, if it be shown that the association accepted the building to construct which it was formed. Haney, etc. Co. *v.* Adaza, etc. Co., 108 Iowa, 313 (1899). A subscriber who, when shown the list of subscribers, does not object that one of the other subscribers is a corporation, cannot afterwards raise that objection. Pacific Mill Co. *v.* Inman, 46 Ore. 352 (1905).

4 Pitchford *v.* Davis, 5 M. & W. 2 (1839).

5 Wontner *v.* Shairp, 4 C. B. 404 (1847); New Hampshire R. R. *v.* Johnson, 30 N. H. 390 (1855); Orynski *v.* Loustaunan, 15 S. W. Rep. 674 (Tex. 1890), holding that this defense is not waived by attending a corporate meeting, the subscriber not knowing all the facts; nor is it waived by paying part of the subscription. Power in the directors to make calls when they see fit does not destroy this defense. A subscriber who attends meetings and participates in the organization waives the defense that the full capital stock has not been subscribed; but if he does so without knowledge of the fact that the full capital stock has not been subscribed, he does not waive such defense. Portland, etc. R. R. *v.* Spillman, 23 Oreg. 587 (1893); International, etc. Assoc. *v.* Walker, 88 Mich. 62 (1891), s. c., 97 Mich. 159, holding that attendance at a meeting and voting are not necessarily a waiver. A person who acts as a stockholder cannot raise the defense that the full capital stock was not subscribed. Doak *v.* Stahlman, 58 S. W. Rep. 741 (Tenn. 1899).

6 Livesey *v.* Omaha Hotel Co., 5 Neb. 50 (1876); Oldtown, etc. R. R. *v.* Veazie, 39 Me. 571 (1855), where as an officer the subscriber aided in preliminary work. This case goes further, and holds that there can be no waiver under any state of facts, but that the full capital stock is necessary. Acts and facts prior to the signing of the subscription do not constitute a waiver. Curry Hotel Co. *v.* Mullins, 93 Mich. 318 (1892).

7 Memphis Branch R. R. *v.* Sullivan, 57 Ga. 240 (1876). Atlantic Cotton Mills *v.* Abbott, 63 Mass. 423 (1852),

amount required by statute to be subscribed before any call can be made has been subscribed, where suit is brought on a subscription.[1] This defense may not be good as against a receiver.[2] A receiver of an insolvent corporation in suing on a subscription need not allege that the full capital stock was subscribed.[3]

§ 182. *Failure to fix definitely the capital stock, where the amount is left in the discretion of the corporation.*—Sometimes corporate charters, especially in the New England states, are granted without specifying the exact amount of the capital stock, but either fixing the outside limit or allowing the corporate authorities to fix it between certain specified limits. Where the charter leaves the amount of the capital stock indefinite, it is the duty of the proper corporate authorities to determine what it shall be; and no subscriber can be held liable on his subscription until such determination is made.[4] After the capital stock is once fixed, there seems to be no rule preventing its being varied subsequently, provided the specified charter limits are observed.[5] It has been held that even subscriptions to the amount of the lowest limit allowed by the charter are insufficient, unless that limit has been designated by the corporate authorities as the amount of the capital stock.[6] After the capital stock is so determined, the full amount thereof must be subscribed before any

holds that paying assessments and attempting to transfer is not a waiver. May *v.* Memphis Branch R. R., 48 Ga. 109 (1873), holds that paying an assessment with notice of this defense is a waiver of it.

1 Milwaukee, etc. Co. *v.* Schoknecht, 108 Wis. 457 (1901).

2 Where the incorporators organize before the minimum capital is subscribed, they are liable to corporate creditors under the Georgia statute up to the amount of such minimum capital, and it is no defense that before debts were incurred they sold their stock back to the corporation. Walters *v.* Porter, 59 S. E. Rep. 452 (Ga. 1907).

3 Myers *v.* Sturgis, 123 N. Y. App. Div. 470 (1908).

4 Worcester, etc. R. R. *v.* Hinds, 62 Mass. 110 (1851); Troy R. R. *v.* Newton, 74 Mass. 596 (1857); Pike *v.* Bangor, etc. R. R., 68 Me. 445 (1878); Somerset R. R. *v.* Clarke, 61 Me. 379 (1873). *Contra*, Warwick R. R. *v.* Cady, 11 R. I. 131 (1875); City Hotel *v.* Dickinson, 72 Mass. 586 (1856). In the case of Kirksey *v.* Florida, etc. Co., 7 Fla. 23 (1857), it was held that the corporate charter need not mention any capital stock or shares of stock, and yet subscriptions may be taken and enforced. In the case of Ward *v.* Griswoldville Mfg. Co., 16 Conn. 593 (1844), where the charter allowed the capital stock to vary from $5,000 to $50,000, it was assumed that the subscriptions were enforceable, although no fixed capital stock had been settled upon. In White Mountains R. R. *v.* Eastman, 34 N. H. 124 (1856), the charter allowed assessments when the lower limit of the capital stock was reached.

5 Somerset, etc. R. R. *v.* Cushing, 45 Me. 524 (1858); Troy, etc. R. R. *v.* Newton, 74 Mass. 596 (1857)—*dicta*, however, in both of these cases.

6 Pike *v.* Bangor, etc. R. R., 68 Me. 445 (1878).

subscriber is liable.[1] It is not necessary that the amount of the capital stock be fixed by formal declaration of the corporate authorities. It may be done by acts equivalent thereto. Thus, a resolution to close the books on a given day,[2] or limiting the time of subscription and then closing the subscription books,[3] or voting that a certain amount of stock in addition to existing subscriptions shall be issued,[4] are the same as, and are equivalent to, an express resolution that the capital stock shall be the amount of subscriptions thus taken.

§ 183. *Irregular incorporation of the company.*—Under the laws of most of the states, charters of incorporation are obtained by complying with the provisions of what are called general incorporating acts. Usually these acts provide that a specified number of persons, by filing at a public registry a certificate setting out certain facts, may thereby form a corporation for the purposes named in such certificate. The various steps to be taken, and the contents of each certificate, are prescribed by the statute. It frequently happens, however, that in the formation of a corporation under the statute some part of the proceeding, through inadvertence or mistake, is not strictly complied with. The same thing happens, also, under a special act incorporating a certain company, and requiring it to perform specified things in order to render the incorporation complete. These defects may render the corporate charter forfeitable at the instance of the state. Accordingly the question has arisen whether such defects in the process of becoming incorporated are a good and sufficient defense to an action by the corporation to collect subscriptions to its stock.

§ 184. When an action is brought to collect a subscription, either directly or indirectly for the benefit of corporate creditors, it is well established that the subscribers cannot defeat such action by the defense that the corporation was not an incorporation, by reason of its not having fully complied with the terms of the statute providing for such an incorporation.[5] Not only is the subscriber estopped, by

1 Somerset, etc. R. R. *v.* Cushing, 45 Me. 524 (1858). *Cf.* Kennebec, etc. R. R. *v.* Jarvis, 34 Me. 360 (1852).

2 Lexington, etc. R. R. *v.* Chandler, 54 Mass. 311 (1847).

3 Bucksport, etc. R. R. *v.* Buck, 65 Me. 536 (1876); s. c., 68 Me. 81.

4 Penobscot, etc R. R. *v.* Bartlett, 78 Mass. 244 (1858).

5 Hickling *v.* Wilson, 104 Ill. 54 (1882); Wheelock *v.* Kost, 77 Ill. 296 (1875); Casey *v.* Galli, 94 U. S. 673 (1876); Upton *v.* Hansbrough, 3 Biss. 417 (1873); s. c., 28 Fed. Cas. 839, the court saying: "I understand the rule to be well settled that, where papers having color of compliance with the statutes have been filed with the proper state officers and meet their approval, but are in fact so defective as to be incapable of supporting the corporation as against the state, they are, as against a subscriber to its capital, held sufficient to constitute a corporation *de facto*, if supported by proof of user;" Clarke *v.* Thomas,

the act of subscribing, from setting up this defense, but he is bound also by the rule that the existence of a corporation cannot be inquired into except by a direct proceeding in behalf of the state.[1] It is sufficient that the corporation exists *de facto*.[2] If, however, there is no authority of law, whatsoever, for such a corporation, the members are liable as partners.[3] It is no defense to a foreclosure suit on a mortgage given by the company that the company was fraudulently organized.[4] A subscription liability cannot be enforced, however, by one of the promoters, as a corporate creditor, where the corporation was organized to sell the product of various competing plants in violation of the anti-trust act.[5]

34 Ohio St. 46 (1874); Voorhees *v.* Receiver of Bank, 19 Ohio, 463 (1850); Ossipee Hosiery, etc. Co. *v.* Canney, 54 N. H. 295 (1874); McCune Min. Co. *v.* Adams, 35 Kan. 193 (1886); Hamilton *v.* Clarion, etc. R. R., 144 Pa. St. 34 (1891); Hause *v.* Mannheimer, 67 Minn. 194 (1897); State Bank Bldg. Co. *v.* Peirce, 92 Iowa, 668 (1894); American Homestead Co. *v.* Linigan, 46 La. Ann. 1118 (1893); Ogden Clay Co. *v.* Harvey, 9 Utah, 497 (1894). Directors cannot escape liability on their unpaid subscriptions on the ground that the company was not legally organized. Tanner *v.* Nichols, 80 S. W. Rep. 225 (Ky. 1904). It is no defense that the corporation has not paid a statutory incorporation fee to the state. Murphy *v.* Wheatley, 102 Md. 501 (1906). It is no defeuse that the company was not legally organized. McCarter *v.* Ketcham, 72 N. J. L. 247 (1905). If the corporation is *de facto*, a stockholder cannot defend on the ground that it is not *de jure*. Stanwood *v.* Sterling Metal Co., 107 Ill. App. Rep. 569 (1903). An incorporator and subscriber cannot set up irregular incorporation as a defense. Wadesboro, etc. Co. *v.* Burns, 114 N. C. 353 (1894). Thompson *v.* Reno Sav. Bank, 19 Nev. 103, 171, 242, 291, 293 (1885), says: "The certificate is made for the benefit of the public, not for the corporation or its stockholders. Those who participated in the incorporation of this bank, and, by a certificate made in pursuance of the statute, announced the amount of its capital stock, cannot, as against the creditors of the corporation, contradict their own certificate." The creditors of a consolidated company may enforce subscriptions to the stock of the constituent companies, and the irregularity of the incorporation of the consolidated company is no defense. Hamilton *v.* Clarion, etc. R. R., 144 Pa. St. 34 (1891). See also ch. XIII.

A subscriber who is sued by a receiver of the corporation on a subscription cannot set up the defense that the purpose of the corporation was illegal, in that it involved a drawing for distribution among the stockholders of lots of unequal value. Cardwell *v.* Kelly, 95 Va. 570 (1898). As against its mortgage the corporation cannot set up the defense that it was not legally organized, in that no stock was ever subscribed for. Jones *v.* Hale, 32 Oreg. 465 (1898).

1 Quoted and approved in Planters', etc. Co. *v.* Webb, 144 Ala. 666 (1905).

2 Quoted and approved in Dickason *v.* Grafton, etc. Co., Ohio Circuits (1905), p. 357.

3 See ch. XIII.

4 Gunderson *v.* Illinois Trust & Savings Bank, 100 Ill. App. Rep. 461 (1902); aff'd, 199 Ill. 422.

5 Euston *v.* Edgar, 105 S. W. Rep. 773 (Mo. 1907).

§ 185. As between the corporation itself and the subscribers there is more difficulty and doubt in determining the rule. The great weight of authority lays down the broad rule that "where there is a corporation *de facto,* with no want of legislative power to its due and legal existence; where it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be; and the questions suggested are only whether there has been exact regularity and strict compliance with the provisions of the law relating to incorporation,—it is plainly a dictate alike of justice and of public policy, that, in controversies between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, such questions should not be suffered to be raised."[1] This, doubtless, is the com-

[1] Cooley, J., in Swartwout *v.* Michigan Air Line R. R., 24 Mich. 389 (1872); American Alkali Co. *v.* Campbell, 113 Fed. Rep. 398 (1902); Torras *v.* Raeburn, 108 Ga. 345 (1899); Fish *v.* Smith, 73 Conn. 377 (1900); Harris *v.* Gateway, etc. Co., 128 Ala. 652 (1901). An important case on this subject is Tar River Nav. Co. *v.* Neal, 3 Hawks (N. C.), 520 (1825), where the court say that "even where it is shown that such charter has been granted upon a precedent condition, and persons are found in the quiet possession and exercise of those corporate rights, as against all but the sovereign the precedent condition shall be taken as performed." In this case the subscriber had participated in corporate meetings. Wilmington, etc. R. R. *v.* Thompson, 7 Jones, L. (N. C.) 387 (1860); Brookville, etc. Co. *v.* McCarty, 8 Ind. 392 (1856), holding also that the subscriber cannot set up that the corporation had forfeited its charter for misuser and non-user; Central, etc. Assoc. *v.* Alabama, etc. Ins. Co., 70 Ala. 120 (1881), where the court say: "Whoever contracts with a corporation having a *de facto* existence, the reputation of a legal corporation, in the actual exercise of corporate powers and franchises, is estopped from denying the legality of the existence of the corporation, or inquiring into irregularities attending its formation, to defeat the contract, or to avoid the liability he has voluntarily and deliberately incurred." It also holds that a subsequent statute curing the defect is constitutional and effective; Appleton Mut. F. Ins. Co. *v.* Jesser, 87 Mass. 446 (1862), the court saying that where "persons were found, with the consent and under the authority of the designated corporators, and without objection on the part of the sovereign power, actually exercising the corporate powers and claiming and using the franchise, they constituted a corporation *de facto;* and the lawfulness of their organization cannot be impeached collaterally in an action to recover an assessment;" McCarthy *v.* Lavasche, 89 Ill. 270 (1878), holding that the defense is not allowable, even though the statute creating the corporation was unconstitutional. See St. Louis, etc. Assoc. *v.* Hennessy, 11 Mo. App. 555 (1882); Slocum *v.* Providence Steam, etc. Co., 10 R. I. 112 (1871); McHose *v.* Wheeler, 45 Pa. St. 32 (1863); Tarbell *v.* Page, 24 Ill. 46 (1860), where no certificate was filed; Walworth *v.* Brackett, 98 Mass. 98 (1867); Hanover, etc. R. R. *v.* Haldeman, 82 Pa. St. 36 (1876), holding that non-user rendering the charter forfeitable is no defense; Rowland *v.* Meader Furniture Co., 38 Ohio St. 269 (1882), holding that ac-

mon law, although a carefully considered case in Missouri held to the contrary, and allowed a subscriber who had not done more than merely subscribe to set up this defense against the corporation, no

tual judgment of forfeiture is no defense; South Bay, etc. *v.* Gray, 30 Me. 547 (1849); Danbury, etc. R. R. *v.* Wilson, 22 Conn. 435 (1853); United Growers Co. *v.* Eisner, 22 N. Y. App. Div. 1 (1897), where the subscriber acted as a director; Central Plank Road Co. *v.* Clemens, 16 Mo. 359 (1852); Maltby *v.* Northwestern Va. R. R. 16 Md. 422 (1860), where the subscriber had already paid calls; Cromford, etc. Ry. *v.* Lacey, 3 Y. & J. 80 (1829), where incorporation was obtained by a false representation to parliament; Rockville, etc. Co. *v.* Van Ness, 2 Cranch, C. C. 449 (1824); s. c., 20 Fed. Cas. 1080, where the subscriber had taken part in an election; Monroe *v.* Fort Wayne, etc. R. R., 28 Mich. 272 (1873), where only three instead of five signed the certificate; Rice *v.* Rock Island, etc. R. R., 21 Ill. 93 (1859); Hunt *v.* Kansas, etc. Bridge Co., 11 Kan. 412 (1873), where the subscriber acted as director; Home Stock Ins. Co. *v.* Sherwood, 72 Mo. 461 (1880); Evansville, etc. R. R. *v.* Evansville, 15 Ind. 395 (1860); Stoops *v.* Greensburgh, etc. Co., 10 Ind. 47 (1857); Centre, etc. Turnp. Co. *v.* McConaby, 16 Serg. & R. (Pa.) 140 (1827), and cases in ch. XXXVIII on this subject; Gill *v.* Kentucky, etc. Min. Co., 7 Bush (Ky.), 635 (1871); Wood *v.* Coosa, etc. R. R., 32 Ga. 273 (1861); Hager *v.* Cleveland, 36 Md. 476 (1872); East Pascagoula Hotel Co. *v.* West, 13 La. Ann. 545 (1858). See also Oregon Cent. R. R. *v.* Scoggin, 3 Oreg. 161 (1869), holding, under a statute, that the subscription may be sued on before the organization is completed. It is no defense that the corporation was organized on a fourteen-day notice instead of fifteen days. Ossipee Hosiery, etc. Co. *v.* Canney, 54 N. H. 295 (1874). Stockholders, when sued on their statutory liability, cannot impeach the organization of the company. Aultman *v.* Waddle, 40 Kan. 195 (1888). The subscriber cannot set up that the charter was unconstitutional. Dows *v.* Naper, 91 Ill. 44 (1878). Illegal incorporation is no defense. Farmers Mut. Tel. Co. *v.* Howell, 132 Iowa 22 (1906). A person induced to subscribe for stock on the representation of an officer that the company had been properly organized, may rescind if it was not properly organized. An offer to surrender the stock in the petition is sufficient. The officer is not personally legally liable if he made the representation in good faith. Maine *v.* Midland Investment Co., 132 Iowa, 273 (1906).

In New York the first case is Dutchess Cotton Manufactory *v.* Davis, 14 Johns. 238 (1817); then came Schenectady, etc. Co. *v.* Thatcher, 11 N. Y. 102 (1854); Eaton *v.* Aspinwall, 19 N. Y. 119 (1859); Methodist, etc. Church *v.* Pickett, 19 N. Y. 482 (1859), where the court said it is sufficient for the corporation to be *de facto*. "Two things are necessary . . . in order to establish the existence of a corporation *de facto*, viz.: (1) The existence of a charter, or some law under which a corporation with the powers assumed might lawfully be created; and (2) a user, by the party to the suit, of the rights claimed to be conferred by such charter or law. . . . The rule established by law as well as by reason is, that parties recognizing the existence of corporations by dealing with them have no right to object to any irregularity in their organization." Black River, etc. R. R. *v.* Clarke, 25 N. Y. 208 (1862); Leonardsville Bank *v.* Willard, 25 N. Y. 574 (1862); Buffalo, etc. R. R. *v.* Cary, 26 N. Y. 75 (1862);

creditor's rights being involved; and the court declared that all the cases denying the defense were cases where the subscriber had

Aspinwall *v.* Sacchi, 57 N. Y. 331 (1874); Dorris *v.* French, 4 Hun, 292 (1875). Not, however, where, at the time of signing the articles, the names of the directors, required to be inserted, were not inserted. Dutchess, etc. R. R. *v.* Mabbett, 58 N. Y. 397 (1874); Cayuga Lake R. R. *v.* Kyle, 64 N. Y. 185 (1876); Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294 (1876); De Witt *v.* Hastings, 69 N. Y. 518 (1877), admitting the defense on the ground that there was no user of a corporate franchise; Ruggles *v.* Brock, 6 Hun, 164 (1875); Mead *v.* Keeler, 24 Barb. 20 (1857); Abbott *v.* Aspinwall, 26 Barb. 202 (1857); Childs *v.* Smith, 55 Barb. 45 (1869); and see Childs *v.* Smith, 46 N. Y. 34 (1871); McFarlan *v.* Triton Ins. Co., 4 Denio, 392 (1847).

This is also the rule in the federal courts. Webster *v.* Upton, 91 U. S. 65 (1875); Chubb *v.* Upton, 95 U. S. 665 (1877). *Contra*, Thompson *v.* Guion, 5 Jones, Eq. (N. C.) 113 (1859). *Cf.* Katama Land Co. *v.* Holley, 129 Mass. 540 (1880).

The lapse of the charter, by limitation of time within which work must be commenced, is a good defense. McCully *v.* Pittsburgh, etc. R. R., 32 Pa. St. 25 (1858). Subscribers to increased capital stock cannot escape liability therefor by setting up that the notice of increase was not published as required by statute. Handley *v.* Stutz, 139 U. S. 417 (1891). See also § 288, *infra*. A subscriber to stock in a West Virginia corporation doing all its business in Minnesota cannot set up in defense that the company was not legally incorporated, or that the plaintiff is not a corporation, he having participated in its incorporation. Minnesota, etc. Co. *v.* Denslow, 46 Minn. 171 (1891). It is no defense that the charter was not registered in all the counties through which the road runs. Anderson *v.* Middle, etc. R. R., 91 Tenn. 44 (1891). Concerning the question of who can complain of mistakes, irregularities, and illegalities in the corporation, see § 5, *supra*. Where the general railroad act provides that unless work is commenced within two years the charter shall be void, a subscriber for stock prior to incorporation may set up the defense that two years have elapsed and the charter is void. Bywaters *v.* Paris, etc. Ry., 73 Tex. 624 (1889). A subscriber cannot deny the incorporation of the company when sued on a note given for his subscription. Columbia Electric Co. *v.* Dixon, 46 Minn. 463 (1891). A note given to be applied in payment of a subscription in a company to be formed has been held to be good, even though the corporation was not legally formed, an attempt at incorporation having been made. Smith *v.* Gillen, 52 Ark. 442 (1890). The validity of the incorporation of an insurance company cannot be questioned by a person who has given to it a capital stock note. Raegener *v.* Hubbard, 167 N. Y. 301 (1901). A constitutional provision that "dues from corporations, other than banking, shall be secured by such individual liability of the corporators, or other means, as may be prescribed by law," does not render unconstitutional a general statute for incorporation which does not prescribe any statutory liability of stockholders, and hence that defense is not available to a subscriber who is sued on his subscription. Williams *v.* Citizens', etc. Co., 153 Ind. 496 (1899). The question of who may question the legality or regularity of the incorporation has given rise to much litigation and is fully considered elsewhere. See § 637, *infra*. So also is the question of whether stockholders may be held liable as partners by creditors of the corporation by

acquiesced, "either by the payment of part of the subscription or by becoming a director, or by attending meetings of stockholders, or by any other act indicating an acquiescence in the validity of his subscription."[1]

§ 186. There is a different class of cases, however, in which a subscriber for stock *is* allowed to make the defense that the corporation has not been regularly and legally incorporated. Where the subscriber made his contract of subscription previous to and in anticipation of the incorporation, and does not, by his subsequent acts, acquiesce in the mode of incorporation, he may set up that the corporation has not been incorporated, and that he is not liable. The rule that a person contracting with a corporation recognizes thereby its capacity to contract, and cannot afterwards deny it in that transaction, does not apply to one who subscribes before incorporation. He may insist upon the organization of a regular and legal corporation.[2]

reason of defective or unauthorized incorporation. See §§ 231–236, *infra*.

1 Kansas City Hotel Co. *v.* Hunt, 57 Mo. 126 (1874). A subscription to a company that has not paid the incorporation fee is not binding, where the statutes provide that the company shall not exercise any powers until such fee is paid, and even the subsequent payment of the fee does not render enforceable a subscription made prior thereto. Cleveland *v.* Mullin, 96 Md. 598 (1903).

2 Dorris *v.* Sweeney, 60 N. Y. 463 (1875); Rikhoff *v.* Brown's, etc. Co., 68 Ind. 388 (1879); Indianapolis Furnace, etc. Co. *v.* Herkimer, 46 Ind. 142 (1874); Nelson *v.* Blakey, 47 Ind. 38 (1874); McIntyre *v.* McLain Ditching Assoc., 40 Ind. 104 (1872); Richmond Factory Assoc. *v.* Clarke, 61 Me. 351 (1873); Reed *v.* Richmond Street R. R., 50 Ind. 342 (1875); Taggart *v.* Western Md. R. R., 24 Md. 563 (1866), the court saying: "The preponderance of authority in favor of a strict compliance with the provisions of the charter, in cases of subscription prior to the organization of the company, is such as is not to be disregarded." *Cf.* Buffalo, etc. R. R. *v.* Hatch, 20 N. Y. 157 (1859). A subscriber for stock prior to incorporation may defeat the subscription by the defense that the company has not been legally incorporated. Capps *v.* Hastings, etc. Co., 40 Neb. 470 (1894). A note given to pay for stock in a corporation to be organized cannot be enforced by the payee where the corporation has not been formed. Northwestern, etc. Co. *v.* Lanning, 83 Minn. 19 (1901). See also § 63, *supra*. Under the Indiana statute authorizing a corporation for manufacturing *or* various other purposes, a corporation cannot be formed for several of these purposes, and hence a subscription made before incorporation cannot be enforced by a company organized for several objects. Williams *v.* Citizens', etc. Co., 25 Ind. App. 351 (1900). In suing on a subscription made prior to incorporation the corporation must allege in detail that it complied with the statutory steps to become a corporation. Brooksville R. R. *v.* Byron, 50 S. W. Rep. 530 (Ky. 1899). A failure to acknowledge the articles of incorporation is a good defense to a subscriber to them who is sued upon his subscription. Greenbrier Ind. Exposition *v.* Rodes, 37 W. Va. 738 (1893). The "records, books, and minutes" of a corporation are sufficient evidence of its incorporation.

§ 187. *Ultra vires acts of the directors of the corporation.*—A subscriber for stock in a corporation cannot defeat an action to collect such subscription by the defense that the directors or the corporation itself have done corporate acts which are beyond the corporate powers.[1] There are other remedies open to the subscriber. He may either enjoin such *ultra vires* acts, or may have them set aside if already accomplished.[2] This defense is clearly distinguishable from the common defense of amendments to the charter, by the fact that the acts here complained of have no sanction from the legislative authorities.[3] Thus, it has been held that a subscriber cannot defeat

Glenn *v.* Orr, 96 N. C. 413 (1887). A subscriber may deny that a consolidated company which succeeds his own was legally incorporated. Mansfield, etc. R. R. *v.* Stout, 26 Ohio St. 241 (1875); Brown *v.* Dibble, 65 Mich. 520 (1887). In suing on an original subscription the corporation must allege that it has been duly incorporated. The payment of part of the subscription is no waiver of the defense. Schloss *v.* Montgomery Trade Co., 87 Ala. 411 (1889). Indefiniteness in the statement of the objects of incorporation is no defense. Owenton, etc. Co. *v.* Smith, 13 S. W. Rep. 426 (Ky. 1890).

1 Cravens *v.* Eagle Cotton Mills Co., 120 Ind. 6 (1889); First Municipality of New Orleans *v.* Orleans Theatre Co., 2 Rob. (La.) 209 (1842); Hannibal, etc. Co. *v.* Menefee, 25 Mo. 547 (1857); Vicksburg, etc. R. R. *v.* McKean, 12 La. Ann. 638 (1857); Smith *v* Tallassee, etc. P. R. Co., 30 Ala. 650 (1857); City Hotel *v.* Dickinson, 72 Mass. 586 (1856); Courtright *v.* Deeds, 37 Iowa, 503 (1873); Hammett *v.* Little Rock, etc. R. R., 20 Ark. 204 (1859). In Macedon, etc. Co. *v.* Lapham, 18 Barb. 312 (1854), however, an *ultra vires* extension of the line was held to be a good defense. A subscriber cannot set up that the corporation has not complied with the provisions of its charter. Toledo, etc. R. R. *v.* Johnson, 49 Mich. 148 (1882). *Ultra vires* acts and no notice of meetings are not good defenses. Cartwright *v.* Dickinson, 88 Tenn. 476 (1890). If a manufacturing corporation does not locate its works in the place prescribed by its articles of incorporation, a subscriber to stock may withdraw his subscription. Auburn, etc. Works *v.* Schultz, 143 Pa. St. 256 (1891).

2 "The stockholder has his remedy by injunction; not to enjoin the collection of calls due upon his stock, but to restrain the corporation from the particular violation or abuse of its charter complained of." Mississippi, etc. R. R. *v.* Cross, 20 Ark. 443 (1859). See also Illinois, etc. R. R. *v.* Cook, 29 Ill. 237 (1862). In *Ex parte* Booker, 18 Ark. 338 (1857), an application for an injunction to restrain the corporation from enforcing the payment of a subscription, on the ground that the corporation had committed *ultra vires* acts, was refused. And see also ch. XXVIII, *infra*. An assessment on irrigation stock to be used for a purpose outside of the charter powers, cannot be collected, and a forfeiture and sale of the stock for failure to pay is void. Seeley *v.* Huntington, etc. Ass'n, 27 Utah 179 (1904).

3 Caley *v.* Philadelphia R. R., 80 Pa. St. 363 (1876). A change in the law between the time of making a subscription and the obtaining of the charter may release or render illegal the subscriptions. Knox *v.* Childersburg Land Co., 86 Ala. 180 (1889). Where the statutes under which the

an action to collect his subscription by showing that the corporation has, without authority of law, and in excess of its powers, executed a lease or sale of the road;[1] or illegally issued its bonds;[2] or purchased shares of its own stock[3] or the stock of another corporation,[4] or changed the location or route of the road.[5] The last instance, especially, has been a frequent defense, but it has been uniformly discountenanced by the courts where the change in the route was made, not by an amendment to the charter, but by the arbitrary, unauthorized act of the corporate authorities. Where an insurance company, having authority to sell its property, proceeds to sell to another company which has no authority to buy, the transaction is illegal, and a stockholder in the former who agrees to take stock in the latter in exchange for his old stock is not bound to carry out the transaction.[6] It is no defense to an action to enforce a subscription that after incorporation the company proceeded to form an illegal combination of competitors in trade.[7] The New York courts, however, have refused to hold a New York stockholder in an English corporation liable for his unpaid subscription, where under a plan of reorganization, sanctioned by the English courts, in accordance with English law, the amount collected is to go to a reorganized company, while other stockholders need not pay their subscriptions if they take part in the reorganized company and pay a small sum; especially where,

company is organized allow the objects of the company to be changed on a vote of the stockholders, a dissenting stockholder is not released from his subscription by such change. Mercantile Statement Co. *v.* Kneal, 51 Minn. 263 (1892). For the principles of law herein relative to amendments to the charter, see § 502, etc., *infra*.

1 Hays *v.* Ottawa, etc. R. R., 61 Ill. 422 (1871); Ottawa, etc. R. R. *v.* Black, 79 Ill. 262 (1875); Illinois Midland Ry. *v.* Barnett, 85 Ill. 313 (1877). See also Tuttle *v.* Michigan, etc. R. R., 35 Mich. 247 (1877); Troy, etc. R. R. *v.* Kerr, 17 Barb. 581 (1854). Or the whole of a business. Plate Glass Univ. Ins. Co. *v.* Sunley, 8 El. & Bl. 47 (1857). But see South Georgia, etc. R. R. *v.* Ayres, 56 Ga. 230 (1876).

2 Merrill *v.* Reaver, 50 Iowa, 404 (1879).

3 *Re* Republic Ins. Co., 3 Biss. 452 (1873); s. c., 20 Fed. Cas. 544.

4 Chetlain *v.* Republic Life Ins. Co., 86 Ill. 220 (1877).

5 Central P. R. Co. *v.* Clemens, 16 Mo. 359 (1852); Mississippi, etc. R. R. *v.* Cross, 20 Ark. 443 (1859). *Cf.* Rives *v.* Montgomery, etc. Co., 30 Ala. 92 (1857). Where, however, the terminus was made two thousand feet away from the location designated by charter, this fact was held to constitute *prima facie* a good defense. Chartiers R. R. *v.* Hodgens, 77 Pa. St. 187 (1874). *Cf.* s. c., 85 Pa. St. 501. See also § 82, *supra*. A change in the route under statutes existing before the incorporation does not release subscribers. Armstrong *v.* Karshner, 47 Ohio St. 276 (1890).

6 Dougan's Case, 28 L. T. Rep. 60 (1873); aff'd, 8 Ch. App. 540 (1873).

7 U. S. Vinegar Co. *v.* Foehrenbach, 148 N. Y. 58 (1895).

if all the stockholders paid in full, the amount would be more than necessary to pay the debts.[1]

§ 188. *Frauds and mismanagement of directors.*—This defense is very similar to the preceding one, and is governed by the same rules of law. A stockholder cannot defeat an action to collect his subscription by the defense that the corporate affairs have been managed fraudulently or recklessly or negligently.[2] The stockholder's remedies for such evils are of a different nature. For fraud he may bring the guilty parties to an accounting;[3] for mismanagement his only remedy is the corporate elections. In no case has he been allowed to escape liability on his subscription by reason thereof. Thus, it is no defense that the corporate authorities fraudulently placed an overvaluation on property purchased by them for the corporation;[4] nor that they have made a fraudulent contract with a construction company,[5] or that the insolvency of the company is due to debts incurred in buying land from the directors, such contract being voidable instead of void, and being subject to the ratification of the majority of the stockholders.[6]

1 Bank of China *v.* Morse, 168 N. Y. 458 (1901).

2 People *v.* Barnett, 91 Ill. 422 (1879); Chetlain *v.* Republic L. Ins. Co., 86 Ill. 220 (1877); Glenn *v.* Rosborough, 48 S. C. 272 (1896); Merrill *v.* Reaver, 50 Iowa, 404 (1879). Depreciation of the stock by reason of mismanagement is no defense. People *v.* Barnett, 91 Ill. 422 (1879). It is no defense that the funds of the company have been wasted. Cook *v.* Hopkinsville, etc. Co., 32 S. W. Rep. 748 (Ky. 1895). Mere mismanagement is no defense. Hards *v.* Platte, etc. Co., 46 Neb. 709 (1896); Oldham *v.* Mt. Sterling Imp. Co., 45 S. W. Rep. 779 (Ky. 1898). Fraud and mismanagement on the part of the directors and corporate officers is not a valid defense herein. *Re* Republic Ins. Co., 3 Biss. 452 (1873); s. c., 20 Fed. Cas. 544.

3 See ch. XXXIX. In Hodgkinson *v.* National, etc. Ins. Co., 26 Beav. 473 (1859), equity restrained the enforcement of calls already made, by reason of the fraud of the directors; but it was conceded in this case that the subscriber was still liable on his subscription.

4 Hornaday *v.* Indiana, etc. R. R., 9 Ind. 263 (1857); Dorris *v.* French, 4 Hun, 292 (1875), where a patent-right was purchased by the directors from themselves, for the corporation, at an exorbitant price.

5 People *v.* Logan County, 63 Ill. 374, 387 (1872).

6 Urner *v.* Sollenberger, 89 Md. 316 (1899). But where the chief promoter of a proposed manufacturing corporation obtains donations from property owners to the proposed corporation on his agreement that $75,000 of stock should be subscribed for within a certain time, and then proceeds to organize the company, he himself subscribing for $25,000 of the stock, and the corporation then purchases certain worthless patents and agency contracts, and issues therefor $63,250 of full-paid stock, including the $25,000 subscribed for by him, and afterwards the corporation collects $4,000 of such donations, and borrows money from such promoter and gives him a mortgage therefor, his mort-

§ 189. *Delay and abandonment of the enterprise.*—As a general rule, it is no defense to an action on a subscription to allege that the enterprise has been unduly delayed.[1] The defense frequently is that there has been a non-user of the corporate franchises.[2] It is, however, a well-established principle that non-user of corporate franchises can be complained of only by the state or in the name of the state.[3] Hence, a subscriber has been held not to be discharged by the fact that the corporation was engaged thirteen years in completing the enterprise—a turnpike.[4] Nor does a temporary abandonment of the work release the subscriber.[5] But when the corporate work was not commenced for nine years, and in the meantime the subscriber had acted on the supposition of an abandonment and had sold property which the road was expected to benefit, he was held not liable on the subscription.[6] Where a person signs an agreement to subscribe, but for three years after incorporation the agreement is never acted upon and no stock is ever issued to him or assessment made upon him, he is not liable on such subscription to creditors.[7]

gage is not good as against the parties who donated the $4,000. Moore *v.* Universal, etc. Co., 122 Mich. 48 (1899).

1 Pickering *v.* Templeton, 2 Mo. App. 424 (1876); Miller *v.* Pittsburgh, etc. R. R., 40 Pa. St. 237 (1861), where there was a delay of two and a half years, the court saying: "Until it can be shown how railroads can be built without money, no such defense as is here set up can prevail;" First Nat. Bank *v.* Hurford, 29 Iowa, 579 (1870), where there was a delay in the performance of a condition subsequent to the subscription. See also Union Hotel Co. *v.* Hersee, 79 N. Y. 454 (1880); reversing 15 Hun, 371. Boyle's Case, 54 L. J. (Ch.) 550 (1885), holds that after a winding-up has commenced there can be no withdrawal; but the court in a *dictum* clearly says that an unreasonable delay in organizing will authorize a withdrawal by the subscriber. But where the charter has lapsed by reason of not complying with its terms, the stockholder is not liable. Sodus Bay, etc. R. R. *v.* Lapham, 43 Hun, 314 (1887).

2 Mississippi, etc. R. R. *v.* Cross, 20 Ark. 443 (1855); Hammett *v.* Little Rock, etc. R. R., 20 Ark. 204 (1859).

3 See § 637, *infra*.

4 Gibson *v.* Columbia, etc. Co., 18 Ohio St. 396 (1868).

5 McMillan *v.* Maysville, etc. R. R., 15 B. Mon. (Ky.) 218 (1854).

6 Fountain Ferry Turnp. Co. *v.* Jewell, 8 B. Mon. (Ky.) 140 (1848). A note in payment of a subscription, payable by its terms after the road had been partially completed, is not enforceable where the enterprise was abandoned and fourteen years afterwards was revived and the road built. Blake *v.* Brown, 80 Iowa, 277 (1890).

7 United States, etc. Co. *v.* Davies, 2 Kan. App. 611 (1895). Where a person signs an agreement in October, 1892, "to take" certain preferred stock in a proposed corporation, but the corporation is not fully organized until June, 1894, the delay in accepting the contract is unreasonable and the corporation cannot enforce the subscription. Carter, etc. Co. *v.* Hazzard, 65 Minn. 432 (1896). An indefinite agreement of a person to take stock in a water company to be organized cannot be enforced by a corporation which has obtained a charter but has

An abandonment of part of the enterprise, however, is no defense.[1] A subscriber cannot defeat the subscription by the fact that the corporation has not completed, and has no intention of completing, the road in its entirety;[2] nor by the fact that the road has been sold under foreclosure.[3] In Pennsylvania a failure on the part of the corporation to make a call for the subscription within six years, the statutory time of limitations on the collection of parol debts, is held to constitute an abandonment of the subscription, and to be a good defense.[4] If the corporation is insolvent, and the subscription is needed to pay corporate creditors, abandonment cannot be set up.[5]

§ 190. *Failure of the corporate enterprise.*—The entire failure of the enterprise and the insolvency of the corporation constitute no defense to an action on calls.[6] This defense would seem on the face of

never held an organization meeting nor taken subscriptions to stock. Nemaha, etc. Co. *v.* Settle, 54 Kan. 424 (1894). In Harrison Nat. Bank *v.* Votaw, 51 Kan. 362 (1893), the creditors of a corporation failed to enforce subscriptions made prior to the incorporation, there being evidence of an intent to abandon the original subscriptions and to obtain others.

1 Dorman *v.* Jacksonville, etc. Co., 7 Fla. 265 (1857). It is no defense that the company had abandoned a part of its business nor that the company was organized for the sole benefit of the charter members. Dallas, etc. Mills *v.* Clancey, 15 S. W. Rep. 194 (Tex. 1891). Where a company is organized to work gold mines in a specified place, as well as elsewhere, and the company actually works mines elsewhere, but not in the specified place, the main purpose of the company is not carried out and a dissolution may be had. *Re* Coolgardie, etc. Mines, 76 L. T. 269 (1897).

2 Buffalo, etc. R. R. *v.* Gifford, 87 N. Y. 294 (1882), aff'g 22 Hun, 359. It is no defense that the road has not been fully completed. Armstrong *v.* Karshner, 47 Ohio St. 276 (1890); Lesher *v.* Karshner, 47 Ohio St. 302 (1890).

3 Buffalo, etc. R. R. *v.* Gifford, 87 N. Y. 294 (1882), aff'g 22 Hun, 359.

4 Pittsburgh, etc. R. R. *v.* Byers, 32 Pa. St. 22 (1858). The same rule is stated less broadly in McCully *v.* Pittsburgh, etc. R. R., 32 Pa. St. 25 (1858), where the court says: "If the delay was not satisfactorily accounted for, subscribers would be at liberty, after that lapse of time, to consider the enterprise abandoned." In this case an actual abandonment and return of subscription money to other subscribers was held to release all the subscribers. In Delaware, etc. R. R. *v.* Rowland, 9 Atl. Rep. 929 (Pa. 1887), it was submitted to the jury whether the subscriber had been released by an abandonment of the enterprise. See also § 195, *infra*. *Cf.* § 638, *infra*, where the charter lapsed.

5 Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294 (1876); Smith *v.* Gower, 2 Duv. (Ky.) 17 (1865); Hardy *v.* Merriweather, 14 Ind. 203 (1860); and see the defense in § 190, *infra*.

6 Bish *v.* Bradford, 17 Ind. 490 (1861); Morgan County *v.* Thomas, 76 Ill. 120, 141 (1875); Four-Mile Valley R. R. *v.* Bailey, 18 Ohio St. 208 (1868). Assessments are collectible though the work is not completed. Red Wing Hotel Co. *v.* Friedrich, 26 Minn. 112 (1879). See Buffalo, etc. R. R. *v.* Gifford, 87 N. Y. 294 (1882), aff'g 22 Hun, 359.

it to be frivolous, and yet is occasionally set up. Under the American doctrine a subscription is enforceable most of all when it is needed to pay corporate creditors. This defense is closely allied to those that precede, and differs little from the defense of abandonment of the enterprise.

§ 191. *Secret agreement as to liability—Subscriptions of other subscribers released or canceled, or on special terms.*—It is no defense for one subscriber, when sued upon his subscription, to allege that the subscriptions of others have been canceled, or that secret and more favorable terms were given to them than to him. If there has been a legal cancellation of other subscriptions the defendant cannot complain.[1] If he has the same right to a cancellation he may obtain it by a suit for that purpose.[2] A secret agreement of the corporation with certain subscribers to stock, whereby they are to be released from payment, or to have some other advantage not common to all the subscribers, is no defense to a subscriber who was not promised the same advantages.[3] In fact secret agreements to release are void, and the subscribers receiving them are liable on their subscriptions absolutely, as though no special advantages had been prom-

1 Rensselaer, etc. Co. *v.* Wetsel, 21 Barb. 56 (1855). If, however, the cancellation is on account of an abandonment of the enterprise, any other subscriber, when sued subsequently on his subscription, may set up such abandonment and cancellation and thereby defeat the action. McCully *v.* Pittsburgh, etc. R. R., 32 Pa. St. 25 (1858).

2 Crawford County *v.* Pittsburgh, etc. R. R., 32 Pa. St. 141 (1858).

3 Anderson *v.* Newcastle, etc. R. R., 12 Ind. 376 (1859); Jewett *v.* Valley Ry., 34 Ohio St. 601 (1878); Agricultural, etc. Ins. Co. *v.* Fitzgerald, 15 Jur. 489 (1850); Memphis Branch R. R. *v.* Sullivan, 57 Ga. 240 (1876); Hall *v.* Selma, etc. R. R., 6 Ala. (N. S.) 74 (1844); Connecticut, etc. R. R. *v.* Bailey, 24 Vt. 465 (1852); Jewell *v.* Rock River Paper Co., 101 Ill. 57 (1881); Berry *v.* Yates, 24 Barb. 199 (1857); Nickerson *v.* English, 142 Mass. 267 (1886). A secret agreement that a subscriber for stock prior to incorporation shall not be required to take the stock is no defense as against the corporation. Greater, etc. Co. *v.* Riley, 210 Pa. St. 283 (1904). In Galena, etc. R. R. *v.* Ennor, 116 Ill. 55 (1886), the court said: "Such secret agreement was fraudulent as to the other subscribers, and was void and of no avail, and the subscription is to be regarded as a valid one for the amount subscribed." See also Thompson *v.* Reno Sav. Bank, 19 Nev. 103, 171, 242, 291, 293 (1885). The subscriber has the burden of proof that other subscriptons are colorable and fictitious. Hayden *v.* Atlanta Cotton Factory, 61 Ga. 233 (1878). The case of Rutz *v.* Esler, etc. Mfg. Co., 3 Ill. App. 83 (1878), is contrary to the general rule. The case of New York Exchange Co. *v.* De Wolf, 31 N. Y. 273 (1865), reversing 5 Bosw. 593, holds that a subscriber may defeat an action on his subscription by showing that other subscriptions were unauthorized and not enforceable. It is fraudulent to represent that a subscription is bona fide when in fact there was an agreement that the subscriber should pay only half as much as other subscribers. State Bank *v.* Cook, 125 Iowa 111 (1904).

ised.[1] Being so, a subscriber, though he did not participate therein, cannot complain. It is no defense that the subscription of another person has been marked "canceled," where there is no proof that defendant subscribed on the faith of such other subscription.[2] The fact that the corporation has forfeited the stock of other subscribers, and has compromised with still others, is no defense to a sub-

1 Quoted and approved in Armstrong *v.* Danahy, 75 Hun, 405 (1894). It is no defense that some other stockholder has not been similarly called on his subscription, inasmuch as this does not release him. Hastings Lumber Co. *v.* Edwards, 188 Mass. 587 (1905). A note given in payment of the subscription price of stock in a national bank may be enforced by the receiver, and it is no defense that the president had agreed that the stock might be returned and the note canceled. Atwater *v.* Stromberg, 75 Minn. 277 (1899). A director cannot defeat a note given in payment of a subscription by the defense that there was a secret agreement that he should not pay. Shuey *v.* Holmes, 22 Wash. 193 (1900). A secret agreement to release a subscriber does not release others, inasmuch as the agreement is invalid. Wilson *v.* Hundley, 96 Va. 96 (1898). A person who subscribes for stock in a bank and gives his note in payment therefor cannot defeat the note on the ground that the president agreed that it need not be paid. Mead *v.* Pettigrew, 11 S. Dak. 529 (1899). A secret agreement between the subscriber and the directors that he shall not be called upon to pay is illegal. Jackson, etc. Co. *v.* Walle, 105 La. 89 (1900). As against corporate creditors a subscriber cannot evade his liability by showing a separate agreement between himself and the corporation to the effect that the stock was to be delivered to him at a future time and that in the meantime he was to advance money to the corporation to the amount of the par value of the stock to be repaid to him out of contracts. Beals *v.* Buffalo, etc. Co., 49 N. Y. App. Div. 589 (1900). Any secret agreement limiting the liability of a stockholder to his unpaid subscription is void as against corporate creditors. Such agreement, however, is binding on such corporate creditors as are chargeable with notice thereof. Carnahan *v.* Campbell, 158 Ind. 226 (1902). *Cf.* previous decision in 59 N. E. Rep. 1054. A secret written agreement whereby a subscriber is to pay when so disposed is fraudulent and void. Yonkers, etc. Co. *v.* Jones, 30 N. Y. App. Div. 316 (1898). Even though it is legal under the statutes of England to provide that no calls shall be made on certain shares, except upon a winding up, yet where the directors are the subscribers for such shares and do not fully inform other subscribers of the situation, they may be compelled at the instance of a stockholder to pay at the same time that the others pay, even though there was no actual fraud, the parties having acted in good faith. Alexander *v.* Automatic, etc. Co., [1900] 2 Ch. 56, rev'g [1899] 2 Ch. 302. A secret agreement of a corporation to a stockholder that it will take back his stock at the end of two years at a ten per cent. advance is void as to creditors. Olmstead *v.* Vance, etc. Co., 196 Ill. 236 (1902); Vance, etc. Co. *v.* Bentley, 92 Ill. App. 287 (1900). See also § 137 and § 170, *supra*.

2 Whittlesey *v.* Frantz, 74 N. Y. 456 (1878). It is no defense that the subscriptions of other parties were erased and that such parties were released by the board of directors. Bristol, etc. Co. *v.* Selliez, 175 Pa. St. 18 (1896).

scriber sued for calls.[1] So, also, the failure of another subscriber to pay the percentage required by statute is not a defense.[2] Where several subscribers refused to take their stock, and finally, to induce them to do so, a party agrees secretly with one of them to purchase his holdings, such an agreement may be enforced.[3]

§ 192. *Failure of the corporation to tender a certificate.*—It is no defense to an action on a subscription to allege that the corporation has not delivered or tendered to the defendant the certificate of stock to which he is entitled.[4] The certificate is merely the stock-

1 Dorman *v.* Jacksonville, etc. Co., 7 Fla. 265 (1857). It is no defense that other unpaid subscriptions have been compromised, where it appears that even if no compromise had been made the entire subscriptions would have been insufficient to pay all the debts. Bennett *v.* Glenn, 55 Fed. Rep. 956 (1893).

2 Swartwout *v.* Michigan Air Line R. R., 24 Mich. 389 (1872).

3 Traphagen *v.* Sagar, 63 Minn. 317 (1895). A contract whereby a party who is about to sell his business to a corporation to be organized agrees secretly to give $5,000 of stock to a party who agrees to subscribe openly for $5,000 of the stock is not enforcible, it appearing that the party who was thus to get the extra stock objected to the amount of stock to be issued to the vendor and withdrew his objection only upon this agreement, and it appearing also that he afterwards became a director and voted to purchase the property at the price demanded by the vendor. Koster *v.* Pain, 41 N. Y. App. Div. 443 (1899).

4 Burr *v.* Wilcox, 22 N. Y. 551 (1860), aff'g 6 Bosw. 198; Chandler *v.* Northern Cross R. R., 18 Ill. 190 (1856); Webb *v.* Baltimore, etc. R. R., 77 Md. 92 (1893); Holland *v.* Duluth, etc. Co., 65 Minn. 324 (1896); Walter, etc. Co. *v.* Robbins, 56 Minn. 48 (1893); San Joaquin, etc. Co. *v.* Beecher, 101 Cal. 70 (1894); Nebraska Exp. Assoc. *v.* Townley, 46 Neb. 893 (1896); Barron *v.* Burrill, 86 Me. 66 (1893); Glenn *v.* Rosborough, 48 S. C. 272 (1896); Miller *v.* Wild Cat, etc. Co., 52 Ind. 51 (1875); New Albany, etc. R. R. *v.* McCormick, 10 Ind. 499 (1858); Slipher *v.* Earhart, 83 Ind. 173 (1882); Paducah, etc. R. R. *v.* Parks, 86 Tenn. 554 (1888); Heaston *v.* Cincinnati, etc. R. R., 16 Ind. 275 (1861); Kennebec, etc. R. R. *v.* Jarvis, 34 Me. 360 (1852); Chaffin *v.* Cummings, 37 Me. 76 (1853). In behalf of corporate creditors, where the corporation is insolvent, a person is often held to be a stockholder although no certificate has been issued to him, and the ordinary *indicia* of stockholdership do not indicate that he is a stockholder. Sanger *v.* Upton, 91 U. S. 56 (1875); Upton *v.* Tribilcock, 91 U. S. 45 (1875); Slee *v.* Bloom, 19 Johns. 456 (1822); Dorris *v.* French, 4 Hun, 292 (1875); Hamilton, etc. Co. *v.* Rice. 7 Barb. 157, 167 (1849); Clark *v.* Farrington, 11 Wis. 306, 327 (1860); Haynes *v.* Brown, 36 N. H. 545, 563 (1858); Chaffin *v.* Cummings, 37 Me. 76, 83 (1853); Griswold *v.* Seligman, 72 Mo. 110 (1880); Boggs *v.* Olcott, 40 Ill. 303 (1866); *Re* South Mountain, etc. Co., 7 Sawy. 30 (1881); Upton *v.* Burnham, 3 Biss. 431 (1873); s. c., 28 Fed. Cas. 831; Payne *v.* Elliot, 54 Cal. 339 (1880). The subscriber may stipulate otherwise in his subscription. Summers *v.* Sleeth, 45 Ind. 598 (1874). No certificate need be tendered by the corporation to sustain its suit to collect the subscription. Farmers Mut. Tel. Co. *v.* Howell, 132 Iowa 22 (1906). In general, see also Schaeffer *v.* Missouri Home

holder's evidence of title to his stock. It is not the stock itself, but only a convenient representative of it. He would be a full stockholder, with all the rights of one, even if the certificates were never issued at all.[1] Consequently, since it is for him to demand the certificate when he wishes it, and not for the corporation to tender it, it is no defense for him to allege that he has never received the paper representative of his stock. The corporation must, however, be in a

Ins. Co., 46 Mo. 248 (1870); South Georgia, etc. R. R. *v.* Ayres, 56 Ga. 230 (1876); Vawter *v.* Ohio, etc. R. R., 14 Ind. 174 (1860); Spear *v.* Crawford, 14 Wend. 20 (1835); Chester Glass Co. *v.* Dewey, 16 Mass. 94 (1819); Fulgam *v.* Macon, etc. R. R., 44 Ga. 597 (1872); Minneapolis Harvester Works *v.* Libby, 24 Minn. 327 (1877); Blyth's Case, L. R. 4 Ch. D. 140 (1876); Agricultural Bank *v.* Burr, 24 Me. 256 (1844); Hawley *v.* Upton, 102 U. S. 314 (1880); Wheeler *v.* Millar, 90 N. Y. 353 (1882), aff'g 24 Hun, 541; Wemple *v.* St. Louis, etc. R. R., 120 Ill. 196 (1887). A tender of a certificate of stock is unnecessary, except where the stock is sold on an executory contract, instead of being subscribed for. Kohlmetz *v.* Calkins, 16 N. Y. App. Div. 518 (1897). The case of Clark *v.* Continental Imp. Co., 57 Ind. 135 (1877), holds that, where the action is for the whole subscription or the last instalments, a tender of the certificate, on condition of payment, is necessary. St. Paul, etc. R. R. *v.* Robbins, 23 Minn. 439 (1877), holds that a tender is necessary where the issue is of preferred stock, after the whole original capital stock has been issued. Where a subscriber has tendered his subscription and demanded a certificate and is refused, a receiver cannot, upon insolvency of the company, hold him liable. Potts *v.* Wallace, 32 Fed. Rep. 272 (1887). A certificate of stock need not be tendered before suit is brought. Webb *v.* Baltimore, etc. R. R., 77 Md. 92 (1893); Astoria, etc. R. R. *v.* Hill, 20 Oreg. 177 (1890); California, etc. Co. *v.* Callender, 94 Cal. 120 (1892); Columbia Electric Co. *v.* Dixon, 46 Minn. 463 (1891); Dallas, etc. Mills *v.* Clancey, 15 S. W. Rep. 194 (Tex. 1891); Marson *v.* Deither, 49 Minn. 423 (1892). A subscriber to the increased capital stock who has actually paid part of the price cannot recover back the money upon the corporate insolvency on the ground that no certicate was issued. Pacific Nat. Bank *v.* Eaton, 141 U. S. 227 (1891); Thayer *v.* Butler, 141 U. S. 234 (1891); Butler *v.* Eaton, 141 U. S. 240 (1891). A consolidated company claiming a subscription made to one of the constituent companies must prove a tender of the stock. Pope *v.* Lake County, 51 Fed. Rep. 769 (1892). A corporation cannot be compelled by the subscriber for stock to issue a certificate therefor before it has been fully paid up, the stock being a part of the increased capital stock. Baltimore, etc. Ry. *v.* Hambleton, 77 Md. 341 (1893). The issue of certificates of stock is not necessary to render the subscriber liable. Mathis *v.* Pridham, 1 Tex. Civ. App. 58 (1892). In suing on a subscription a corporation need not prove that it had authority to issue stock. Atlantic, etc. Co. *v.* Kreusler, 40 N. Y. App. Div. 268 (1899). It is no defense that a certificate has not been issued to the subscriber. Beals *v.* Buffalo, etc. Co., 49 N. Y. App. Div. 589 (1900). *Cf.* § 61, *supra*, and § 373, *infra*.

[1] Fulgam *v.* Macon, etc. R. R., 44 Ga. 597 (1872). The issuing of a certificate is not necessary to constitute stockholdership. Cartwright *v.* Dickinson, 88 Tenn. 476 (1890).

position to issue such certificate.[1] If certificates for the whole capital stock have already been issued, the defendant subscriber, by this fact, may defeat the action to collect his subscription.[2] It has also been held that the plaintiff corporation must aver a readiness and willingness to deliver the certificate of stock.[3] The duty of a corporation to issue certificates of stock is considered elsewhere.[4] Where

1 McCord *v.* Ohio, etc. R. R., 13 Ind. 220 (1859). A pledgee of an underwriter's agreement may have difficulty in tendering performance to the underwriters. Litchfield, etc. Society *v.* Dibble, 67 Atl. Rep. 476 (Conn. 1907).

2 Quoted and approved in Knoxville, etc. R. R. *v.* Mayor, 98 Tenn. 1 (1896); Burrows *v.* Smith, 10 N. Y. 550 (1853). See also § 58, *supra*. The stockholder may set up that the corporation had no stock to offer him. Lathrop *v.* Kneeland, 46 Barb. 432 (1866). *Cf.* Mackley's Case, L. R. 1 Ch. D. 247 (1875). Even though a corporation has contracted to sell all its stock to another party, yet a subscriber is liable if the corporation has arranged to issue the stock to him upon payment. Leigh *v.* Chattanooga, etc. R. R., 104 Ga. 13 (1898).

3 James *v.* Cincinnati, etc. R. R., 2 Disney (Ohio), 261 (1858). The corporation, in suing for the subscription, should allege a readiness and willingness to deliver the certificates of stock upon payment. Walter, etc. Co. *v.* Jefferson, 57 Minn. 456 (1894). A tender of the stock is not necessary where the corporation alleges that it is ready and willing to issue the stock. Seymour *v.* Jefferson, 74 N. W. Rep. 149 (Minn. 1898).

4 See § 61, *supra*. An incorporator who subscribes for eleven shares of stock, but does not pay for them nor claim them for ten years, and in the meantime they have been issued to the real parties in interest, cannot then claim them. Taylor *v.* Johnson, 99 S. W. Rep. 320 (Ky. 1907). In a suit to compel the issue of certificates of stock to a transferee it must be alleged that a transfer has been made on the books or that the company should have made such transfer. Lacaff *v.* Dutch, etc. Co., 31 Wash. 566 (1903). A subscriber cannot rescind his subscription on the ground that the certicates had never been issued to him. Cotter *v.* Butte, etc. Co., 31 Mont. 129 (1904). It has been held in Maryland that a subscriber to the increased capital stock of a company is not entitled to a certificate until he has paid for the stock in full, and such subscriber is not entitled to the rights of a stockholder until he has paid in full. The court stated that such stockholders are not entitled to dividends equally with other stockholders. The basis of the decision was the difference between original stock and increased stock. The court refused to compel the corporation to issue a certificate. Baltimore, etc. Ry. *v.* Hambleton, 77 Md. 341 (1893). A subscriber for stock who has given his note in payment may file a bill in equity to compel the corporation to recognize him as a stockholder, where the corporation denies that he is a stockholder, and has issued all its stock to other parties who took with notice. It is unnecessary to bring into the suit the other parties who actually have the stock, the stock having been held by the company as collateral security. Morey *v.* Fish, etc. Co., 108 Wis. 520 (1901). Mandamus will not issue to compel a corporation to issue to a purchaser treasury stock which he has purchased, even though he has paid for the same, unless the stock has some peculiar and special value different

a corporation receives money in payment for increased capital stock to be issued and never increases its stock, and the money has been used in the business and the corporation becomes insolvent, the subscriber is not entitled to repayment in preference to other creditors.[1]

§ 193. *Set-off and counter-claim.*—It seems to be well established that, when a corporation has become insolvent, and the subscriptions for stock are being enforced for the benefit of corporate creditors, a subscriber cannot, in the suit brought to collect his subscription, set up a counter-claim or set-off.[2] This rule is founded in equity and

from other similar stock in that company, or unless the control of the corporation is at issue. The legal right to the stock must also be clear. State *v.* Jumbo, etc. Min. Co., 94 Pac. Rep. 74 (Neb. 1908). See also § 58, *supra*, and § 766c, *infra*. Even though a person subscribes for stock in a turnpike company in 1857 and does not claim the stock or dividends, and after seven years does not attend meetings or pay any attention to his interest, and dies in 1868, nevertheless his representatives may collect the dividends due on the stock and may claim the stock. The statute of limitations is no bar if the company has never notified him that his right to the stock is disputed. Owingsville, etc. Co. *v.* Bondurant's Adm'r, 107 Ky. 505 (1900).

1 Bircher *v.* Walther, 163 Mo. 461 (1901). The fact that no certificate of stock was issued does not make a payment thereon a debt of the company. Cooper *v.* Jennings, etc. Co., 42 S. Rep. 766 (La. 1907).

2 Handley *v.* Stutz, 139 U. S. 417 (1891); Welch *v.* Sargent, 127 Cal. 72 (1899); Killen *v.* Barnes, 106 Wis. 546 (1900); Richardson *v.* Merritt, 74 Minn. 354 (1899); Efird *v.* Piedmont, etc. Co., 55 S. C. 78 (1899); Wilkinson *v.* Bertock, 111 Ga. 187 (1900); Colorado, etc. Co. *v.* Sedalia, etc. Co., 13 Colo. App. 474 (1899); Sawyer *v.* Hoag, 17 Wall. 610 (1873); Shickle *v.* Watts, 94 Mo. 410 (1888); Government, etc. Co. *v.* Dempsey, 50 L. J. (Q. B.) 199 (1881). Quoted and approved in Indiana, etc. Co. *v.* McGill, 15 Ind. App. 1 (1896), holding, however, that money due to a subscriber by the contract under which the stock was issued may be offset. The leading case in England on this subject is Grissell's Case, L. R. 1 Ch. App. 528 (1866), where the court said: "If a set-off were allowed against a call, it would have the effect of withdrawing altogether from the creditors part of the funds applicable to the payment of their debts." See also Black's Case, L. R. 8 Ch. App. 254 (1872); Gill's Case, L. R. 12 Ch. D. 755 (1879); Calisher's Case, L. R. 5 Eq. 214 (1868); Barnett's Case, L. R. 19 Eq. 449 (1875); *Re* Whitehouse, L. R. 9 Ch. D. 595 (1878), disapproving Brighton Arcade Co. *v.* Dowling, L. R. 3 C. P. 175 (1868). See also Matthews *v.* Albert, 24 Md. 527 (1866). Garnet, etc. Min. Co. *v.* Sutton, 3 B. & S. 321 (1862), allowing set-off, was based on a statute repealed by Companies Act, 1862. See Hillier *v.* Allegheny Mut. Ins. Co., 3 Pa. St. 470 (1846); Long *v.* Penn. Ins. Co., 6 Pa. St. 421 (1847). *Cf.* Scammon *v.* Kimball, 92 U. S. 362 (1875); Osgood *v.* Ogden, 4 Keyes, 70 (1868); Lawrence *v.* Nelson, 21 N. Y. 158 (1860). Shields *v.* Hobart, 172 Mo. 491 (1903). Set-off for services rendered was allowed in Turner *v.* Fidelity etc., 2 Cal. App. 122 (1905). Money paid by a stockholder to the attorney of the company at the request of the directors may be set off by him. Graebner *v.* Post, 119 Wis. 392 (1903).

A subscriber cannot set off against his unpaid subscription a judgment

public policy. The stockholder is not deprived of his remedy for the debt due him from the corporation, but he is obliged to proceed in

lien where there are prior liens which would take the money due on his subscription if he should first pay it in. Nor, on the other hand, if there are other debts of the company, will the obligation of the company to the stockholders be canceled by the company's offsetting the subscription against the debt, unless the subscriber is insolvent. Gilchrist *v.* Helena, etc. R. R., 49 Fed. Rep. 519 (1892); Boulton Carbon Co. *v.* Mills, 78 Iowa, 460 (1889). In this case the learned court refers to § 227*d* (1st ed.) of this work, and dissents from the statement of law there laid down. It will be noticed, however, that § 227*d* stated the law as to set-off in cases of *statutory* liability of stockholders. The right of set-off in cases of *subscription* liability of stockholders is stated in this work in § 193, *supra*, and the law as there laid down agrees with the decision in the above case—a case of subscription liability. Where set-off is a good defense to the action of a creditor who is also a stockholder and is liable, it is a good defense as against the assignee of his claim. Callanan *v.* Windsor, 78 Iowa, 193 (1889). Unpaid salaries voted to its officers by an insolvent corporation which has never made any profits cannot be offset as against the stockholders' liability to creditors. Burns *v.* Beck, etc. Co., 83 Ga. 471 (1889). A set-off is not allowed. Hoby *v.* Birch, 62 L. T. Rep. 404 (1890), reviewing the various contradictory decisions. No set-off is allowed as regards subscription liability. Tama Water-Power Co. *v.* Hopkins, 79 Iowa, 653 (1890). In a suit in equity by a receiver against all the stockholders, individual stockholders cannot plead in set-off debts due from the corporation. Bausman *v.* Kinnear, 79 Fed. Rep. 172 (1897); Mathis *v.* Pridham, 1 Tex. Civ. App. 58 (1892). In Scoville *v.* Thayer, 105 U. S. 143, 152 (1881), the court said: "It is a general rule that a holder of claims against an insolvent corporation cannot set them off against his liability for an assessment on his stock in the corporation in a suit by an assignee in bankruptcy." To same effect, Thebus *v.* Smiley, 110 Ill. 316 (1884); Williams *v.* Traphagen, 38 N. J. Eq. 57 (1884). Payment of subscriptions in advance of calls, by turning in a debt thereon, is not payment upon corporate insolvency and winding-up. Kent's Case, L. R. 37 Ch. D. 508; s. c., L. R. 39 Ch. D. 259 (1888). *Cf.* Healey, Law & Pr. of Companies (3d ed.), 129, 130, 611, 834–836. Creditors who are stockholders cannot claim any part of the assets until their unpaid subscription is paid, but may claim their part before it is certain that any of the statutory liability will be required. Schlaudecker's Appeal, 14 Atl. Rep. 229 (Pa. 1888). A counter-claim which the company had against a creditor, but which has been adjudicated against it, cannot be set up by stockholders when they are sued on their subscriptions. Stutz *v.* Handley, 41 Fed. Rep. 531 (1890); reversed on other grounds, 139 U. S. 417. A subscriber sued on his subscription may set off a debt due from the company to him. Appleton *v.* Turnbull, 84 Me. 72 (1891). Set-off of a debt by defendant against the corporate creditor is good, even in an equitable suit, if only one creditor has come into the suit. Washington Sav. Bank *v.* Butchers', etc. Bank, 130 Mo. 155 (1895). An insolvent corporation cannot give a preference to a director by offsetting against his subscription a debt due to him. Wyman *v.* Williams, 53 Neb. 670 (1898). The court in Wyman *v.* Bowman, 127 Fed. Rep. 257 (1904) declined to follow the decision of the Supreme Court of Nebraska

the same manner, and is allowed to participate in the final corporate assets to the same extent and at the same time as other creditors.[1]

Where, however, payment of a subscription is demanded or enforced for the benefit of the corporation itself, and not for corporate creditors, it is competent for the subscriber to set up, in defense of the action, a set-off or counter-claim.[2]

In New York it has been established that, where a corporate creditor brings an action at law to enforce an unpaid subscription, the subscriber may set up, in defense to the action, a set-off or counter-claim consisting of a debt due from the corporation to him, but that such a defense is not allowable in a suit in equity.[3] The distinction is based on the fact that a general accounting of all corporate debts and assets is possible by the latter remedy, but is impossible in the action at law.[4]

§ 194. *Modification of the plan and scope of the enterprise after subscription.*—A material modification of the plan of a proposed corporation, so that the actual charter differs essentially from the corporation as contemplated by the subscription contract signed before incorporation, releases such of the subscribers as object thereto. Such also is the rule where the charter materially varies the plan as laid down in the prospectus. Various illustrations of these principles of law are given in the notes below.[5] The reduction of the capital stock

in Wyman *v.* Williams, 52 Neb. 833. Concerning set-off as against the *statutory* liability of stockholders, see §225, *infra.*

1 Grissell's Case, L. R. 1 Ch. App. 528 (1866). *Cf.* Long *v.* Penn. Ins. Co., 6 Pa. St. 421 (1847).

2 Barnett's Case, L. R. 19 Eq. 449 (1875); Bausman *v.* Denny, 73 Fed. Rep. 69 (1896). Where a corporate creditor is suing the corporation, a stockholder cannot intervene in a suit and set up a counter-claim or set-off due from such corporate creditor to such intervening stockholder. Gallagher *v.* Germania Brewing Co., 53 Minn. 214 (1893).

3 Richards *v.* Kinsley, 14 Daly (N. Y.), 334 (1887), where the rule is clearly laid down; also, Christensen *v.* Colby, 43 Hun, 362 (1887). In both of these cases the rule is based on analogous decisions in regard to the stockholder's statutory liabilities. See § 225, *infra.*

4 Tallmadge *v.* Fishkill Iron Co., 4 Barb. 382 (1848). In Wheeler *v.* Millar, 90 N. Y. 353 (1882), the stockholder's subscription and statutory liability combined were sufficient to pay his own and the other debts involved in the case. See Sackett's Harbor Bank *v.* Blake, 3 Rich. Eq. (S. C.) 225 (1851); Grose *v.* Hilt, 36 Me. 22 (1853); Whitman *v.* Porter, 107 Mass. 522 (1871), a joint-stock company case; Poole's Case, L. R. 9 Ch. D. 322 (1878). *Cf.* Eastman *v.* Crosby, 90 Mass. 206 (1864).

5 A subscription prior to incorporation, the object of the incorporation having been stated to be to acquire certain patents, is not enforceable where the corporation is actually organized for that purpose, and also to do a manufacturing business. Stern *v.* McKee, 70 N. Y. App. Div. 142 (1902). Where, prior to incorporation, a person agrees to take stock in a corporation to furnish in-

does not release the subscriber.[1] A person does not waive his right to refuse payment of his subscription and to recover back anything

candescent electric lighting, a corporation to furnish electricity and power cannot enforce his subscription. Marysville, etc. Co. *v.* Johnson, 109 Cal. 192 (1895). Where the charter varies from the subscription paper in that the capital stock is doubled and the objects changed, a subscriber is not bound, even though he delay several months in repudiating the contract. Baker *v.* Fort Worth Board of Trade, 8 Tex. Civ. App. 560 (1894). A subscription to a joint-stock association or partnership cannot be enforced by a corporation subsequently organized. Knottsville, etc. Co. *v.* Mattingly, 35 S. W Rep. 1114 (Ky. 1896). The omission from the charter of minor details contained in the subscription prior to incorporation does not release the subscriber. Petrie *v.* Coulter, 10 Okl. 257 (1900). A change in the name is immaterial. Yonkers, etc. Co. *v.* Taylor, 30 N. Y. App. Div. 334 (1898). Where a subscription contract before incorporation provides for a capital of $30,000, the subscription cannot be enforced if the company is actually incorporated for $35,000. Newport, etc. Co. *v.* Mims, 103 Tenn. 465 (1899). The fact that the subscription paper provided that the corporation should expire in 1910, whereas by the charter it was to expire in 1919, is no defense. Greenbrier, etc. Exposition *v.* Ocheltree, 44 W. Va. 626 (1898). Where the corporation is incorporated with a less capital stock than was proposed when the defendant subscribed, he is not bound by the subscription. Santa Cruz R. R. *v.* Schwartz, 53 Cal. 106 (1878). After six years and after the corporation has become insolvent it it too late for a subscriber to claim that the charter differed from the subscription agreement. Walter *v.* Merced, etc. Assoc., 126 Cal. 582 (1899). If the statute requires the profile and estimates to be made before municipal aid is given, a subsequent variation releases the subscription. State *v.* Morristown, 93 Tenn. 239 (1893). After a winding-up has commenced there can be no release herein. Oakes *v.* Turquand, L. R. 2 H. L. 325 (1867). A subscription to stock is enforceable severally although signed by several. A change in it by several of the subscribers does not release the others. An increase in the capital upon incorporation does not release. Gibbons *v.* Grinsel, 79 Wis. 365 (1891). A subscription to a company to be organized to construct and operate a cotton oil mill is binding, even though the charter when obtained gives it power also to construct and operate cotton gins as feeders for the mill. Comanche, etc. Co. *v.* Browne, 92 S. W. Rep. 450 (Tex. 1906). Where subscribers to the stock of a proposed telephone corporation authorize a committee of nine to purchase material and incorporate, and five of the committee in opposition to four do purchase and incorporate, the minority are not bound by their action. Mt. Carmel, etc. Co. *v.* Mt. Carmel, etc. Co., 119 Ky. 461 (1905).

In England cases arise releasing the subscriber when the memoranda of association vary from the prospectus. Stewart's Case, L. R. 1 Ch. App. 574 (1866); Webster's Case, L. R. 2 Eq. 741 (1866); Ship's Case, 2 De G., J. &. S. 544 (1865); Downes *v.* Ship, L. R. 3 H. L. 343 (1868). *Cf.* Nixon *v.* Brownlow, 3 H. & N. 686 (1858); Norman *v.* Mitchell, 5 De G., M. & G. 648 (1854). See also Dorris *v.* Sweeney, 60 N. Y. 463 (1875). If a subscriber pays an instalment on his

[1] Myers *v.* Sturgis, 123 N. Y. App. Div. 470 (1908).

already paid, on the ground that the charter varied from the original agreement, even though he took part in the organization meeting when a motion to adopt the charter was passed, it appearing that he did not know of the change.[1]

§ 195. *Statute of limitations.*—After a call has been made, and the subscription or a part of the subscription is thereby rendered due and payable, the statute of limitations begins to run. Difficulty, however, arises in determining whether the statute begins to run before the call is made. In Pennsylvania the courts hold that the call must be made before six years have elapsed after the call is possible; otherwise the right of collection is barred.[2] But the better rule,

stock or participates in a meeting after incorporation, he cannot afterwards set up that the charter did not correspond with the prospectus. West End, etc. Co. *v.* Claiborne, 97 Va. 734 (1900). It is no defense that a greater capital stock is provided for in the charter than in the preliminary agreement, nor that the subscriptions have not all been paid in, where the defendant acquiesced in all this by attending meetings and voting. International, etc. Assoc. *v.* Walker, 83 Mich. 386 (1890).

As to the alteration of the subscription list itself, see § 62, *supra.*

A subscription to a corporation to be organized to purchase, improve, and sell land in a certain city is not enforceable where the corporation was afterwards actually formed to purchase and sell land anywhere and also to do many other things. West End, etc. Co. *v.* Nash, 51 W. Va. 341 (1902). Where the statute authorizes incorporation for producing and selling electricity, and the certificate of incorporation includes this as well as manufacturing and selling electrical appliances, apparatus and supplies, the corporation is not a *de jure* corporation, and hence insufficient to support an action by one promoter against another on a contract of the latter to convey land to a corporation to be formed and to take stock in payment, especially where the full capital stock of such corporation had not been subscribed for. Burk *v.* Mead, 159 Ind. 252 (1902).

[1] Smith *v.* Burns, etc. Co., 111 N. W. Rep. 1123 (Wis. 1907).

[2] McCully *v.* Pittsburgh, etc. R. R., 32 Pa. St. 25 (1858); Pittsburgh, etc. R. R. *v.* Byers, 32 Pa. St. 22 (1858); Pittsburgh, etc. R. R. *v.* Graham, 36 Pa. St. 77 (1859); Shackamaxon Bank *v.* Disston, 2 Ry. & Corp. L. J. 62 (Pa. 1887). *Cf.* Pittsburgh, etc. R. R. *v.* Plummer, 37 Pa. St. 413 (1860). A contrary rule seems to have been followed in Mack's Appeal, 7 Atl. Rep. 481 (1886). The statute runs against the liability of subscribers from the time of the subscription, where no call is made before the statute becomes a bar. Hamilton *v.* Clarion, etc. R. R., 144 Pa. St. 34 (1891). And it is now held in Pennsylvania that the statute of limitations runs against an unpaid subscription from the date of the assignment by the corporation for the benefit of creditors, and not from the time of a call. Franklin Sav. Bank *v.* Bridges, 8 Atl. Rep. 611 (Pa. 1887). *Cf.* Allibone *v.* Hagar, 46 Pa. St. 48 (1863), where a plea of the statute of limitations in a suit for unpaid subscriptions was not allowed, because by statute the liability of stockholders continued until the whole capital was paid in. The statute of limitations begins to run against unpaid subscriptions upon the company making an assignment for the benefit of creditors, even though no

and the one supported by the weight of authority, is that the statute of limitations begins to run on a subscription for stock only after a call has been made and is due.[1] Where the contract for subscription

call was made. Swearingen *v.* Sewickley, etc. Co., 198 Pa. St. 68 (1901). In Shackamaxon Bank *v.* Dougherty, 20 W. N. Cas. 297 (1887), it was held that a mere delay of six years in making calls barred all recovery, and obviously the bar of the statute was applied when no action was brought for six years after assessment made, or six years after the corporation assigned for the benefit of its creditors. Where by the terms of a subscription it is to become due only upon call, the statute of limitations does not begin to run until the call is made, even though such call is not made within six years thereafter. Cook *v.* Carpenter, 212 Pa. St. 165 (1905). The statute of limitations begins to run when the subscription is made, even though a call is not made until long afterwards. Great Western Tel. Co. *v.* Purdy, 83 Iowa, 430 (1891). A decision of a state court that the statute of limitations runs against a subscription from the time the subscription is made does not involve any federal question. Great Western Tel. Co. *v.* Purdy, 162 U. S. 329 (1896), applying the Iowa statute of limitations. See also § 189, *supra.*

1 Glenn *v.* Marbury, 145 U. S. 499 (1892); Hawkins *v.* Glenn, 131 U. S. 319 (1889); Glenn *v.* Liggett, 135 U. S. 533 (1890); Semple *v.* Glenn, 91 Ala. 245 (1891); Lehman *v.* Glenn, 87 Ala. 618 (1889); Glenn *v.* Priest, 48 Fed. Rep. 19 (1891); Priest *v.* Glenn, 51 Fed. Rep. 405 (1892); Fitzgerald's Estate *v.* Union Sav. Bank, 65 Neb. 97 (1902). The statute of limitations does not run against an unpaid subscription until a call and assessment has been made. McCarter *v.* Ketcham, 72 N. J. L. 247 (1905). The statute of limitations begins to run from the time of the call only, and where a Kentucky stockholder in a Virginia corporation is sued, the Virginia statute of limitations is no defense unless pleaded. Otter View, etc. *v.* Bolling's Ex'x, 70 S. W. Rep. 834 (Ky. 1902). The statute of limitations does not begin to run until the call is made, and if the call is rescinded the statute does not begin to run until the call is renewed. Union, etc. Bank *v.* Leiter, 145 Cal. 696 (1905). Where the directors made a call and the statute of limitations has run against such call, this is a good defense against a call by a court. Gold *v.* Paynter, 101 Va. 714 (1903). The four years' statute of limitations in Nebraska begins to run against an assessment of the comptroller on national-bank stock from the time the assessment is due, and the same length of time will be a bar to a suit in equity even as against the party who transferred the stock to an irresponsible person in order to avoid liability. Thompson *v.* German Ins. Co., 77 Fed. Rep. 258 (1896). Where by statute the assignor is liable, the statute of limitations does not commence to run until there has been a call. Priest *v.* Glenn, 51 Fed. Rep. 400 (1892); Taggart *v.* Western Md. R. R., 24 Md. 563 (1866); Western R. R. *v.* Avery, 64 N. C. 491 (1870); Glenn *v.* Williams, 60 Md. 93 (1882); Baltimore, etc. Turnp. Co. *v.* Barnes, 6 H. & J. (Md.) 57 (1823); Salisbury *v.* Black's Adm'r, 6 H. & J. (Md.) 293 (1825), where, however, no call was necessary; Curry *v.* Woodward, 53 Ala. 371 (1875); Glenn *v.* Soule, 22 Fed. Rep. 417 (1884); Glenn *v.* Foote, 36 Fed. Rep. 824 (1888); Great Western Tel. Co. *v.* Gray, 122 Ill. 630 (1887). *Cf.* § 225, *infra;* Glenn *v.* Howard, 81 Ga. 383 (1889). If a subscription is conditional, the statute of limitations runs only from the time of performance. Cornell's Appeal, 114

fixes the date of payment, the statute of limitations begins to run from that date and is not stopped by the appointment of a receiver unless he actually commenced his suit against the stockholder.[1] It has been held that where the statute is a bar against the corporation it is a bar against corporate creditors.[2] In New York it has been

Pa. St. 153 (1886). Where a stock subscription is payable when the road is finished, the statute of limitations does not begin to run until such road is actually finished, and the transfer of its cars by a ferry, pending the construction of a bridge, is not a completion of the road, even though the directors have declared it finished before such bridge was completed. Garner *v.* Hall, 122 Ala. 221 (1899). Where the only proof of subscription is the charter, which states the names of the stockholders and the number of shares held by each, the statute of limitations begins to run from the time of signing the charter. Harris *v.* Gateway, etc. Co., 128 Ala. 652 (1901). Merely authorizing a receiver to collect subscriptions, held not a call sufficient to set the statute of limitations running. Glenn *v.* Macon, 32 Fed. Rep. 7 (1887). Where the statute prescribes that the receiver shall collect subscriptions at once, the statute of limitations begins to run as soon as he is appointed. Webber *v.* Hovey, 108 Mich. 49 (1895). The statute of limitations begins to run on unpaid subscriptions from the dissolution of the corporation. Garesché *v* Lewis, 93 Mo. 197 (1887). The statute of limitations runs against unpaid subscriptions only from the time of a call by the court, not from the time of an assignment to a trustee. Vanderwerken *v.* Glenn, 85 Va. 9 (1888); Lewis *v.* Glenn, 84 Va. 947 (1888). The state statute of limitations as to executors and estates will be applied by the federal courts to suits by a receiver for the enforcement of a stockholder's liability in a national bank. Butler *v.* Poole, 44 Fed. Rep. 586 (1890). Although the statute of limitations bars the action by the creditor against the corporation, yet if a lien exists by trust deed, the debt may be enforced against unpaid subscriptions. Hambleton *v.* Glenn, 9 S. E. Rep. 129 (Va. 1889). If the stockholder is a non-resident the statute of limitations does not run. Tama, etc. Co. *v.* Hopkins, 79 Iowa, 653 (1890). The statute of limitations is no bar. Lehman *v.* Glenn, 87 Ala. 618 (1889). The statute of limitations does not begin to run as against creditors until they have exhausted their remedy against the company, and have established the amount due from the stockholders and necessary to pay the debt. Mathis *v.* Pridham, 1 Tex. Civ. App. 58 (1892). The statute of limitations begins to run only from the date of a call, even though long prior thereto the defendant said he would not take his stock. *Re* Haggart, etc. Co., 19 App. Rep. (Can.) 582 (1892).

1 Williams *v.* Taylor, 99 Md. 306 (1904). Even though by the subscription calls are to be made "if needed," yet if the prospectus states that the payments are to be at specified times, the statute of limitations begins to run from those times. Williams *v.* Matthews, 103 Va. 180 (1904).

2 Stilphen *v.* Ware, 45 Cal. 110 (1872); Davidson *v.* Rankin, 34 Cal. 503 (1868), in probate matters; Hamilton *v.* Clarion, etc. R. R., 144 Pa. St. 34 (1891); Thompson *v.* Reno Sav. Bank, 19 Nev. 103, 171, 242, 291, 293 (1885); South Carolina Mfg. Co. *v.* Bank of South Carolina, 6 Rich. Eq. (S. C.) 227 (1854); First National Bank *v.* Greene, 64 Iowa, 445 (1884). Where the statute of limitations is a bar to the corporation collecting unpaid subscriptions it is equally a bar as against corporate

held that, inasmuch as the corporate creditor's right to enforce the unpaid subscription accrues only after judgment against the corporation is obtained, the statute of limitations runs only from the date of such judgment.[1] In Virginia it is held that the statute of limitations begins to run from the time the decree is entered that the subscriptions be paid to a receiver.[2] Courts of equity will generally apply the same period of limitation as at law, unless there are special and equitable reasons for doing otherwise.[3] After one creditor

creditors. Hawkins *v.* Donnerberg, 40 Oreg. 97 (1901). The statute applicable to written contracts applies, although the subscription is partly in writing. Falmouth, etc. Co. *v.* Shawhan, 107 Ind. 47 (1886). It is well to suggest here that the creditor, before enforcing this liability, must first obtain judgment against the corporation. See § 200, *infra*. The corporation can defeat the action against it by setting up the statute of limitations, if sufficient time has elapsed. If the corporation fails to set up that defense, the stockholder may set it up in behalf of the corporation when he is sued. Such, at least, is the rule in some jurisdictions. See § 209, *infra*. The statute of limitations, by commencing to run against one call, does not thereby commence to run against the whole subscription. Dorsheimer *v.* Glenn, 51 Fed. Rep. 404 (1892); Priest *v.* Glenn, 51 Fed. Rep. 405 (1892).

1 Christensen *v.* Colby, 43 Hun, 362 (1887). Christensen *v.* Quintard, 36 Hun, 334 (1885). Overruled on another point in s. c., 8 N. Y. Supp. 400. See also § 225, *infra*, notes. *Cf.* Williams *v.* Taylor, 120 N. Y. 244 (1890), rev'g Williams *v.* Meyer, 41 Hun, 515, involving a sale of treasury stock. The statute of limitations begins to run upon the return of execution unsatisfied. Van Pelt *v.* Gardner, 54 Neb. 701 (1898). Where a demand note is given in payment of a subscription the statute of limitations does not begin to run until demand of payment is made or the corporation becomes insolvent. Crofoot *v.* Thatcher, 19 Utah, 212 (1899). The statute of limitations begins to run from the time that execution is returned unsatisfied on a creditor's claim. Lester, etc. *v.* Bemis, etc. Co., 71 Ark. 379 (1903). The statute of limitations does not commence to run until default is made or the company has become insolvent and ceased business. Such default may be by non-payment when the subscription becomes due by statutory enactment. West *v.* Topeka Sav. Bank, 66 Kan. 524 (1903). In Montana the statute of limitations does not commence to run until execution has been returned unsatisfied against the corporation, so far as creditors are concerned. King *v.* Pony, etc. Co., 28 Mont. 74 (1903).

2 Liberty, etc. Bank *v.* Otter View, etc. Co., 96 Va. 352 (1898).

3 Bank of United States *v.* Dallam, 4 Dana (Ky.), 574 (1836). In Payne *v.* Bullard, 23 Miss. 88 (1851), and Hightower *v.* Thornton, 8 Ga. 486 (1850), however, it was held that the statute of limitations has no application by analogy to the equitable actions to collect subscriptions. In Terry *v.* Bank of Cape Fear, 20 Fed.Rep. 777 (1884), the court said, in a similar case: "In adjusting equitable rights, courts of equity will never allow the statute of limitations to have a manifestly inequitable and unjust operation." In Scovill *v.* Thayer, 105 U. S. 143, 155 (1881), a case in equity, the court said: "Before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent juris-

has filed a bill for a receiver and to collect unpaid subscriptions, the statute of limitations ceases to run from that date as against other creditors who subsequently come into the suit.[1] Where a subscriber defeats even a part of the action on his subscription by setting up the statute of limitations, he cannot claim the stock, at least unless he pays the part which was barred by the statute.[2] Liability on stock issued for property at an overvaluation commences only upon insolvency of the corporation. Hence the statute of limitations runs from that date.[3] Questions relative to the right of a stockholder to set up the defense that the creditor's claim against the corporation is barred by the statute of limitation are considered elsewhere.[4]

§ 196. *Ignorance or mistake.*—It is no defense to an action for a subscription that the subscriber at the time of subscribing was ignorant of the actual condition of the corporation.[5] Nor is it a defense that he was ignorant of the legal effect of the subscription contract which he signed.[6]

diction, or, at the very least, some authorized demand upon him for payment. And it is clear the statute of limitations does not begin to run in his favor until such order or demand;" citing cases. A decree of a court of equity that the subscription be paid is equivalent to a call, and the statute commences to run. Glenn *v.* Saxton, 68 Cal. 353 (1886). An assignment by the corporation for the benefit of creditors starts the statute within a reasonable time thereafter. Glenn *v.* Dorsheimer, 24 Fed. Rep. 536 (1885); Glenn *v.* Priest, 28 Fed. Rep. 907 (1886). For an explanation of the origin of the Glenn cases, see Baltimore, etc. R. R. *v.* Glenn, 28 Md. 287 (1867). Where a decree is made assessing the stockholders on their subscriptions, the statute of limitations begins to run from the entry of the decree. Glenn *v.* McAllister, 46 Fed. Rep. 883 (1891).

1 Dunne *v.* Portland, etc. Ry., 40 Oreg. 295 (1901). As regards the enforcement of the stockholder's subscription liability, the statute of limitations does not run against the creditors' claims after such creditors have intervened in a suit brought by one creditor to sequestrate the property of the corporation and enforce the subscription liabilities. London, etc. Co. *v.* St. Paul, etc. Co., 84 Minn. 144 (1901). See also §§ 46, 225.

2 Johnson *v.* Albany, etc. R. R., 54 N. Y. 416, 426 (1873), where the court said: "The claim of the plaintiff is not supported by any principle that should give it any consideration in either a court of law or equity. The statute of limitations never paid a debt, although it barred a remedy."

3 Jones *v.* Whitworth, 94 Tenn. 602 (1895), holding also that the time may be shorter as to deceased stockholders. The statute of limitations does not begin to run against the liability of a stockholder on stock fraudulently issued for property at an overvaluation until the corporate creditor has reduced his claim to a judgment. Kelly *v.* Clark, 21 Mont. 291 (1898). See also §§ 46, 47, *supra.*

4 See §§ 209, 224, 750, *infra.*

5 Payson *v.* Withers, 5 Biss. 269 (1873); s. c., 19 Fed. Cas. 29. See also § 350, *infra.*

6 New Albany, etc. R. R. *v.* Fields, 10 Ind. 187 (1858); Clem *v.* Newcastle, etc. R. R., 9 Ind. 488 (1857). See also cases in §§ 53, 147, *supra.*

§ 197. *Miscellaneous defenses.*—A subscriber cannot defeat an action for the collection of his subscription by alleging that the charter was obtained in bad faith;[1] or that, where a corporate creditor is enforcing payment, such creditor is also a director of the corporation;[2] or that other subscribers have paid their subscriptions in Confederate money;[3] or that he has paid the subscription by note instead of by cash, as required by the charter;[4] or that the promoters sold to the corporation a patent-right at an overvaluation;[5] or that the officers were illegally elected;[6] or that an illegal by-law prevents his voting until calls are paid;[7] or that, by the charter, the whole capital stock should have been paid in before the commencement of business, which was not done;[8] or that the corporation has been ousted from its franchises;[9] or that the plaintiff is only an assignee of the company's rights.[10] A material alteration, however, in a subscription contract is a good defense unless the corporation proves it to have been made without its knowledge or procurement.[11] He may also defend on the ground that the call is for the purpose of an unfair and illegal reorganization.[12] It is no defense that the corporation was to

1 Garrett *v.* Dillsburg, etc. R. R., 78 Pa. St. 465 (1875); Smith *v.* Heidecker, 39 Mo. 157 (1866). Or illegally changed. Peychaud *v.* Lane, 24 La. Ann. 404 (1872).

2 Chouteau Ins. Co. *v.* Floyd, 74 Mo. 286 (1881).

3 Macon, etc. R. R. *v.* Vason, 57 Ga. 314 (1876).

4 Little *v.* O'Brien, 9 Mass. 423 (1812).

5 Dorris *v.* French, 4 Hun, 292 (1875). See also ch. III and notes.

6 Vernon Soc. *v.* Hills, 6 Cow. 23 (1826). See also § 110, *supra*. It is no defense that the trustees were not stockholders, as required by statute. Ross *v.* Bank of Gold Hill, 20 Nev. 191 (1888).

7 Chandler *v.* Northern Cross R. R., 18 Ill. 190 (1856).

8 McDermott *v.* Donegan, 44 Mo. 85 (1869).

9 Gaff *v.* Flesher, 33 Ohio St. 107 (1877); Rowland *v.* Meader Furniture Co., 38 Ohio St. 269 (1882). It is no defense that the corporation commenced business before one-half of its capital stock had been paid in according to the charter. Maine, etc. Co. *v.* Southern, etc. Co. 92 Me. 444 (1899).

10 See § 111, *supra*.

11 Bery *v.* Marietta, etc. Ry., 26 Ohio St. 673 (1875). *Cf.* Ellison *v.* Mobile, etc. R. R., 36 Miss. 572 (1858). See also § 62, *supra*.

12 In the case of Bank of China *v.* Morse, 44 N. Y. App. Div. 435 (1899), where a New York subscriber to stock in an English corporation was sued by the company for the amount of such subscription, such company having been reorganized under the peculiar English statutes, the court refused to enforce the liability on the ground that the funds were not for the purpose of paying debts of the old corporation, but were partially for the purposes of the new corporation, which the New York subscriber did not become interested in and had no notice thereof, and on the further ground that the reorganization scheme was practically a sale by the old company to the new company. Aff'd, 168 N. Y. 458. A stockholder sued on a call cannot defend on the ground that the call was invalid. His remedy is a suit to set aside the call.

distribute lots by a drawing.[1] A person who has been discharged under the bankrupt act is not liable on subscriptions made previous to his application in bankruptcy.[2] The defenses that the corporate charter has been amended by the legislature without the consent of the defendant subscriber;[3] that an assignee of a corporation has the sole right, as a general rule, to collect subscriptions;[4] that the stockholder did not know the legal effect of his subscription;[5] and that the charter differs from the terms of the subscription contract,—are considered elsewhere.[6] The reduction of the capital stock does not release the subscriber.[7] Various other defenses are referred to in the note below.[8]

§ 198. *Waiver of defenses.*—A subscriber to stock in a corporation may waive any defense he may have to the subscription. The waiver may be express, or it may arise by implication from the acts

Campbell *v.* American, etc. Co., 125 Fed. Rep. 207 (1903). See also § 113, *supra.*

1 Reed *v.* Gold, 102 Va. 37 (1903).

2 Glenn *v.* Abell, 39 Fed. Rep. 10 (1889); but see Sayre *v.* Glenn, 87 Ala. 631 (1889). A discharge in bankruptcy of a subscriber for stock is a bar to a suit to enforce the subscription where the company became insolvent before such bankruptcy. Carey *v.* Mayer, 79 Fed. Rep. 926 (1897). The bankruptcy act does not release an applicant thereunder from liability for calls made after his release in bankruptcy. Glenn *v.* Howard, 65 Md. 40 (1886). A bankrupt is released on the statutory liability on stock in another state where such liability has been adjudicated, even though he was not a party thereto. Dight *v.* Chapman, 44 Ore. 265 (1904).

3 See ch. XXVIII, *infra.*

4 See § 111, *supra*, and § 852, *infra.*

5 See § 147, *supra.*

6 See § 194, *supra*, § 502, note, *infra*, and ch. IX.

7 Myers *v.* Sturgis, 123 N. Y. App. Div. 470 (1908). An increase of the capital stock as allowed by the charter does not release subscribers. Port Edwards, etc. Ry. *v.* Arpin, 80 Wis. 214 (1891).

8 Change of name is no defense. Howard *v.* Glenn, 85 Ga. 238 (1890). A change of name during organization is no defense. Priest *v.* Glenn, 51 Fed. Rep. 400 (1892). A slight change in the name as incorporated is no defense. Joseph *v.* Davis, 10 S. Rep. 830 (Ala. 1892). A slight change in the name is no defense where the subscriber has already paid assessments. McCormick *v.* Great Bend, etc. Co., 48 Kan. 614 (1892). It is no defense to a subscription that the subscriber did not read the paper. Stutz *v.* Handley, 41 Fed. Rep. 531 (1890); reversed on other grounds, 139 U. S. 417. Although a corporation has taken more subscriptions than its capital stock and has issued certificates therefor, yet this does not release subscribers up to the correct amount. Cartwright *v.* Dickinson, 88 Tenn. 476 (1890). It is no defense to a railroad stock subscription that defendant was to receive stock in a construction company, or that the control would not change hands, or that the company has sold all its property. Russell *v.* Alabama Midland Ry., 94 Ga. 510 (1894). A sale under statutes existing at the time of subscription is valid and does not release the subscriber. Armstrong *v.* Karshner, 47 Ohio St. 276 (1890). See also § 225, *infra.*

and declarations of the subscriber. Thus, taking part in corporate meetings,[1] or the payment of a call, with full knowledge of the defense, are held to be a waiver;[2] and any act indicating a clear intent to abide by or accept or pass over an objection which the subscriber might make will be held to be a waiver.[3] Subscriptions paid in and partly consumed by losses before the incorporation was completed, are not to be credited on the subscription itself as against corporate creditors.[4]

1 Kampmann *v.* Tarver, 29 S. W. Rep. 1144 (Tex. 1895). The court may submit to the jury whether the defendant knew that the whole capital stock was not subscribed when he attended meetings and voted. International, etc. Assoc. *v.* Walker, 97 Mich. 159 (1893). A subscriber who takes part in the business of the company cannot defend on the ground that a statute had not been complied with in paying in twenty per cent. in cash. Canfield *v.* Gregory, 66 Conn. 9 (1895).

2 Mississippi, etc. R. R. *v.* Harris, 36 Miss. 17 (1858); Inter-Mountain Pub. Co. *v.* Jack, 5 Mont. 568 (1885); Hamilton *v.* Grangers', etc. Ins. Co., 67 Ga. 145 (1881). A subscriber by taking part in the organization and paying part of the subscription waives objections to the irregular incorporation of the company. Greenbrier, etc. Exp. *v.* Squires, 40 W. Va. 307 (1895). A payment of a call on a subscription is not a waiver of the defense that the corporation has been formed for different purposes than were represented by the promoters at the time of the subscription, where the subscriber did not know that fact when he paid. Strong *v.* Southwestern, etc. Co., 38 S. W. Rep. 546 (Tex. 1896). Partial payment of the subscription in ignorance of the fact that one of the other subscribers was incompetent to subscribe is not a waiver of the defense. Denny Hotel Co. *v.* Gilmore, 6 Wash. 152 (1893). The complaint need not allege that the full capital stock has been subscribed, where it alleges that the subscriber had paid several instalments and had received a dividend. Duluth Inv. Co. *v.* De Witt, 63 Minn. 538 (1896). A stockholder who pays assessments cannot defend against other assessments on the ground that the capital stock had not been fully subscribed. Callahan *v.* Chilcott, etc. Co., 86 Pac. Rep. 123 (Col. 1906). By paying assessments, the subscriber waives the objection that the full capital stock was not subscribed. Myers *v.* Sturgis, 123 N. Y. App. Div. 470 (1908).

3 See May *v.* Memphis Branch R. R., 48 Ga. 109 (1873); Middlesex Turnp. Corp. *v.* Swan, 10 Mass. 384 (1813); McCully *v.* Pittsburgh, etc. R. R., 32 Pa. St. 25 (1858). Participating in benefits with knowledge is a waiver. Detroit, etc. Club *v.* Fitzgerald, 109 Mich. 670 (1896). The defense that the full capital stock has not been subscribed may be waived, and where the treasurer collects from others he cannot set up such defense himself. Macfarland *v.* West Side Imp. Assoc., 53 Neb. 417 (1898). See also §§ 160, 161, *supra*, and ch. XLIV.

4 Bank of De Soto *v.* Reed, 109 S. W. Rep. 256 (Tex. 1908).

CHAPTER XI.

THE STOCKHOLDERS' LIABILITY TO CORPORATE CREDITORS UPON UNPAID SUBSCRIPTIONS.

§ 199. Unpaid subscriptions a fund for the benefit of creditors—Construction of the liability.
200. Can be reached only after judgment against the corporation, and execution returned unsatisfied.
201. The remedy by garnishment or attachment, or by notice to the stockholder.
202. The remedy by *mandamus*.
203. The remedy by action at law.
204. The remedy by bill in equity.
205, 206. Parties to the bill in equity.
§ 207. A court of equity may make a call.
208. Receivers and assignees for the benefit of creditors — Their duties, powers, and liabilities as to shares not paid up.
209. The judgment against the corporation impeachable only for fraud or want of jurisdiction.
210. Defenses available against corporate creditors in actions to compel payment of balances of subscriptions.
211. Contribution.

§ 199. *Unpaid subscriptions a fund for the benefit of creditors—Construction of the liability.*—The capital or capital stock of a corporation is the aggregate of the par value of all the shares into which the capital is divided upon the incorporation; it is the fund or resource with which the corporation is enabled to act and transact its business, and upon the faith of which persons give credit to the corporation and become corporate creditors. The public, in dealing with a corporation, assumes that its actual capital, in money or money's worth, is equal to the capital stock which it purports to have, unless it has been impaired by business losses. The public has a right to assume that the capital stock has been or will be fully paid up, if it be necessary in order to meet corporate liabilities. Accordingly, the American courts go very far to protect corporate creditors, and in this country it is a well-settled doctrine that unpaid subscriptions to the capital stock constitute, upon the insolvency of the corporation, a fund for the benefit of the creditors of the corporation. The United States courts formerly looked upon the capital stock as a trust fund for the benefit of corporate creditors,[1] but the more recent decisions

1 "Though it be a doctrine of modern date," says Mr. Justice Miller in Sawyer *v.* Hoag, 17 Wall. 610, 620 (1873), "we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to

eliminate any trust feature from the capital stock.[1] There are three methods by which stockholders seek to avoid their liability to corporate creditors: First, by a cancellation or withdrawal from the contract;[2] second, by a release from their obligation to pay the full par value of the stock;[3] third, by a transfer of the stock.[4] In each of these cases, however, a court of equity does its utmost to protect the corporate creditors, and a rigid scrutiny will be made in the interest of creditors into every transaction of such a nature.[5] A subscription

the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen." This seems to be a distinctively American doctrine. It is not known to the English law, and was first clearly announced by Mr. Justice Story in Wood *v.* Dummer, 3 Mason, 308 (1824); s. c., 30 Fed. Cas. 435. See also the cases of Hightower *v.* Thornton, 8 Ga. 486 (1850); Germantown Pass. Ry. *v.* Fitler, 60 Pa. St. 124 (1869); Crawford *v.* Rohrer, 59 Md. 599 (1882); Lewis *v.* Robertson, 21 Miss. 558 (1850); Bunn's Appeal, 105 Pa. St. 49 (1884); Curran *v.* Arkansas, 15 How. 304 (1853); Mumma *v.* Potomac Co., 8 Pet. 281 (1834); Sanger *v.* Upton, 91 U. S. 56 (1875); Morgan County *v.* Allen, 103 U. S. 498 (1880); Osgood *v.* Laytin, 3 Keyes (N. Y.), 521 (1867); s. c., 5 Abb. Pr. (N. S.) 1. *Cf.* Vose *v.* Grant, 15 Mass. 505 (1819); Spear *v.* Grant, 16 Mass. 9 (1819); Baker *v.* Atlas Bank, 50 Mass. 182 (1845); Osgood *v.* King, 42 Iowa, 478 (1876); Chisholm *v.* Forny, 65 Iowa, 333 (1884); Jackson *v.* Traer, 64 Iowa, 469 (1884); Mills *v.* Stewart, 41 N. Y. 384, 389 (1869); Morgan *v.* New York, etc. R. R., 19 Paige, Ch. 290 (1843); Salmon *v.* Hamborough Co., 1 Cas. in Ch. 204 (1671); Nevitt *v.* Bank of Port Gibson, 14 Miss. 513 (1846). As to the trust-fund theory, however, see § 9, *supra*.

1 "When a corporation is solvent, the theory that its capital is a trust fund upon which there is any lien for the payment of its debts has in fact very little foundation. No general creditor has any lien upon the fund under such circumstances, and the right of the corporation to deal with its property is absolute, so long as it does not violate its charter or the law applicable to such corporation." McDonald *v.* Williams, 174 U. S. 397, 401 (1899).

2 See §§ 167–170, *supra*.

3 See §§ 167–170, and ch. III, *supra*.

4 See ch. XV, *supra*.

5 Sawyer *v.* Hoag, 17 Wall. 610 (1873); Morgan County *v.* Allen, 103 U. S. 498 (1880); Chouteau *v.* Dean, 7 Mo. App. 210 (1879); Gill *v.* Balis, 72 Mo. 424 (1880); Putnam *v.* New Albany, 4 Biss. 365 (Ind. 1869); s. c., 20 Fed. Cas. 79; *Re* South Mountain, etc. Co., 7 Sawyer, 30 (1881); s. c., 5 Fed. Rep. 403; Union Mut. L. Ins. Co. *v.* Frear Stone Mfg. Co., 97 Ill. 537 (1881); Singer *v.* Given, 61 Iowa, 93 (1883); Jackson *v.* Traer, 64 Iowa, 469 (1884); Mathis *v.* Pridham, 1 Tex. Civ. App. 58 (1892); Chisholm *v.* Forny, 65 Iowa, 333 (1884). In one case it is said that it is not within the ingenuity of man to devise a scheme to prevent courts of equity from enforcing the payment of unpaid subscriptions to capital stock for the benefit of corporate creditors. Upton *v.* Hansbrough, 3 Biss. 417, 425 (1873); s. c., 28 Fed. Cas. 839. A fraudulent device by which a stockholder pays his subscription by a note, and subsequently obtains the note at a large discount, may be valid as against the company, but will be set aside as regards corporate cred-

liability may be enforced in another state and in construing the liability of stockholders on an unpaid subscription, the court will follow the decisions of the state which created the corporation.[1] An alien corporation may sue a stockholder in the courts of the state where he resides on a foreign unpaid subscription.[2] A statute releasing stockholders from paying one-half of the par value of the stock and declaring the stock paid up, although but fifty per cent. had been

itors. Bouton *v.* Dement, 123 Ill. 142 (1887). A subscriber cannot pay for his stock by purchasing full-paid stock and having this substituted for his subscription. Marshall Foundry Co. *v.* Killian, 99 N. C. 501 (1888). The stockholder's liability in this respect is not confined in general to the original capital stock, but it attaches, upon an authorized increase of the capital, to such increase. Chubb *v.* Upton, 95 U. S. 665 (1877). See also Delano *v.* Butler (Pacific Nat. Bank Cases), 118 U. S. 634 (1886). The filing of the statutory certificate declaring that the whole amount of the capital stock has been paid in is not conclusive of the fact, and will not prevent proof to the contrary. Barre Nat. Bank *v.* Hingham Mfg. Co., 127 Mass. 563 (1879); Wheeler *v.* Millar, 90 N. Y. 353 (1882); Veeder *v.* Mudgett, 95 N. Y. 295 (1884); Thompson *v.* Reno Sav. Bank, 19 Nev. 103, 171, 242, 291, 293 (1885). A creditor of a dissolved Missouri corporation may maintain a suit in equity in Connecticut against citizens of Connecticut who were stockholders in such corporation, to collect unpaid subscriptions, it being alleged that the directors refused to collect the same; and where $100,000 capital stock was issued for land worth only $10,000 the stockholders are liable for the difference under the laws of Missouri, and hence may be held liable in Connecticut. Lewisohn *v.* Stoddard, 78 Conn. 575 (1906). The liability of a subscriber for stock in an Arizona corporation may be enforced in Kentucky. Williams' Ex'r *v.* Chamberlain, 94 S. W. Rep. 29 (Ky. 1906). See also §§ 46, 47, *infra*. The subscription liability may be enforced in another state. Latimer *v.* Citizens' State Bank, 102 Iowa, 162 (1897); Sigua Iron Co. *v.* Brown, 19 N. Y. App. Div. 143 (1897). See also §§ 208, 223, *infra*. The question whether a stockholder may limit or entirely do away with his liability, by an express contract to that effect with corporate creditors, is considered elsewhere. See § 216, *infra*.

[1] Glenn *v.* Liggett, 135 U. S. 533 (1890); Penobscot, etc. Co. *v.* Bartlett, 78 Mass. 244 (1858). *Cf.* Bank of China *v.* Morse, 168 N. Y. 458 (1901). See also § 223, *infra*. The supreme court of the United States will not reverse a judgment of the court of appeals of New York, although the court of appeals, in passing upon the liability of stockholders, refused to follow the law of Virginia, where the corporation had been incorporated, the stockholders against whom suit was brought being residents of New York. Glenn *v.* Garth, 147 U. S. 360 (1893). Subscribers to stock are liable according to the law of the state incorporating the company, and not according to the law of the state where the subscribers reside. A subscriber to stock in a Virginia corporation is liable by statute although he has transferred his stock. Morris *v.* Glenn, 87 Ala. 628 (1888).

[2] Anglo-American, etc. Co. *v.* Dyer, 181 Mass. 593 (1902). The subscription liability of an Illinois stockholder in a Scottish corporation may be enforced in Illinois, and the extent

paid thereon, is unconstitutional as regards creditors existing at the time such statute was enacted.[1]

§ 200. *Can be reached only after judgment against the corporation and execution returned unsatisfied.*—Unpaid subscriptions to the capital stock are not the primary or regular fund for the payment of corporate debts. Persons transacting business with the corporation look to the corporation itself for the payment of their debts. Credit is given to the corporation, not to the stockholders, and it is the natural order of business that the creditors of the corporation are to be paid by the corporation from funds in the corporate treasury. Ordinarily, corporate creditors have no knowledge or concern about the subscription list, and as to whether subscriptions are unpaid or partially paid. So long as the corporation meets its obligations in the ordinary course of business, corporate creditors have no need to concern themselves about unpaid subscriptions to the stock. But when the corporation is in default and embarrassed, or for any reason fails to pay its debts, then its creditors have rights with reference to such unpaid subscriptions. They then have the right to know whether all the subscriptions for stock have been fully paid in, and, if not, they have the right to compel such payment.[2]

It accordingly becomes important to know at what point, in their efforts to collect what is due them, corporate creditors may cease to pursue the corporation and proceed directly against its delinquent stockholders. The well-established rule upon this point is that a corporate creditor's suit to enforce payment of unpaid subscriptions can be properly brought only after a judgment at law has been obtained against the corporation, and an execution returned unsatisfied.[3]

of the liability will be determined by the laws of Scotland. Mandel *v.* Swan, etc. Co., 154 Ill. 177 (1895).

1 Williams *v.* Watters, 97 Md. 113 (1903). See also § 497, *infra.*

2 Quoted and approved in Tichenor *v.* Williams, etc. Co., 116 Ga. 303 (1902).

3 Bank of United States *v.* Dallam, 4 Dana (Ky.), 574 (1836); Walser *v.* Seligman, 13 Fed. Rep. 415 (1882); Wetherbee *v.* Baker, 35 N. J. Eq. 501 (1882); Cutright *v.* Stanford, 81 Ill. 240 (1876); Baxter *v.* Moses, 77 Me. 465 (1885); Terry *v.* Anderson, 95 U. S. 628, 636 (1877); Cleveland *v.* Burnham, 55 Wis. 598 (1882); s. c., 64 Wis. 347; Freeland *v.* McCullough, 1 Denio, 414 (1845); Bayliss *v.* Swift, 40 Iowa, 648 (1875). The suit is to be brought for this purpose in the courts of the state where the corporation exists. Barclay *v.* Talman, 4 Edw. Ch. 123 (1842); Murray *v.* Vanderbilt, 39 Barb. 140, 147 (1863); Bank of Virginia *v.* Adams, 1 Pars. Eq. 534 (1850); Patterson *v.* Lynde, 112 Ill. 196 (1884); Harris *v.* Pullman, 84 Ill. 20, 25 (1876). See also § 219, *infra. Cf.* Claflin *v.* McDermott, 12 Fed. Rep. 375 (1882).

Simple contract creditors of a corporation, whose claims have not been reduced to judgment, and who have no express lien on its property, have no standing in a federal court of equity to collect unpaid subscriptions and apply the same to the payment

This rule is of such importance that by statute, in many of the states, a creditor's right to proceed against a stockholder on his unpaid subscription is allowed only after the remedy against the corporation itself has been exhausted.[1] By this is meant that judgment shall have been duly recovered against the corporation, and execution issued and regularly returned unsatisfied. Nothing short of that exhausts the remedy against the corporation.[2] Of course a contrary rule may be established by statute.[3] It has been held that a court of equity may enforce the liability of stockholders who have turned in property in payment for their stock at a fraudulent overvaluation,

of their debts, even though they allege that an existing mortgage on the property is fraudulent, and that the company is insolvent, and a bill of foreclosure of the mortgage is going on. They might under certain conditions intervene. Hollins *v.* Brierfield Coal, etc. Co., 150 U. S. 371 (1893). The federal courts will not even follow a state statute authorizing such a suit, nor does the fact that the foreclosure suit is in the federal court give jurisdiction of the creditor's suit. Hollins *v.* Brierfield Coal, etc. Co., 150 U. S. 371 (1893). The return of execution unsatisfied is necessary. Albright *v.* Texas, 8 New Mex. 422 (1896).

1 Thornton *v.* Lane, 11 Ga. 459 (1852); Lane *v.* Harris, 16 Ga. 217 (1854); McClaren *v.* Franciscus, 43 Mo. 452 (1869); New England Com. Bank *v.* Newport Steam Factory, 6 R. I. 154 (1859); Priest *v.* Essex Mfg. Co., 115 Mass. 380 (1874); Cambridge Waterworks *v.* Somerville Dyeing, etc. Co., 86 Mass. 239 (1862); Lindsley *v.* Simonds, 2 Abb. Pr. (N. S.) 69 (1866); Blake *v.* Hinkle, 10 Yerg. (Tenn.) 218 (1836); Shellington *v.* Howland, 53 N. Y. 371 (1873); Wehrman *v.* Reakirt, 1 Cin. Super. Ct. (Ohio), 230 (1871); Dauchy *v.* Brown, 24 Vt. 197 (1852); Drinkwater *v.* Portland Marine Ry., 18 Me. 35 (1841); Handy *v.* Draper, 89 N. Y. 334 (1882); Burch *v.* Taylor, 1 Wash. St. 245 (1890); Baines *v.* Babcock, 95 Cal. 581 (1891). *Cf.* Perkins *v.* Church, 31 Barb. 84 (1859).

2 Quoted and approved in King *v.* Pony, etc. Co., 28 Mont. 74 (1903). Rocky Mountain Nat. Bank *v.* Bliss, 89 N. Y. 338 (1882).

In England a *scire facias* is a necessary preliminary, unless there is some statutory enactment to the contrary. Bartlett *v.* Pentland, 1 B. & Ad. 704 (1831); Clowes *v.* Brettell, 10 M. & W. 506 (1842); s. c., 11 M. & W. 461; Wingfield *v* Barton, 2 Dowl. (N. S.) 355 (1842); Winfield *v.* Peel, 12 L. J. (N. S., Q. B.) 102 (1842). In a suit by a corporate creditor against a corporation to obtain judgment before suing stockholders on their liability, the stockholders are not allowed to come in as parties. Hambleton *v.* Glenn, 9 S. E. Rep. 129 (Va. 1889). Proof that a creditor has exhausted his legal remedy against the corporation is shown by the judgment and an execution theron returned unsatisfied. Evidence that the company owns a large amount of personal property besides its road and franchise is inadmissible. Baines *v.* Babcock, 95 Cal. 581 (1891).

3 Under the Illinois statute no judgment need be first obtained against the corporation. The suit may be against the corporation and the stockholders simultaneously. Parmelee *v.* Price, 208 Ill. 544 (1904). No execution need be returned unsatisfied under the Arkansas statute.

even though the creditor did not obtain judgments and have executions returned unsatisfied.[1]

The corporate funds are the corporate creditors' primary resource, even where the liability of the individual stockholder is declared to be primary, like that of an original contractor or partner.[2] Where, however, the corporation has been adjudged a bankrupt, the remedy against the corporation need not first be exhausted.[3] Such, also, has been held to be the rule where the corporation is notoriously insolvent,[4] or has been formally dissolved.[5]

Lester, etc. *v.* Bemis, etc. Co., 71 Ark. 379 (1903).

1 See *v.* Heppenheimer, 69 N. J. Eq. 36 (1905).

2 Stone *v.* Wiggin, 46 Mass. 316 (1842); Stedman *v.* Eveleth, 47 Mass. 114 (1843).

3 State Savings Assoc. *v.* Kellogg, 52 Mo. 583 (1873); Dryden *v.* Kellogg, 2 Mo. Ap. 87 (1876); Shellington *v.* Howland, 53 N. Y. 371 (1873). *Cf.* Ansonia Brass, etc. Co. *v.* New Lamp Chimney Co., 53 N. Y. 123 (1873); s. c., aff'd, New Lamp Chimney Co. *v.* Ansonia Brass, etc. Co., 91 U. S. 656 (1875); Walser *v.* Seligman, 13 Fed. Rep. 415 (1882). *Contra*, Birmingham Nat. Bank *v.* Mosser, 14 Hun, 605 (1878); Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747 (1887). See § 219, *infra*.

4 Hodges *v.* Silver Hill Min. Co., 9 Oreg. 200 (1881); Terry *v.* Tubman, 92 U. S. 156 (1875); Camden *v.* Doremus, 3 How. 515, 533 (1845); Stutz *v.* Handley, 41 Fed. Rep. 531 (1890); reversed on other grounds, 139 U. S. 417; Salt Lake Hardware Co. *v.* Tintic Milling Co., 13 Utah, 423 (1896). See also Hollingshead *v.* Woodward, 107 N. Y. 96 (1887). It has been held that the right of action accrues to the creditor whenever it is clear that the corporation has no property from which the claim can be paid. A judgment is not necessary for the *beginning* of an action against the stockholder, though it may be necessary as *evidence* in such an action to determine the measure of damages. First Nat. Bank *v.* Greene, 64 Iowa, 445 (1884). *Cf.* Cleveland *v.* Marine Bank, 17 Wis. 545 (1863). A creditor of an insolvent corporation may bring a creditor's bill against the assignee for the benefit of creditors of a subscriber, even though no judgment against the corporation had been obtained and no other stockholders are made co-defendants. Samainego *v.* Stiles, 20 Pac. Rep. 607 (Ariz. 1889). A creditor must first exhaust his remedy against the corporation unless he proves it insolvent. Fletcher *v.* Bank of Lonoke, 71 Ark. 1 (1902). No judgment against the corporation is necessary if the company is insolvent and is in the hands of a receiver. Williams' Ex'r *v.* Chamberlain, 94 S. W. Rep. 29 (Ky. 1906). A creditor may file a bill to collect unpaid subscriptions without a call being first made by the directors, where the company has disposed of all its property and is insolvent. Chilberg *v.* Siebenbaum, 41 Wash. 663 (1906). Judgment against the corporation is not first necessary. Chilberg *v.* Siebenbaum, 41 Wash. 663 (1906). In North Dakota a simple creditor in an insolvent corporation may file a bill in equity to enforce the stockholders' subscription liability. Marshall-Wells, etc. Co. *v.* New Era, etc. Co., 13 N. Dak. 396 (1904).

5 Approved in Latimer *v.* Citizens' State Bank, 102 Iowa, 162 (1897). As to what is sufficient to dissolve a corporation for this purpose, see Kincaid *v.* Dwinelle, 59 N. Y. 548 (1875). Under a statute requiring dissolution of the corporation before corporate creditors can reach unpaid subscriptions,

A bill in equity lies to enforce the subscription liability of a stockholder in a foreign corporation.[1] No judgment against the corporation need be obtained in the state where such suit is brought, if judgment has been obtained and execution returned unsatisfied where the corporation exists, and it is shown that the company has no property and service cannot be made in the state upon the company.[2] The bill in equity must show that the remedy against the corporation has been exhausted.[3]

§ 201. *The remedy by garnishment or attachment or by notice to the stockholder.*—There are various remedies which corporate cred-

the corporation is deemed to be dissolved when it has ceased to exercise its proper functions, is without funds, and is indebted. Penniman *v.* Briggs, 1 Hopk. Ch. 300 (1824); Slee *v.* Bloom, 19 Johns. 456 (1822); Bank of Poughkeepsie *v.* Ibbotson, 24 Wend. 473, 479 (1840). *Cf.* Terry *v.* Anderson, 95 U. S. 628 (1877). Remington *v.* Samana Bay Co., 140 Mass. 494 (1886), holds that the judgment herein against the corporation is void if the corporation has been dissolved. See § 642, *infra.* It has been said that corporate creditors need not await the collection by the corporation of doubtful claims, but may compel the payment of their claims by the stockholders and let the latter take the risk and delay. "Creditors," says the supreme court of Tennessee, "will not be required to wait the collection of doubtful claims or claims in litigation. The stockholders must pay promptly, and take upon themselves the onus of delay and risk as to all such claims." Moses *v.* Ocoee Bank, 1 Lea (Tenn.), 398, 413 (1878). See also Stark *v.* Burke, 9 La. Ann. 341, 343 (1854). General creditors may also reach unpaid subscriptions, although another corporate creditor has a mortgage lien on the corporate property, rights, privileges, and franchises. Dean *v.* Biggs, 25 Hun, 122 (1881). Aff'd, 93 N. Y. 662. See also §§ 219, 852, *infra.*

1 See § 199, *supra.*

2 Rule *v.* Omega, etc. Co., 64 Minn. 326 (1896). See also note 3, p. 503. Unless such proof is given, judgment in the state where suit is brought must be shown. National Tube Works *v.* Ballou, 146 U. S. 517 (1892); s. c., 42 Fed. Rep. 749; Rocky Mountain Nat. Bank *v.* Bliss, 89 N. Y. 338 (1882). In this case it is held that a proceeding *in rem*, affecting only the property of the corporation attached, and execution against that property, is not what the rule requires; and again, that the recovery of a judgment and issue of execution in another state is not a compliance with the rule, but that a judgment in and execution issued out of a court of the state where the statute is in force is necessary. To the same effect, see Brice *v.* Munro, 5 Can. Law T. 130, Ont. High Ct. of Just., Q. B. Div. (1885), in which case it is held that an execution issued and returned in Quebec is not sufficient as against a company incorporated and existing in Ontario. *Contra,* Shickle *v.* Watts, 94 Mo. 410 (1888). Mere insolvency of a corporation does not obviate the necessity of a judgment and execution returned unsatisfied before a corporate creditor can sue the stockholders on their unpaid subscriptions. Neither does that fact that the corporation is a foreign corporation and that service cannot be obtained upon it in the state, obviate the necessity of such judgment. Dickinson *v.* Traphagan, 147 Ala. 442 (1906).

3 Doak *v.* Stahlman, 58 S. W. Rep. 741 (Tenn. 1899).

itors may employ to enforce the payment of partially paid-up subscriptions. Among these is that of garnishment. Thus, where a subscription has been called in, in part or wholly, and has not been paid by the subscriber, it is, at least to the extent of such calls, an asset of the corporation, and, like other assets, is subject to garnishment at the instance of a corporate creditor.[1]

But this remedy is not available to reach that part of the unpaid subscription for which calls have not been made.[2] In a garnishment

1 Kern *v.* Chicago, etc. Assoc., 140 Ill. 371 (1892); Bohrer *v.* Adair, 61 Neb. 824 (1901); Joseph *v.* Davis, 10 S. Rep. 830 (Ala. 1892); Meints *v.* East St. Louis, etc. Co., 89 Ill. 48 (1878); Hannah *v.* Moberly Bank, 67 Mo. 678 (1878); Simpson *v.* Reynolds, 71 Mo. 594 (1880); Faull *v.* Alaska, etc. Min. Co., 8 Sawyer, 420 (1883); Curry *v.* Woodward, 53 Ala. 371 (1875); Bingham *v.* Rushing, 5 Ala. 403 (1843); Hays *v.* Lycoming F. Ins. Co., 99 Pa. St. 621 (1882). *Cf.* Rand *v.* White Mountains R. R., 40 N. H. 79 (1860); Brown *v.* Union Ins. Co., 3 La. Ann. 177 (1848); Scott *v.* Windham, 73 Miss. 76 (1894); Dean *v.* Biggs, 25 Hun, 122 (1881). Aff'd, 93 N. Y. 662. The creditor of a corporation may garnishee a person owing such corporation on a subscription for stock, even though such corporation has sold its assets to another corporation. Prentice *v.* U. S., etc. Steamship Co., 78 Fed. Rep. 106 (1897). An attachment of unpaid subscriptions due to a foreign corporation will be stayed where sequestration proceedings are commenced, but the priority of the attachment creditor will be preserved. *Re* Queensland, etc. Co., 58 L. T. Rep. 878 (1888). See s. c., [1892] 1 Ch. 219. Where garnishee process lies at the instance of a judgment creditor to collect unpaid subscriptions, a suit in equity will not lie. Henderson *v.* Hall, 134 Ala. 455 (1900).

2 Quoted and approved in Bohrer *v.* Adair, 61 Neb. 824 (1901); Bingham *v.* Rushing, 5 Ala. 403 (1843); Brown *v.* Union Ins. Co., 3 La. Ann. 177 (1848); Bunn's Appeal, 105 Pa. St. 49 (1884). See also Coalfield Co. *v.* Peck, 98 Ill. 139 (1881). In Nevada the right of garnishment in a case where calls had not been made was expressly denied. McKelvey *v.* Crockett, 18 Nev. 238 (1884). *Cf.* Meints *v.* East St. Louis, etc. Co., 89 Ill. 48 (1878); Hughes *v.* Oregonian Ry., 11 Oreg. 158 (1883); Peterson *v.* Sinclair, 83 Pa. St. 250 (1877); Langford *v.* Ottumwa W. P. Co., 59 Iowa 283 (1882); Chandler *v.* Siddle, 10 Nat. Bankr. Reg. 236 (1874); s. c., 5 Fed. Cas. 459. Collection may be by garnishee process in Alabama. Henderson *v.* Mayfield, etc. Mills, 45 S. Rep. 211 (Ala. 1907). In New York there is no process of garnishment, but instead thereof an attachment is allowed. Under an attachment against a foreign corporation not chartered by the United States, the sheriff may levy upon the sums remaining unpaid upon a subscription to the capital stock of the corporation, the subscriber being within the county and having property therein; "or upon one or more shares of stock therein held by such a person, or transferred by him for the purpose of avoiding payment thereof." N. Y. Code Civ. Proc., § 646. See also Cooper *v.* Adel, etc. Co., 122 N. C. 463 (1898).

It has also been held that a corporate creditor, by an execution against the corporation, may reach an unpaid subscription, though no call has been made. *Re* Glen Iron Works, 17 Fed. Rep. 324 (1883); s. c., 20 Fed. Rep. 674 (1884); Cucullu *v.* Union Ins. Co., 2 Rob. (La.) 571, 573 (1842). *Cf.*

suit against a corporation and a stockholder to reach an unpaid subscription the stockholder may contest the validity of the claim against the corporation, even though the corporation has defaulted in the suit.[1] The California courts will not enforce the subscription liability of stockholders in an Illinois corporation where the Illinois statutes prescribe that the remedy may be by garnishment.[2]

Attachment lies against resident subscribers to stock in a foreign corporation, the subscription price not having been fully paid.[3]

Still another remedy is often given by statute. The statute may provide that, after the remedy is exhausted against the corporation, the stockholders may by summons be brought into that same suit and compelled to pay.[4] This special remedy in Missouri for col-

Bunn's Appeal, 105 Pa. St. 49 (1884); and see Hannah *v.* Moberly Bank, 67 Mo. 678 (1878). But this is a somewhat questionable rule, and the remedy proposed by it is probably very seldom invoked. For the remedy in Pennsylvania, where by statute, after execution returned unsatisfied against the corporation, on order of the court, execution issues against the stockholders, see Lauder *v.* Tillia, 117 Pa. St. 304 (1887). Bank of Virginia *v.* Adams, 1 Pars. Sel. Cas. 534 (1850), holding that a court of equity in Pennsylvania has no jurisdiction to compel stockholders of a foreign corporation residing there to pay a subscription to its stock on the application of its creditors. As regards the statutory remedy of a creditor in enforcing an unpaid subscription in Maine, see Libby *v.* Tobey, 82 Me. 397 (1890).

In the case of Ogilvie *v.* Knox Ins. Co., 22 How. 380 (1859), the court said: "The creditors of the corporation are seeking satisfaction out of the assets of the company to which the defendants are debtors. If the debts attached are sufficient to pay their demands the creditors need look no further. They are not bound to settle up all the affairs of this corporation, and the equities between its various stockholders or partners, corporators, or debtors." If a corporation has been dissolved, garnishee process does not lie against a stockholder at the instance of a corporate creditor to reach an unpaid subscription. Paschall *v.* Whitsell, 11 Ala. 472 (1847).

1 Doak *v.* Stahlman, 58 S. W. Rep. 741 (Tenn. 1899).

2 Russell *v.* Pacific Ry., 113 Cal. 258 (1896). See also Christensen *v.* Eno, 106 N. Y. 97 (1887).

3 Cooper *v.* Adel, etc. Co., 122 N. C. 463 (1898).

4 A state statute may provide that a judgment creditor of a corporation may summon in a stockholder who has not paid his subscription and compel him to pay such subscription to such judgment creditor. Hill *v.* Merchants' Mut. Ins. Co., 134 U. S. 515 (1890). Where the stockholder's liability attaches upon a notice served upon him, the creditor who first serves the notice acquires a prior right to collect. Wells *v.* Robb, 43 Kan. 201 (1890). Although the stockholder's subscription liability may be enforced by levy of execution against his property on a judgment against the corporation, "after sufficient notice," yet notice to a non-resident stockholder by publication is not sufficient. Wilson *v.* St. Louis, etc. Ry., 108 Mo. 588 (1891). Where the statutory mode of collecting subscriptions is by motion based on a judgment against the corporation, notice of the motion being given to the stock-

lecting unpaid subscriptions does not prevent a corporate creditor maintaining a suit in equity in Connecticut against stockholders in a Missouri corporation.[1] At common law such notice cannot be given by publication to a non-resident.[2]

§ 202. *The remedy by mandamus.*—It is doubtful whether corporate creditors may, in this country, have recourse to the writ of

holder, such notice is not good when served out of the state on a non-resident. A judgment based on such notice is not good. Wilson *v.* Seligman, 144 U. S. 41 (1892), aff'g 36 Fed. Rep. 154. In Missouri it is held that "a proceeding by motion for execution against a stockholder of an insolvent corporation is in no sense the institution of an independent suit, but a mere supplementary proceeding in aid of the execution against the corporation." Kohn *v.* Lucas, 17 Mo. App. 29 (1885); Paxon *v.* Talmage, 87 Mo. 13 (1885). A proceeding under the Missouri statute after judgment against the corporation to collect stockholders' subscription liability after a mere notice may be removed into the federal court. Lackawanna, etc. Co. *v.* Bates, 56 Fed. Rep. 737 (1893).

The statutory remedy of issuing execution against stockholders for their unpaid subscriptions on a judgment against the corporation ceases when a receiver is appointed. Showalter *v.* Laredo Imp. Co., 83 Tex. 162 (1892). In England this plan has been tried and was unsatisfactory. Creditors, when they could not obtain satisfaction from companies, singled out some unfortunate stockholder, and compelled him to pay the whole amount for which judgment had been recovered. This course was in the highest degree unfair; and parliament was induced, when legislating on joint stock companies in 1856, to leave out all those clauses, found in the preceding acts, enabling creditors to execute judgments against individual stockholders, and to provide, instead, that creditors should have the power, upon non-payment of the debts due to them from the company, to cause it to be wound up. The same view prevailed when the acts relating to joint-stock companies were remodeled in 1862. Consequently, a creditor of a company registered under the Companies Act, 1862, can only execute a judgment obtained against the company by proceeding against the corporate property, and, if necessary, by having recourse to a petition for winding up the company. In Lowry *v.* Inman, 46 N. Y. 119 (1871), a charter permitting the property of stockholders to be taken upon execution on a judgment against the corporation, and providing that such stockholders may use the same powers against others to enforce contribution, was held not to create such a general individual liability as would sustain a personal action.

The legislature may modify a summary remedy to collect subscriptions. *Ex parte* Northeast, etc. R. R., 37 Ala. 679 (1861); Howard *v.* Kentucky, etc. Ins. Co., 13 B. Mon. (Ky.) 282 (1852). A statutory remedy of one state is not available in another state. Christensen *v.* Eno, 106 N. Y. 97 (1887).

1 Lewisohn *v.* Stoddard, 78 Conn. 575 (1906).

2 Even though property purchased for $2,500 and worth not over $5,000 is turned in for $13,500 of stock, yet the bankruptcy court where the company is organized cannot hold a non-resident stockholder liable on the stock by service by publication. *In re* Haley, 158 Fed. Rep. 74 (1908).

mandamus to compel the officers of the corporation to make a call for the purpose of raising money to meet corporate obligations.[1]

In the English courts a *mandamus* is sometimes awarded in these cases.[2] But in this country the question of calls is not usually of much importance in such cases. The corporation is generally insolvent; a bill is filed in a court of equity to collect and distribute all the assets, and calls on the subscriptions are made by the court itself.[3]

§ 203. *The remedy by action at law.*—Another remedy is by an action at law. It has been held that unpaid subscriptions, after call, may be enforced by an action at law brought directly by the creditor against the delinquent subscriber, and that in such an action each subscriber is liable, not for his proportionate share, but to the full extent of his unpaid subscription.[4]

The tendency of the law, however, is to do away with this remedy, and to compel the creditor in all cases to seek his remedy in a court of equity. This tendency is in accord with the best interests of corporate creditors and stockholders and the prevention of a multiplicity of suits.[5]

1 Dalton, etc. R. R. *v.* McDaniel, 56 Ga. 191 (1876); Hatch *v.* Dana, 101 U. S. 205, 215 (1879). *Cf.* Cucullu *v.* Union Ins. Co., 2 Rob. (La.) 571, 573 (1842); Allen *v.* Montgomery R. R., 11 Ala. 437 (1847).

2 Regina *v.* Victoria Park Co., 1 Q. B. 288 (1841); Regina *v.* Ledgard, 1 Q. B. 616 (1841); Rex. *v.* St. Katherine Dock Co., 4 B. & Ad. 360 (1832).

3 See § 108, *supra.*

4 Bank of United States *v.* Dallam, 4 Dana (Ky.), 574 (1836); Allen *v.* Montgomery R. R., 11 Ala. 437 (1847); Persch *v.* Simmons, 3 N. Y. Supp. 783 (1889). An action to recover unpaid subscriptions may be at law. Faull *v.* Alaska, etc. Min. Co., 14 Fed. Rep. 657 (1883); Tama Water-power Co. *v.* Hopkins, 79 Iowa, 653 (1890); Calumet Paper Co. *v.* Stotts Inv. Co., 96 Iowa, 147 (1895); Wilbur *v.* Stockholders, 18 Nat. Bankr. Reg. 178 (1878); s. c., 29 Fed. Cas. 1189; White *v.* Blum, 4 Neb. 555 (876); McCarthy *v.* Lavasche, 89 Ill. 270 (1878); Freeman *v.* Winchester, 18 Miss. 577 (1848). *Contra*, Griffith *v.* Mangam, 73 N. Y. 611 (1878). *Cf.* Glenn *v.* Lancaster, 109 N. Y. 641 (1888). Concerning the pleadings in a suit at law to collect subscriptions, see Glenn *v.* Sumner, 132 U. S. 152 (1889). A suit by contractors against subscribers for stock in a company must be against each separately and not against all in one suit. Davis *v.* McMillan, 13 Ind. App. 424 (1895). See also §§ 208, 220, 223, *infra.*

A subscription paper, "We agree to pay," is several and not joint. A suit against all the subscribers will fail. Davis, etc. Co. *v.* Barber, 51 Fed. Rep. 148 (1892). *Cf.* § 76, *supra.*

The legislature may by statute make a court of law the sole forum in which to collect unpaid subscriptions. Shickell *v.* Berryville, etc. Co., 99 Va. 88 (1901). Under the Iowa statute authorizing a corporate creditor to sue a stockholder on an unpaid subscription, the suit may be brought in the federal court in New York to enforce such liability, and such suit may be at law under such statute. Atlantic T. Co. *v.* Osgood, 116 Fed. Rep. 1019 (1902).

5 See § 204, *infra.*

§ 204. *The remedy by bill in equity.*—The remedy most usually adopted by corporate creditors to obtain the payment of their claims against the corporation from the unpaid balances of subscriptions due the corporation by the subscribers to the capital stock is a bill in equity. This is in the nature of a creditor's bill, reaching the equitable assets of the principal debtor. It is the most effectual, simple, and just remedy, and is not only the favorite remedy of the courts, but is generally resorted to by the corporate creditors themselves.[1] Some of the courts have even gone to the extent of hold-

[1] Pfohl *v.* Simpson, 71 N. Y. 137 (1878); Mathez *v.* Neidig, 72 N. Y. 100 (1878); Dayton *v.* Borst, 31 N. Y. 435 (1865); Mann *v.* Pentz, 3 N. Y. 415 (1850); Stephens *v.* Fox, 83 N. Y. 313 (1881); s. c., 17 Hun, 435; Griffith *v.* Mangam, 73 N. Y. 611 (1878); Christensen *v.* Eno, 106 N. Y. 97, 100 (1887); Ward *v.* Griswoldville Mfg. Co., 16 Conn. 593 (1844); Bank of United States *v.* Dallam, 4 Dana (Ky.), 574 (1836); Shickle *v.* Watts, 94 Mo. 410 (1888); Crawford *v.* Rohrer, 59 Md. 599 (1882); Hightower *v.* Thornton, 8 Ga. 486 (1850); Hightower *v.* Mustian, 8 Ga. 506 (1850); Dalton, etc. R. R. *v.* McDaniel, 56 Ga. 191 (1876); Germantown Pass. Ry. *v.* Fitler, 60 Pa. St. 124 (1869); Adler *v.* Milwaukee, etc. Co., 13 Wis. 57 (1860); Gianella *v.* Bigelow, 96 Wis. 185 (1897); Curry *v.* Woodward, 53 Ala. 371 (1875); Allen *v.* Montgomery R. R., 11 Ala. 437 (1847); Wincock *v.* Turpin, 96 Ill. 135 (1880); Hickling *v.* Wilson, 104 Ill. 54 (1882); Henry *v.* Vermillion, etc. R. R., 17 Ohio, 187 (1848); Miers *v.* Zanesville, etc. Turnp. Co., 11 Ohio, 273 (1842); Judson *v.* Rossie Galena Co., 9 Paige, 598 (1842); Van Pelt *v.* U. S. Met. Spring, etc. Co., 13 Abb. Pr. (N. S.) 325, 331 (1872). [Compare with this case Sherwood *v.* Buffalo, etc. R. R., 12 How. Pr. 137 (1855), and Hammond *v.* Hudson River, etc. Co., 11 How. Pr. 29, 33 (1854).] Marsh *v.* Burroughs, 1 Woods, 463 (1871); s. c., 16 Fed. Cas. 800; Louisiana Paper Co. *v.* Waples, 3 Woods, 34 (1877); s. c., 15 Fed. Cas. 968; Faull *v.* Alaska, etc. Min. Co., 8 Sawyer, 420 (1883); Holmes *v.* Sherwood, 16 Fed. Rep. 725 (1881); Chandler *v.* Siddle, 10 Nat. Bankr. Reg. 236 (1874); s. c., 5 Fed. Cas. 459; Myers *v.* Seeley, 10 Nat. Bankr. Reg. 411 (1874); s. c., 17 Fed. Cas. 1118; Wilbur *v.* Stockholders, 18 Nat. Bankr. Reg. 178 (1878); s. c., 29 Fed. Cas. 1189; Harmon *v.* Page, 62 Cal. 448 (1882); Ogilvie *v.* Knox Ins. Co., 22 How. 380 (1859); Sanger *v.* Upton, 91 U. S. 56, 60 (1875); Hatch *v.* Dana, 101 U. S. 205 (1879); Salmon *v.* Hamborough Co., 1 Cas. in Ch. (Eng.) 204 (1671); Patterson *v.* Lynde, 106 U. S. 519 (1882), saying that "no one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law so as to appropriate it exclusively to himself." A bill in equity may be filed in the federal courts to collect unpaid subscriptions and apply them to the payment of claims of claimants who are corporate creditors. If the sums due the original complainants amount to more than $2,000, the court has jurisdiction. If the aggregate collections are more than $5,000, an appeal lies. Handley *v.* Stutz, 137 U. S. 366 (1890). In determining the jurisdiction of the federal court in suits to enforce a stockholder's subscription liability, the aggregate liability of all the stockholders who are joined as defendants is not considered, but the separate liability is considered. Wilson *v.* Kiesel, 164 U. S. 248 (1896). In Ohio it has been held that an action for unpaid

ing a bill in equity to be the exclusive remedy for the corporate creditor in these cases.[1] Occasionally, also, statutes are enacted prescribing that a creditor who seeks to apply such assets to the payment of his claim can do so only by a suit in equity.[2] The right to proceed by a suit in equity herein has been held to exist, even where the general equitable remedy by creditor's bill has been abol-

assessments on subscription for stock might be joined in an action on the statutory liability of stockholders. Warner *v.* Callender, 20 Ohio St. 190 (1870). A bill in equity is the proper remedy. Johnston *v.* Markle Paper Co., 153 Pa. St. 189 (1893); Baines *v.* Babcock, 95 Cal. 581 (1892). A bill may be filed by a judgment creditor whose execution has been returned unsatisfied to enjoin executions, have a receiver appointed, have subscriptions collected, etc. Ballin *v.* Loeb, 78 Wis. 404 (1890). In an action to enforce the liability of stockholders in a foreign corporation the plaintiff may examine the defendant before trial in order to frame his complaint. Thayer *v.* Humphreys, 69 Hun, 343 (1893). A judgment creditor of a corporation with an execution returned unsatisfied may file a bill against a stockholder to reach an unpaid subscription of the latter and to reach corporate property which was illegally conveyed to him. Hall *v.* Henderson, 114 Ala. 601 (1896); s. c., 126 Ala. 449. A corporate creditor, where the corporate property has been exhausted, may file a bill in the nature of a creditor's bill to collect unpaid subscriptions. The suit may be against one subscriber. But the bill must be so framed that other creditors may come in. Gilchrist *v.* Helena, etc. R. R., 49 Fed. Rep. 519 (1892). The fund realized from the suit in equity is distributed ratably among all the creditors. Mathis *v.* Pridham, 1 Tex. Civ. App. 58 (1892). The capital stock is not a trust fund for the benefit of creditors, and hence a court of equity has no jurisdiction on that ground to collect unpaid subscriptions. Henderson *v.* Hall, 134 Ala. 455 (1900).

1 Thomson, etc. Co. *v.* Murray, 60 N. J. L. 20 (1897); Van Pelt *v.* Gardner, 54 Neb. 701 (1898); Jones *v.* Jarman, 34 Ark. 323 (1879); Harris *v.* First Parish, 40 Mass. 112 (1839); Knowlton *v.* Ackley, 62 Mass. 93 (1851); Erickson *v.* Nesmith, 81 Mass. 221 (1860); Smith *v.* Huckabee, 53 Ala. 191 (1875); Umsted *v.* Buskirk, 17 Ohio St. 113 (1866); Pollard *v.* Bailey, 20 Wall. 520 (1874); Terry *v.* Little, 101 U. S. 216 (1879). *Cf.* Spear *v.* Grant, 16 Mass. 9 (1819); Hodges *v.* Silver Hill Min. Co., 9 Oreg. 200 (1881). The remedy is in equity alone. Hamilton *v.* Clarion, etc. R. R., 144 Pa. St. 34 (1891); Burch *v.* Taylor, 1 Wash. St. 245 (1890); Universal F. Ins. Co. *v.* Tabor, 16 Colo. 531 (1891). It seems to be well settled that, in the United States courts, unpaid subscriptions can be reached by a corporate creditor in a court of equity only. Brown *v.* Fisk, 23 Fed. Rep. 228 (1885). In Bunn's Appeal, 105 Pa. St. 49 (1884), the supreme court of Pennsylvania clearly held that upon corporate insolvency no creditor can sue at law for the application of unpaid subscriptions to his debt. His remedy is in equity alone. In Nebraska a creditor cannot collect an unpaid subscription by a suit at law. His remedy is in equity. Reed *v.* Burg, 96 N. W. Rep. 414 (Neb. 1901). As to discovering the names of stockholders, see Hipple *v.* Five Mile, etc. Co., 3 Atl. Rep. 682 (N. J. Eq. 1886); also, § 519, *infra*.

2 Hadley *v.* Russell, 40 N. H. 109 (1860).

ished by statute.[1] Where stock has been issued as full paid without any money or property being paid therefor, a judgment creditor's remedy is in equity and not at law.[2] Where the same defense is involved in various suits against subscribers to stock, a court of equity has jurisdiction, and all the subscribers may be made parties defendant.[3] A statute giving a remedy in equity is not unconstitutional as depriving the defendant of trial by jury.[4] A recent case in the federal court holds that equity has jurisdiction of a suit by a receiver to collect unpaid subscriptions where the stockholders are numerous and can be joined in one suit, and the cost of a separate suit would be excessive and the full assessment is not necessary and the average amount of assessment is small.[5]

§ 205. *Parties to the bill in equity—Parties plaintiff.*—A corporate creditor who seeks in this way to obtain payment of his claim for the unpaid subscriptions to the capital stock of the corporation should file his bill on behalf of himself and such other

1 Adler *v.* Milwaukee, etc. Mfg. Co., 13 Wis. 57 (1860). The equitable jurisdiction herein seems to have been based on various grounds. See Wilbur *v.* Stockholders, 18 Nat. Bankr. Reg. 178 (1878); s. c., 29 Fed. Cas. 1189. In one case the bill in equity has been held to be in the nature of an equitable attachment in which the subscribers are in effect called on to answer as garnishee of the principal debtor. Ogilvie *v.* Knox Ins. Co., 22 How. 380 (1859). In practice a receiver is usually appointed, the amount of the corporate debts and the amount necessary to be contributed by the holders of shares not paid up are ascertained by proof, or through a referee and master's report, and then there is a final decree affording, so far as the assets admit, adequate relief, and, in any event, proportional relief to all parties. Dalton, etc. R. R. *v.* McDaniel, 56 Ga. 191 (1876).

2 First Nat. Bank *v.* Peavey, 69 Fed. Rep. 455 (1895). A judgment creditor's bill is multifarious where it asks to hold the defendant liable on a subscription for stock, and as an officer for causing the corporation to buy its own stock, and as an outsider for obtaining real estate of the company without consideration, and as an outsider misrepresenting the condition of the company. First Nat. Bank *v.* Peavey, 75 Fed. Rep. 154 (1896). The liability of subscribers for stock under the Maine statutes, where the stock is not properly paid up, cannot be enforced in the federal courts by a suit in equity, even though the statutes of Maine authorize such a suit. Alderson *v.* Dole, 74 Fed. Rep. 29 (1896). It is doubtful whether a holder of stock which purports to be fully paid up can be held liable thereon in an action at law, because the certificate of stock must first be disposed of and annulled as having been fraudulently issued. See *v.* Heppenheimer, 69 N. J. Eq. 36 (1905).

3 Wyman *v.* Bowman, 127 Fed. Rep. 257 (1904), holding also that where the chief part of an action against the transferrer of stock to enforce his subscription liability is to set aside a transfer and release, equity has jurisdiction.

4 Parmelee *v.* Price, 208 Ill. 544 (1904).

5 Brown *v.* Allebach, 156 Fed. Rep. 697 (1907).

creditors as may wish to come in.[1] The general rule is that such a suit is and should be for the benefit of any or all creditors who elect to come in as parties complainant, and establish their debts according to the course and practice of a court of chancery.[2] While the bill must be so framed as to permit other creditors, if they elect, to come in and be made parties to the suit, it is in no way necessary to join them as parties. The other creditors are proper but

1 Handley *v.* Stutz, 137 U. S. 366 (1890); First Nat. Bank *v.* Peavey, 75 Fed. Rep. 154 (1896); Crease *v.* Babcock, 51 Mass. 525 (1846); Holmes *v.* Sherwood, 16 Fed. Rep. 725 (1881); Sawyer *v.* Hoag, 17 Wall. 610 (1873); Mills *v.* Scott, 99 U. S. 25 (1878); Patterson *v.* Lynde, 106 U. S. 519 (1882). A creditor's suit to collect unpaid subscriptions must not only be in equity but must be for the benefit of all creditors. Bickley *v.* Schlag, 46 N. J. Eq. 533 (1890); Van Pelt *v.* Gardner, 54 Neb. 701 (1898).

2 Wetherbee *v.* Baker, 35 N. J. Eq. 501 (1882); Coleman *v.* White, 14 Wis. 700 (1862); Carpenter *v.* Marine Bank, 14 Wis. 705, n. (1862); Morgan *v.* New York, etc. R. R., 10 Paige, 290 (1843); Masters *v.* Rossie Lead Min. Co., 2 Sandf. Ch. 301 (1845); Mann *v.* Pentz, 3 N. Y. 415 (1850); Umsted *v.* Buskirk, 17 Ohio St. 113 (1866); Crease *v.* Babcock, 51 Mass. 525 (1846); Pollard *v.* Bailey, 20 Wall. 520 (1874); Terry *v.* Little, 101 U. S. 216 (1879). Any creditor has a right to come in, establish his claim, and share *pro rata* in the distribution of the assets, even though the bill was not filed for the benefit of such as should choose to come in and share the expense. Turnbull *v.* Prentiss Lumber Co., 55 Mich. 387 (1884). See also Tallmadge *v.* Fishkill Iron Co., 4 Barb. 382, 393 (1848); Walker *v.* Crain, 17 Barb. 119, 131 (1853). In consequence thereof no one creditor can, by superior diligence in filing a bill, obtain a preference over other creditors in respect of the unpaid balances of subscriptions. See the cases in preceding note. There is, however, an early case in the Ohio reports which seems to recognize such a preference. Miers *v.* Zanesville, etc. Turnp. Co., 13 Ohio, 197 (1844). See Adler *v.* Milwaukee, etc. Co., 13 Wis. 57 (1860); Wright *v* McCormack, 17 Ohio St. 86 (1866). There must be an account taken of the amount of debts, assets, and unpaid capital, and a decree for an assessment of the amount due by each stockholder. Bell's Appeal, 115 Pa. St. 88 (1887). Otherwise it is for the jury to say whether the whole of the unpaid subscriptions are needed to pay corporate debts. Citizens', etc. Co. *v.* Gillespie, 115 Pa. St. 564 (1887). The pleadings may be of such a nature that the trial must be at law. Glenn *v.* Lancaster, 109 N. Y. 641 (1888). In California it is held that a judgment creditor's suit in behalf of himself and other creditors is not in behalf of simple creditors. Where the judgment retains the cause for other judgment creditors who may come in and make a proper showing, this refers only to judgment creditors then existing. Several judgment creditors may join in the suit in equity. A prior judgment in favor of another creditor is not evidence of the liability of the stockholders. Baines *v.* West Coast Lumber Co., 104 Cal. 1 (1894). But see Thatcher *v.* King, 156 Mass. 490 (1892). As to the form of a decree in a creditor's action, and as to the right of a creditor to discontinue a suit brought in behalf of himself and other creditors, see Salisbury *v.* Binghamton Pub. Co., 85 Hun, 99 (1895), and § 222, *infra.*

not necessary parties.[1] Several creditors, however, cannot bring separate suits of this nature. They must all join in one proceeding.[2] Where the suit is in equity in behalf of all the creditors, the judgment cannot be in behalf of the plaintiff only, if it appears that there are other creditors.[3] A stockholder who is also a creditor may file a bill as a creditor to reach unpaid subscriptions. He must, however, pay his own subscription.[4] The stockholders need not

1 Marsh *v.* Burroughs, 1 Woods, 463 (1871); s. c., 16 Fed. Cas. 800; Crease *v.* Babcock, 51 Mass. 525 (1846); Hatch *v.* Dana, 101 U. S. 205 (1879). *Cf.* Adler *v.* Milwaukee, etc. Co., 13 Wis. 57 (1860). One creditor cannot maintain a suit in his behalf alone, but the suit must be in behalf of all corporate creditors and against all stockholders who have not paid. A receiver will be appointed. Van Pelt *v.* Gardner, 54 Neb. 701 (1898). A judgment creditor may commence a suit in equity against a stockholder to collect his unpaid subscription without joining other stockholders, and even though no account has been taken of the indebtedness of the company. Cooper *v.* Adel, etc. Co., 127 N. C. 219 (1900). In California the bill by a corporate creditor may be against one or more stockholders, but the fund is distributed among all creditors. Welch *v.* Sargent, 127 Cal. 72 (1899). A corporate creditor's right to recover does not depend on other debts of the corporation, and no accounting is necessary, and it is not necessary to join all stockholders as parties defendant. Walter *v.* Merced, etc. Assoc., 126 Cal. 582 (1899). A judgment creditor may maintain a suit in equity to reach unpaid subscriptions, and need not allege that it is in behalf of all creditors and that other creditors may apply to come in. McBryan *v.* Universal, etc. Co., 130 Mich. 111 (1902). A creditor may file a bill in equity in his own behalf alone against some of the stockholders to collect their unpaid subscriptions. Harrell *v.* Blount, 112 Ga. 711 (1901). Corporate creditor suing need not join all the corporate creditors as co-complainants nor all the stockholders liable as defendants. Cornell's Appeal, 114 Pa. St. 153 (1886). Other creditors may come in on a bill by a creditor to collect unpaid subscriptions. Bailey *v.* Pittsburgh, etc. R. R., 139 Pa. St. 213 (1891).

2 Crease *v.* Babcock, 51 Mass. 525 (1846). But see Perry *v.* Turner, 55 Mo. 418 (1874). And an action to compel the payment of an unpaid subscription may be joined by a creditor with an action to enforce a statutory liability. Warner *v.* Callender, 20 Ohio St. 190 (1870). Accordingly, where a bill is filed, on behalf of all the creditors who choose to come in, against all the stockholders in default, the courts will enjoin a separate creditor's suit. Pierce *v.* Milwaukee Construction Co., 38 Wis. 253 (1875). *Cf.* Coleman *v.* White, 14 Wis. 700 (1862); Carpenter *v.* Marine Bank, 14 Wis. 705, n. (1862); Ballston Spa Bank *v.* Marine Bank, 18 Wis. 490 (1864).

3 Hallett *v.* Metropolitan, etc. Co., 69 N. Y. App. Div. 258 (1902).

4 Bickley *v.* Schlag, 46 N. J. Eq. 533 (1890); Bissit *v.* Kentucky River Nav. Co., 15 Fed. Rep. 353 (1882), and the valuable note; Thompson *v.* Reno Savings Bank, 19 Nev. 103, 171, 242, 291, 293 (1885). *Cf.* Hogg's Appeal, 88 Pa. St. 195 (1878); Calhoun *v.* Steam Ferry Boat, 27 Int. Rev. Rec. 273 (1881), in which case it is held he cannot sue the corporation. But see Milvain *v.* Mather, 5 Exch. 55 (1850), in which it is held that a corporation sued by a stockholder

wait to be made parties defendant to a creditors' bill before moving for contribution, but may, in a proper case, before a suit in the nature of a creditors' bill is filed against them by creditors of the corporation, file a bill in equity upon their own account, making the corporation a party, to enforce the payment of unpaid balances of subscription, for the payment of corporate indebtedness, and for contribution.[1] A corporate creditor suing a stockholder for his unpaid subscription may join a claim against the defendants for corporate assets wrongfully appropriated by them.[2]

§ 206. *Parties defendant.*—The defendants to such a suit should be the corporation itself,[3] and all from whom an unpaid subscrip-

may set off any amount due by him on calls. *Cf. Ex parte* Winsor, 3 Story, 411 (1844); s. c., 30 Fed. Cas. 312; Weber *v.* Fickey, 47 Md. 196 (1877); s. c., 52 Md. 501; holding that a stockholder who is also a creditor and who has not fully paid his subscription cannot recover from another stockholder the full amount of his claim. Emmert *v.* Smith, 40 Md. 123 (1874), to same effect. A stockholder cannot file a bill to compel others to pay in their subscriptions where he has not paid his own. Holton *v.* Wallace, 66 Fed. Rep. 409 (1895). A stockholder who is also a creditor may enforce the liability, but he must pay his proportion. Wilson *v.* Kiesel, 9 Utah, 397 (1894). Under the New Jersey statute where stockholders are held liable to corporate creditors on stock issued for property taken at a fraudulent overvaluation, a creditor is entitled to participate, even though he is also one of the stockholders and took part in the illegal issue. Easton Nat. Bank *v.* American, etc. Co., 70 N. J. Eq. 732 (1906); rev'g in part 69 N. J. Eq. 326. In a suit by a stockholder as a corporate creditor, to collect unpaid subscriptions, the defendants cannot set off the plaintiff's unpaid subscription. Moreover the defendants are liable for the entire unpaid subscription, and not in their proportion of all unpaid subscriptions, since the liability is several and not joint. Blood *v.* La Serena, etc. Co., 89 Pac. Rep. 1090 (Cal. 1907).

1 Fiery *v.* Emmert, 36 Md. 464 (1872).

2 Lewisohn *v.* Stoddard, 78 Conn. 575 (1906). A judgment creditor's suit against the stockholders to reach assets which they have distributed among themselves may also pray that they be held liable for their unpaid subscriptions. Jahn *v.* Champagne, etc. Co., 147 Fed. Rep. 631 (1906).

3 The corporation is ordinarily a necessary party. Mann *v.* Pentz, 3 N. Y. 415 (1850); Continental, etc. Co. *v.* Cook, 152 Fed. Rep. 652 (1906); Commercial, etc. *v.* Warthen, 119 Ga. 990 (1904); Jones Co. *v.* Hoffman, 114 La. 996 (1905); Cooper *v.* Adel, etc. Co., 122 N. C. 463 (1898); Walsh *v.* Memphis, etc. R. R., 2 McCrary, 156 (1881); s. c., 6 Fed. Rep. 797; s. c. *sub nom.* Walser *v.* Memphis, etc. R. R., 19 Fed. Rep. 152 (1883); Wilbur *v.* Stockholders, 18 Bankr. Reg. 178 (1878); s. c., 29 Fed. Cas. 1189; Wetherbee *v.* Baker, 35 N. J. Eq. 501 (1882); First Nat. Bank *v.* Smith, 6 Fed. Rep. 215 (1879); Brinckerhoff *v.* Brown, 7 Johns. Ch. 217 (1823). But see, *contra*, Van Pelt *v.* Gardner, 54 Neb. 701 (1898); Walser *v.* Seligman, 13 Fed. Rep. 415 (1882), a well-considered case, and Wellman *v.* Howland Coal, etc. Works, 19 Fed. Rep. 51 (1884). In the former of these

tion is due, except as are unknown or insolvent, or beyond the jurisdiction.[1]

cases the court says: "Sufficient reasons for not making it (the corporation) a party are found in the fact that it is beyond the jurisdiction of this court, and also in the fact that it is practically defunct." In the case last cited it was held that, where a corporation is without property or officers or place of business, it need not be made a party of record. The corporation is a necessary party defendant in an action by corporate creditors to collect unpaid subscriptions. Service upon it by publication is insufficient. King *v.* Sullivan, 93 Ga. 621 (1894); Van Pelt *v.* Gardner, 54 Neb. 701 (1898).

1 Hadley *v.* Russell, 40 N. H. 109 (1860); Erickson *v.* Nesmith, 46 N. H. 371 (1866); Pierce *v.* Milwaukee Construction Co., 38 Wis. 253 (1875); Coleman *v.* White, 14 Wis. 700 (1862); Carpenter *v.* Marine Bank, 14 Wis. 705, n. (1862); Umsted *v.* Buskirk, 17 Ohio St. 113 (1866); Mann *v.* Pentz, 3 N. Y. 415 (1850); Griffith *v.* Mangam, 73 N. Y. 611 (1878); Vick *v.* Lane, 56 Miss. 681 (1879); Walsh *v.* Memphis, etc. R. R., 2 McCrary, 156 (1881); s. c., 6 Fed. Rep. 797; s. c., *sub nom.* Walser *v.* Memphis, etc. R. R., 19 Fed. Rep. 152 (1883). A suit must be in equity and all stockholders and creditors within the jurisdiction must be brought in. Van Pelt *v.* Gardner, 54 Neb. 701 (1898). *Cf.* Young *v.* New York, etc. Steamship Co., 10 Abb. Pr. 229 (1860), holding that judgment creditors are not proper parties defendant without showing why they were not made parties plaintiff. The bill should contain an appropriate allegation as to the stockholders unknown, insolvent, or out of the jurisdiction, and a prayer that, upon discovery, they be made parties when possible. Bogardus *v.* Rosendale Mfg. Co., 7 N. Y. 147 (1852). In a suit in equity by a corporate creditor to collect unpaid subscriptions all subscribers must be made parties defendant, unless a reason is given for not doing so, such as non-residence, insolvency, etc. Fremont, etc. Co. *v.* Storey, 96 N. W. Rep. 416 (Neb. 1902). In a suit in equity by a corporate creditor against stockholders for unpaid subscriptions, subscribers who did not pay the ten per cent. required by statute to make them stockholders need not be joined as parties defendant nor subscribers whose shares have been forfeited. Ford *v.* Chase, 118 N. Y. App. Div. 605 (1907); aff'd 189 N. Y. 504. A corporate creditor may proceed against a single stockholder or more without bringing in other stockholders, the liability of each being several and fixed by the amount of unpaid subscriptions. Williams' Ex'r *v.* Chamberlain, 94 S. W. Rep. 29 (Ky. 1906). Under the Illinois statute making both transferrer and transferee liable for the unpaid subscription, a corporate creditor's suit need not join all the parties who are liable. Meyer *v.* Ruby, etc. Co., 192 Mo. 162 (1905). It is not necessary to join all the stockholders. Martin *v.* South, etc. Co., 94 Va. 28 (1896); s. c., 97 Va. 349. See also cases in note 2, p. 514, *supra*. In a suit by a receiver to collect subscriptions several subscribers may be joined as parties defendant. Cox *v.* Dickie, 93 Pac. Rep. 523 (Wash. 1908). "Where the attempt is to reach the liability of the stockholders on their subscriptions to capital stock, all the solvent stockholders within the jurisdiction must be joined, except where this will be excused upon an allegation that the number is too great." Vick *v.* Lane, 56 Miss. 681, 684 (1879). But on the other hand, with respect to the matter of joining all the solvent stockholders who are

The stockholders against whom the bill is filed may, however, it seems, when all are not made parties, file a cross-bill, obtain a

in arrears as parties defendant to the bill, provided they are within the jurisdiction, we find a line of authorities in support of the proposition that all such stockholders are not always necessary parties to the bill; that such a suit may properly be brought against one, or any, of the delinquent stockholders as well as against all; and that a bill will not be held defective merely because it fails to include all the delinquent stockholders as parties defendant. Ogilvie *v.* Knox Ins. Co., 22 How. 380 (1859); Hatch *v.* Dana, 101 U. S. 205 (1879); Marsh *v.* Burroughs, 1 Woods, 463 (1871); s. c., 16 Fed. Cas. 800; Holmes *v.* Sherwood, 16 Fed. Rep. 725 (1881); Glenn *v.* Williams, 60 Md. 93 (1882); Bartlett *v.* Drew, 57 N. Y. 587 (1874); Erundage *v.* Monumental, etc. Min. Co., 12 Oreg. 322 (1885). *Cf.* Von Schmidt *v.* Huntington, 1 Cal. 55 (1850); Lamar Ins. Co. *v.* Gulick, 102 Ill. 41 (1882). Any other rule would place upon the creditor a burden which would be unjust and perhaps destructive of the remedy itself. In Hatch *v.* Dana, 101 U. S. 205 (1879), there was a bill to compel payment of a debt out of the unpaid subscription of a single stockholder. It was not sought to wind up the company. It being urged that a cerditor of an insolvent corporation is not at liberty to proceed against one or more delinquent subscribers to recover the amount of his debt, without an account being taken of other indebtedness, and without bringing in all the stockholders for contribution, the court, by Mr. Justice Strong, said: "The liability of a subscriber for the capital stock of a company is several and not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers, and in equity his liability does not cease to be several. A creditor's bill merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation. It does not change the character of the debt attached or garnished. It may be that, if the object of the bill is to wind up the affairs of this corporation, all the stockholders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent a multiplicity of suits. But this is no such case. The most that can be said is that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangible property, that is, out of its unpaid stock, there is not the same reason for requiring all the stockholders to be made defendants. *Cf.* Bonewitz *v.* Van Wert County Bank, 41 Ohio St. 78 (1884), where it was held error to give judgment against the defendants properly before the court, when the return of the summons was entirely silent as to two of the defendants. As to when bills brought by creditors in these cases are and are not multifarious, see Allen *v.* Montgomery R. R., 11 Ala. 437 (1847); Cambridge Waterworks *v.* Somerville Dyeing, etc. Co., 80 Mass. 193 (1860), where the liability of some of the defendants was as directors and of others as stockholders, and the bill was held to be multifarious; Barre Nat. Bank *v.* Hingham Mfg. Co., 127 Mass. 563 (1879); Pope *v.* Leonard, 115 Mass. 286 (1874); Deaderick *v.* Wilson, 8 Baxt. (Tenn.) 108 (1874). Executors

discovery of the remaining delinquent stockholders, bring them in as parties, and thus enforce contribution.[1] If all the parties who are liable have not been brought before the court, it has been held that those who are defendants of record cannot be charged with liability which should fall upon those who are absent, unless it be shown that the absentees are insolvent or beyond the jurisdiction of the court.[2] This, however, can hardly be considered sound law.[3]

§ 207. *A court of equity may make a call.*—It is well settled that, when stock is subscribed to be paid in upon call by the corporate authorities, and the company neglects or refuses to make such calls as are necessary to raise funds to meet the just corporate ob-

of a deceased stockholder may be joined with other stockholders as defendants where the suit is in equity. Hamilton *v.* Clarion, etc. R. R., 144 Pa. St. 34 (1891). A creditor's bill filed to collect the unpaid subscriptions of stockholders will be dismissed where only a few of the stockholders are made party defendants and no allegation is made showing clearly and in detail that the other stockholders cannot be reached and brought in. Dunston *v.* Hoptonic Co., 83 Mich. 372 (1890). An insolvent stockholder is not a necessary party to a suit by corporate creditors to collect subscriptions. Wilson *v.* California Wine Co., 95 Mich. 117 (1893). All the stockholders need not be joined as defendants. Baines *v.* Babcock, 95 Cal. 581 (1892); Gibbons *v.* Grinsel, 79 Wis. 365 (1891). A stockholder may be held liable on a subscription, although the corporation is not made a party defendant and other stockholders are not joined. A court of equity has jurisdiction. Potter *v.* Dear, 95 Cal. 578 (1892). In Michigan, by statute, stockholders may be joined as parties defendant in a judgment creditor's suit, in order to collect unpaid subscriptions. Schaub *v.* Welded, etc. Co., 130 Mich. 606 (1902). The directors are proper parties where they refuse to collect the unpaid subscriptions. Lewisohn *v.* Stoddard, 78 Conn. 575 (1906). In a suit brought by a corporate creditor against many stockholders to collect unpaid subscriptions, the plaintiff is not entitled to an order allowing him to examine persons for the purpose of ascertaining the residence of the defendants in order that they may be served. Union Collection Co. *v.* Superior Court, 149 Cal. 790 (1906).

[1] Hatch *v.* Dana, 101 U. S. 205 (1879). In the original bill itself there may properly be a prayer, when some of the delinquent stockholders are unknown, for a discovery, in order that such unknown stockholders may be made parties by amendment. Hipple *v.* Five-Mile, etc. Imp. Co., 3 Atl. Rep. 682 (N. J. 1886); Bogardus *v.* Rosendale Mfg. Co., 7 N. Y. 147 (1852); Morgan *v.* New York, etc. R. R., 10 Paige, 290 (1843).

[2] Wood *v.* Dummer, 3 Mason, 308 (1824); s. c., 30 Fed. Cas. 435. But see Marsh *v.* Burroughs, 1 Woods, 463 (1871); s. c., 16 Fed. Cas. 800. *Cf.* Erickson *v.* Nesmith, 46 N. H. 371 (1866). *Contra*, Cornell's Appeal, 114 Pa. St. 153 (1886), citing Stang's Appeal, 10 W. N. Cas. 409 (1881). When there are delinquent stockholders beyond the jurisdiction, the stockholders who have been sued and compelled to pay more than their due proportion must look to them for contribution. Holmes *v.* Sherwood, 16 Fed. Rep. 725 (1881). See also § 208, *infra*.

[3] See § 211, *infra*.

ligations, a court of equity will itself make the necessary calls if the interests of the creditors require it.[1] The court will, in behalf of the creditors, do what it is the duty of the corporation to do in respect of calls.[2] And the court may make the call although the statute says calls shall be made by the trustees, directors, or managers.[3] When a receiver is liquidating a corporation, an unpaid subscription is considered as immediately due.[4] An order of the

1 See § 108, *supra*.

2 Great Western Tel. Co. *v.* Purdy, 162 U. S. 329 (1896); Scovill *v.* Thayer, 105 U. S. 143, 155 (1881); Hatch *v.* Dana, 101 U. S. 205, 214 (1879); Covell *v.* Fowler, 144 Fed. Rep. 535 (1906); Curry *v.* Woodward, 53 Ala. 371 (1875); Wilbur *v.* Stockholders, 18 Nat. Bankr. Reg. 178 (1878); s. c., 29 Fed. Cas. 1189; Marsh *v.* Burroughs, 1 Woods, 463 (1871); s. c., 16 Fed. Cas. 800; Myers *v.* Seeley, 10 Nat. Bankr. Reg. 411 (1874); s. c., 17 Fed. Cas. 1118; Henry *v.* Vermillion, etc. R. R., 17 Ohio, 187 (1848); Robinson *v.* Bank of Darien, 18 Ga. 65 (1855); Ward *v.* Griswoldville Mfg. Co., 16 Conn. 593 (1844); Sanger *v.* Upton, 91 U. S. 56 (1875); Chubb *v.* Upton, 95 U. S. 665 (1877); Glenn *v.* Williams, 60 Md. 93 (1882). *Cf.* Germantown Pass. Ry. *v.* Fitler, 60 Pa. St. 124 (1869); Chandler *v.* Keith, 42 Iowa, 99 (1875); Mann *v.* Pentz, 3 N. Y. 415 (1850); Ogilvie *v.* Knox Ins. Co., 22 How. 380 (1859); Adler *v.* Milwaukee, etc. Co., 13 Wis. 57 (1860); Armstrong *v.* Danahy, 75 Hun, 405 (1894). And see Seymour *v.* Sturgess, 26 N. Y. 134 (1862); Wheeler *v.* Millar, 90 N. Y. 353 (1882). The court itself may make a call. Marson *v.* Deither, 49 Minn. 423 (1892). A call is necessary, or the equivalent, where the receiver sues. Chandler *v.* Siddle, 3 Dill. 477 (1874); s. c., 5 Fed. Cas. 459. No call is necessary where creditors file a bill to reach unpaid subscriptions. Hamilton *v.* Clarion, etc. R R., 144 Pa. St. 34 (1891). Non-resident stockholders are bound by the decree of the court levying the assessment. Howard *v.* Glenn, 85 Ga. 238 (1890). Where the statute requires twenty days' notice to stockholders before calls are made, creditors must give this notice before claiming and collecting the unpaid subscription. Universal F. Ins. Co. *v.* Tabor, 16 Colo. 531 (1891). In a suit by creditors to collect unpaid subscriptions the court may levy an assessment and direct execution for collection of the same. The court may also subsequently levy another assessment. The Virginia statute of 1897 requiring collection to be at law did not apply to pending proceedings. Martin *v.* South, etc. Co., 97 Va. 349 (1899); s. c., 94 Va. 28.

3 Crawford *v.* Rohrer, 59 Md. 599 (1882). *Cf.* Glenn *v.* Saxton, 68 Cal. 353 (1886). A call may be made in behalf of corporate creditors although the company had contracted with the stockholders not to call in the subscriptions until a later date. *Re* Cordova, etc. Co., [1891] 2 Ch. 580. Where, however, it was provided by the charter of the corporation that all calls are to be made only upon a three-fourths vote of the stockholders, it was held that a call by the court was irregular. Louisiana Paper Co. *v.* Waples, 3 Woods, 34 (1877); s. c., 15 Fed. Cas. 968. A court of equity may make a call, even though the statute provided that calls should be paid after having been made by the directors and certain notice given. Kroegher *v.* Calivada, etc. Co., 119 Fed. Rep. 641 (1902).

4 Carnahan *v.* Campbell, 158 Ind. 226 (1902).

court deciding the amount of debts and the necessity of collecting subscriptions to pay the same and specifying payments to be made by stockholders, and authorizing suit for that purpose, constitutes an assessment.[1] The order of the court levying an assessment is binding on the stockholders, even though no notice was given to them.[2] The court may direct the receiver to make a call instead of the court making the call itself directly.[3] A receiver may collect a call made by the directors.[4] In ordering a receiver to collect a portion of unpaid subscriptions the court must determine judicially how much will be needed to pay the debts, and the application of the receiver for an order will be denied if the assets have not yet been exhausted, and if the real owners of stock held in the name of dummies might be ascertained, but has not been.[5] A call, whether made by the court or by the directors, is conclusive evidence of the necessity therefor, unless directly attacked and set aside by judicial proceedings.[6] A stockholder may file a bill in equity to review an assess-

1 McCarter *v.* Ketcham, 67 Atl. Rep. 610 (N. J. 1907).

2 Brown *v.* Allebach, 156 Fed. Rep. 697 (1907).

3 Falk *v.* Whitman, etc. Co., 55 N. J. Eq. 396 (1897). See also § 208, *infra.* A receiver may make calls when so directed by the court. Maxwell *v.* Akin, 89 Fed. Rep. 178 (1898). A petition of a receiver to make calls on stock will be granted if it shows the necessity therefor and facts from which the amount of the necessary call can be determined by the court. Kirkpatrick *v.* American, etc. Co., 140 Fed. Rep. 186 (1905). The court may disregard the formality of a call and order the unpaid subscriptions to be paid to the receiver, or the court may require the receiver to make and enforce a call. Knight & Wall Co. *v.* Tampa, etc. Co., 46 S. Rep. 285 (Fla. 1908).

4 Wyman *v.* Williams, 52 Neb. 833 (1897). See also § 208, *infra.*

5 Kirkpatrick *v.* American, etc. Co., 135 Fed. Rep. 230 (1905). Before the bankruptcy court authorizes its trustee to collect unpaid subscriptions, the court must determine how much has been paid on the stock, and also whether collection is necessary to pay corporate debts, and also how much the unpaid corporate debts will amount to. *In re* Remington, etc. Co., 153 Fed. Rep. 345 (1907); holding, also, that in the bankruptcy court a stockholder cannot defend against a decision already rendered by the court as to the amount still due on the stock and the amount of corporate debts, but he may defend as to any matter peculiar to his own case. See, also, § 208, *infra.*

6 Great Western Tel. Co. *v.* Purdy, 162 U. S. 329 (1896). A member of a mutual insurance company cannot contest an assessment by the receiver on the ground that it is excessive. Collins *v.* Welch, 141 Mich. 676 (1905). Although a court in Virginia, where a company is incorporated, levies, at the instance of a corporate creditor, an assessment upon the stock larger than is necessary to pay the debts, yet the courts of another state will not inquire into the propriety of the amount of the assessment. Furnald *v.* Glenn, 56 Fed. Rep. 372 (1893). Where the court has assessed the stockholders, the necessity of the assessment cannot be contested. Cumberland, etc. Co. *v.* Clinton Hill, etc. Co., 57 N. J. Eq. 627

ment made by a receiver of an insolvent corporation where the claim upon which the receivership is based and all the proceedings subsequent thereto are permeated with fraud.[1] An assessment is necessary before suit against a subscriber, and such assessment must be made by the corporation if solvent, and by the court if insolvent. The assessment by the court will be on all stockholders, and if part cannot be collected a further assessment may be made later.[2] The question of whether interest on the call may be collected is considered elsewhere,[3] as is also the question of the form of the judgment against each stockholder.[4] Where the amount still due on unpaid stock is sufficient the judgment against the stockholders may include the claims proved and allowed with interest; also fees for creditors in winding up the company and in the suit to recover from the stockholders; also counsel fees and compensation to the receiver and expenses incurred in enforcing the decree.[5] In a hearing on an application by a receiver to levy assessments on unpaid subscriptions and for the collection of the same, the special defenses of the subscribers will not be considered. The court will only ascertain the amount of the debts, the names of the stockholders who have not paid, and the amount of the assessment necessary. A receiver will not be required first to try to collect a claim which he has, he having no funds to prosecute the same and the stockholders not offering to indemnify him.[6]

§ 208. *Receivers and assignees for the benefit of creditors—Their duties, powers, and liabilities as to unpaid subscriptions.*—When a corporation becomes insolvent, with corporate creditors on the one hand pressing their claims, and subscriptions to the capital stock

(1899); s. c., 54 Atl. Rep. 450 (1903). The decree appointing the receiver and fixing the amount of assessment is conclusive on stockholders. Castleman *v.* Templeman, 87 Md. 546 (1898).

1 Farwell *v.* Great Western Tel. Co., 161 Ill. 522 (1896), reviewing in full the twenty years' litigation growing out of the insolvency of the Great Western Telegraph Company. *Cf.* Furnald *v.* Glenn, 64 Fed. Rep. 49 (1894).

2 Covell *v.* Fowler, 144 Fed. Rep. 535 (1906). *Cf.* Ross, etc. Co. *v.* Southern, etc. Co., 72 Fed. Rep. 957 (1896). An assessment by a board of directors or a decree in chancery is not necessary to sustain an attachment by a receiver to collect the unpaid subscriptions of non-residents. Kohler *v.* Agassiz, 99 Cal. 9 (1893). In a suit in equity by a corporate creditor to enforce unpaid subscriptions several judgments may be entered against those who are served and appear for the amounts for which they should be assessed in order to pay the debts, but such assessment must first be made by the court. Turner *v.* Fidelity, etc., 2 Cal. App. 122 (1905). See § 108, *supra.*

3 See § 112, *supra.*

4 See § 211, *infra.*

5 See *r.* Heppenheimer, 69 N. J. Eq. 36 (1905).

6 Cumberland, etc. Co. *r.* Clinton Hill, etc. Co., 64 N. J. Eq. 517 (1903).

wholly or partially uncollected on the other hand, it is usual to place the assets of the company, including the claims against delinquent stockholders, in the hands of a third person for the benefit of all concerned. Such a person may be an assignee under state insolvent laws, a receiver, or an assignee for the benefit of creditors. A receiver in such a case may be defined to be a third person appointed by a court of equity to act as the representative alike of creditors and stockholders for the purpose of collecting the corporate assets and paying the corporate debts.[1] It is the right and duty of such a receiver to collect the unpaid subscriptions, so far as may be necessary, for the purpose of paying the corporate debts in full.[2]

1 Johnson *v.* Laflin, 5 Dill. 65 (1878); s. c., 13 Fed. Cas. 758; aff'd, 103 U. S. 800 (1880). The court may levy an assessment for the benefit of corporate creditors and may appoint a receiver to collect. Carter, etc. Co. *v.* Hano Co., 73 N. H. 588 (1906).

2 See § 207, *supra*. Dayton *v.* Borst, 31 N. Y. 435 (1865); Myers *v.* Sturgis, 123 N. Y. App. Div. 470 (1908); Nathan *v.* Whitlock, 9 Paige, 152 (1841); Means's Appeal, 85 Pa. St. 75 (1877); Dorris *v.* French, 4 Hun, 292 (1875); Van Wagenen *v.* Clark, 22 Hun, 497 (1880); Frank *v.* Morrison, 58 Md. 423 (1882); Chandler *v.* Brown, 77 Ill. 333 (1875); Calkins *v.* Atkinson, 2 Lans. 12 (1870); Dalton, etc. R. R. *v.* McDaniel, 56 Ga. 191 (1876); Berry *v.* Rood, 168 Mo. 316 (1902); Campbell *v.* Chapman, 31 S. Rep. 101 (Miss. 1902). *Cf.* Tucker *v.* Gilman, 45 Hun, 193 (1887); aff'd, 121 N. Y. 189; Tobey *v.* Russell, 9 R. I. 58 (1868); Stewart *v.* Lay, 45 Iowa, 604 (1877); Clarke *v.* Thomas, 34 Ohio St. 46 (1877); Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294 (1876). See also § 869, *infra*. A creditor and stockholder in an insolvent corporation, which has no assets except unpaid subscriptions, may have a receiver appointed to collect such subscriptions. Lamont *v.* Lamont, etc. Co., 109 Mo. App. 46 (1904). A provision in the Nebraska constitution rendering subscribers liable to creditors to the extent of their unpaid subscriptions, makes them liable, even though they have transferred their stock, and may be enforced by a receiver. This is the rule, even though the transferee gave his notes to the corporation in substitution for notes of the transferrer which the corporation gave up. Wyman *v.* Bowman, 127 Fed. Rep. 257 (1904). The remedy is a suit by some one properly representing the corporation to collect the subscriptions for the benefit of all the creditors. Jones Co. *v.* Hoffman, 114 La. 996 (1905). A receiver in a stockholder's suit to marshal and distribute the assets of an insolvent corporation may by order compel the complainant to pay a balance due on his subscription. Calef *v.* Wyandotte Realty Co., 70 Kan. 318 (1904). A receiver may collect unpaid subscriptions in accordance with an order of the court. McCarter *v.* Ketcham, 67 Atl. Rep. 610 (N. J. 1907). A receiver may sue to collect calls which became due before his appointment. Basting *v.* Ankeny, 64 Minn. 133 (1896). See also § 207, *supra*. A receiver of the corporation may levy an attachment to collect the unpaid subscriptions of non-residents. Kohler *v.* Agassiz, 99 Cal. 9 (1893). An assignee for benefit of creditors of an insolvent cor-

As long as the authority of the receiver exists, a creditor cannot directly bring suit against delinquent stockholders, but the receiver

poration may enforce unpaid subscriptions. Chamberlain *v.* Bromberg, 83 Ala. 576 (1888). As incidental to the receiver's power to collect unpaid balances of subscription, it is held that he may, as an officer of the court, make calls for the amount due. Hall *v.* U. S. Ins. Co., 5 Gill (Md.), 484 (1847); Rankine *v.* Elliott, 16 N. Y. 377 (1857). Lionberger *v.* Broadway Sav. Bank, 10 Mo. App. 499 (1881), holds that an assignee for benefit of creditors may, by a bill in equity, compel the directors of the insolvent corporation to make an assessment upon the capital stock, payable to him; such a suit is not affected by the fact that certain creditors are proceeding against the stockholders by motion under the statute, since the proceeding by motion is cumulative merely and not exclusive. Chandler *v.* Keith, 42 Iowa, 99 (1875), holds that a stockholder who had paid all regular assessments could not be called upon by the receiver, in an action at law, to pay the remainder of his subscription until a general call is made upon the stockholders for the amount assessed upon their shares, and this call should be preceded by the fact that losses have been sustained by the corporation, showing a necessity for an assessment and call upon the stockholders. A receiver represents the corporation, its stockholders and creditors. Hubbell *v.* Syracuse, etc. Works, 42 Hun, 182 (1886). "The receiver represents the creditors as well as all other parties interested in the corporation." A subscriber sued by him on the subscription cannot set up fraudulent representations inducing him to subscribe. Ruggles *v.* Brock, 6 Hun, 164 (1875). See also § 164, *supra*. A receiver may cause to be assessed and may collect assessments on parties liable therefor to pay insurance losses. McDonald *v.* Ross-Lewin, 29 Hun, 87 (1883). An order that the receiver may collect the unpaid subscriptions is not a "call," but merely gives authority. Liggett *v.* Glenn, 51 Fed. Rep. 381 (1892). The statute of limitations runs only from the time when the court makes a call. An action at common law on subscriptions must be in the company's name, and not in the name of the assignee of the company. Glenn *v.* Marbury, 145 U. S. 499 (1892). Under the English Railway Companies Act of 1867, § 4, a receiver has no such power. *Re* Birmingham, etc. Ry., L. R. 18 Ch. D. 155 (1881). In New York, by statute, the receiver may sue. See Dayton *v.* Borst, 31 N. Y. 435 (1865); and see, previous to the statute, Mann *v.* Pentz, 3 N. Y. 415 (1850), reversing 2 Sandf. Ch. 257. The receiver cannot enforce the subscription where the defendant had transferred his stock and been discharged by the corporation. Cutting *v.* Damerel, 88 N. Y. 410 (1882). In regard to the power of the receiver to enforce the statutory liability, see § 218, *infra*.

The receiver of a foreign corporation, duly empowered to sue at home, may sue resident stockholders for the balances due the company, provided the corporation itself could have done so if it had remained solvent. Dayton *v.* Borst, 31 N. Y. 435 (1865), a case where a receiver appointed by the court of chancery in New Jersey was held competent to maintain a suit of this nature in New York against a citizen thereof; Mann *v.* Cooke, 20 Conn. 178 (1850). See also McDonough *v.* Phelps, 15 How. Pr. 372 (1856); Seymour *v.* Sturgess, 26 N. Y. 134 (1862). After a transfer, the transferrer is not liable to the receiver any more than he would have been to the corporation. Billings *v.* Robinson, 94 N. Y. 415 (1884), affirm-

may be compelled to act in the matter at the instance of creditors.[1] Although a receiver has been appointed by the United States court

ing 28 Hun, 122 (1882). See ch. XV, *infra*. As to the power of the court to give a receiver power to compromise claims upon unpaid subscriptions, see Chandler *v.* Brown, 77 Ill. 333 (1875), also §§ 167–171, *supra*, and § 210, *infra*. A receiver cannot enforce subscriptions which the corporation could not enforce. Winters *v.* Armstrong, 37 Fed. Rep. 508 (1889). The receiver may sell the subscription at auction and the subscriber may buy it. Dean *v.* Biggs, 25 Hun, 122 (1881); aff'd 93 N. Y. 662; Castleman *v.* Templeman, 87 Md. 546 (1898). A receiver in a foreclosure suit cannot collect unpaid subscriptions. Lea *v.* Iron, etc. Co., 119 Ala. 271 (1898). Even though a receiver is in charge, yet if all the debts are paid the court will not authorize him to collect unpaid subscriptions, notwithstanding existing contracts may call for further money later. Tichenor *v.* Williams, etc. Co., 116 Ga. 303 (1902). The failure of a receiver to notify a subscriber to pay his unpaid subscription is immaterial, even though ordered by the court, inasmuch as that defense may be set up in the answer and payment made and the defendant relieved from costs. Berry *v.* Rood, 168 Mo. 316 (1902).

[1] After a receiver has been appointed, a creditor cannot institute proceedings to collect unpaid subscriptions. Rouse, etc. Co. *v.* Detroit, etc. Co., 111 Mich. 251 (1896). After a receiver has been appointed, he alone can collect the unpaid subscriptions. Big Creek Stone Co. *v.* Seward, 144 Ind. 205 (1895). A creditor who has caused a receiver to be appointed and directed to collect subscriptions cannot himself bring suit for such collection. Castleman *v.* Templeman, 87 Md. 546 (1898). Where a receiver has been appointed, he alone can bring an action to compel stockholders to refund corporate moneys which they have taken after paying in the same on their subscriptions. South Bend, etc. Co. *v.* Pierre F. & M. Ins. Co., 4 So. Dak. 173 (1893). It is the receiver's duty to act promptly and vigilantly in the collection of the assets, and to compel payment of balances due by subscribers on unpaid stock, if such a course is necessary to meet the demands of creditors. If the receiver fails to do his duty in this respect the creditors may compel him to act, inasmuch as they cannot act directly themselves. Gas Light, etc. Co. *v.* Haynes, 7 La. Ann. 114 (1852); New Orleans Gas Light Co. *v.* Bennett, 6 La. Ann. 457 (1851); Stark *v.* Burke, 9 La. Ann. 341 (1854); Atwood *v.* Rhode Island Agric. Bank, 1 R. I. 376 (1850); Rankine *v.* Elliott, 16 N. Y. 377 (1857), holding that when a receiver of an insolvent railroad is appointed in an action in behalf of all its creditors, the right to proceed for the collection of unpaid subscriptions vests in him, and a judgment creditor will be enjoined from proceeding against a stockholder in an action begun after the order was made, but before the appointment is perfected. While the receiver is in charge, a corporate creditor cannot sue to enforce a stockholder's liability on an unpaid subscription. Merchants' Nat. Bank *v.* Northwestern Mfg. Co., 48 Minn. 361 (1892).

In Indiana a creditor of a manufacturing corporation may collect his debt from unpaid subscriptions through a receiver, and in that way only. Wheeler *v.* Thayer, 121 Ind. 64 (1889). The United States district court has jurisdiction of an action by the receiver of an insolvent national bank to collect assessments on stock. Stephens *v.* Bernays, 44 Fed. Rep. 642 (1890). A receiver may cause to be

in Pennsylvania of the assets of a West Virginia corporation, the corporation may sue in New York to recover an unpaid subscription and may continue the suit although subsequently an ancillary receiver is appointed in New York.[1] A receiver appointed in one state may sue a stockholder in another state on an unpaid subscription.[2] In the United States court, however, it is held that a receiver appointed by a state court cannot maintain a suit in another jurisdiction to collect unpaid subscriptions, even though the court appointing him authorized such suit. Neither can he maintain such a suit in the name of the corporation, but the rule may be otherwise where by statute or otherwise title was vested in the receiver.[3] A suit by a federal receiver to collect unpaid subscriptions to stock

assessed and may collect assessments on parties liable therefor to pay insurance losses. McDonald *v.* Ross-Lewin, 29 Hun, 87 (1883). Where a receiver is appointed to take charge of "the property" he may sue to collect unpaid subscriptions. Showalter *v.* Laredo Imp. Co., 83 Tex. 162 (1892). In a judgment creditor's suit for sequestration and a receiver, both the corporation and a stockholder liable on his subscription being made parties, the receiver may have judgment against a stockholder. Spooner *v.* Bay St. Louis Synd., 47 Minn. 464 (1891). Although some fraudulent claims have been allowed in the court which appointed the receiver and made the calls, yet a stockholder who is sued in another state cannot enjoin the collection of the judgment on that ground. Foote *v.* Glenn, 52 Fed. Rep. 529 (1892). Although the statute of limitations is a bar unless the court allows creditors to be substituted in place of a receiver who has brought suits to enforce the liability of stockholders and is held not to have had authority to do so, yet such substitution will not be granted. Fairbanks *v.* Farwell, 141 Ill. 354 (1892). See also § 222, *infra*. The position of the receiver as regards the collection of subscriptions is stated in Republic Life Ins. Co. *v.* Swigert, 135 Ill. 150, 167, 172 (1890). The court referred to and considered many authorities. Where the bonds are invalid a receiver appointed in the foreclosure suit has no power to collect subscriptions. Farmers' L. & T. Co. *v.* San Diego, etc. Co., 49 Fed. Rep. 188 (1892). A receiver may collect the unpaid par value of stock issued for cash at less than par, even though the corporation agreed with the stockholders that no more than the amount already paid should ever be required. Such an agreement does not bind the receiver in so far as it is necessary for him to collect the money to pay creditors. Mathis *v.* Pridham, 1 Tex. Civ. App. 58 (1892).

[1] Sigua, etc. Co. *v.* Brown, 171 N. Y. 488 (1902). Where at the instance of the attorney-general a bank has been declared insolvent and the transaction of further business enjoined, an assessment on the stock levied before the decree, but payable after the decree, cannot be enforced by the bank. Bank of National City *v.* Johnston, 133 Cal. 185 (1901).

[2] Fish *v.* Smith, 73 Conn. 377 (1900). A Virginia receiver of a Virginia corporation may sue in Maryland in the name of the corporation to collect unpaid subscriptions of Maryland stockholders, it appearing that no harm is thereby done to Maryland creditors. Castleman *v.* Templeman, 87 Md. 546 (1898).

[3] Great Western, etc. Co. *v.* Harris, 128 Fed. Rep. 321 (1903); aff'd 198 U. S. 561.

may be in the federal court, irrespective of citizenship or the amount involved.[1] Before the court authorizes a receiver to collect unpaid subscriptions there must be a judicial ascertainment of the corporate debts.[2] No judgment is necessary against the corporation in a suit by a receiver against directors for calls which had been made by the directors.[3] The court may direct a receiver to make a call instead of the court making the call itself directly.[4] A receiver may collect a call made by the directors.[5] Where a receiver fails to allege that his suit to collect subscriptions was authorized by the court, his action will fail.[6] If the receiver refuses to collect the subscriptions, the remedy of the creditor is to apply for the removal of the receiver,[7] or a creditor may intervene and proceed himself.[8] But a creditor cannot sue to reach subscriptions for stock, unless the receiver refuses to sue.[9] The receiver's suit to collect unpaid sub-

1 Brown *v.* Allebach, 156 Fed. Rep. 697 (1907).

2 See § 207, *supra.* State *v.* German, etc. Bank, 50 Neb. 734 (1897). A receiver cannot bring suit to collect subscriptions until the corporate debts have been ascertained and the corporate property exhausted, but unpaid calls made by the directors may be collected by the receiver as a part of the corporate assets. Wyman *v.* Williams, 53 Neb. 670 (1898); s. c., 52 Neb. 833 (1897). In a receiver's suit at law to collect subscriptions, his allegation that all the subscriptions were necessary to pay the debts will raise a presumption that the court ascertained such to be the fact before the suit was commenced. Worth *v.* Wharton, 122 N. C. 376 (1898). It has been held that a receiver may collect unpaid balances due on subscriptions, although the other corporate assets have not been collected and the amount of the liabilities is undetermined. Stark *v.* Burke, 9 La. Ann. 341 (1854). And that if, on the final settlement, there is a surplus, it is to be returned *pro rata* to the shareholders who have paid in full. Pentz *v.* Hawley, 1 Barb. Ch. (N. Y.) 122 (1845). But the more modern and better rule is that a receiver has no authority to call upon a subscriber for his unpaid balance until the court have determined the amount of the corporate indebtedness and fixed definitely the liability of each share of the stock. Chandler *v.* Keith, 42 Iowa, 99 (1875). See also Mills *v.* Scott, 99 U. S. 25 (1878).

3 Wyman *v.* Williams, 52 Neb. 833 (1897).

4 See § 207, *supra.*

5 See § 207, *supra.*

6 Gainey *v.* Gilson, 149 Ind. 58 (1897).

7 Links *v.* Connecticut, etc. Co., 66 Conn. 277 (1895). Even though a receiver apointed by the United States Court declines to bring suit against certain stockholders to collect alleged unpaid subscriptions, a bill in equity will not lie in the state court for a receiver to make such collection, no application to the federal court for that purpose having been made. Gallagher *v.* Asphalt Co., 67 N. J. Eq. 441 (1904).

8 Spilman *v.* Mendenhall, 57 N. W. Rep. 468 (Minn. 1894).

9 First Nat. Bank *v.* Dovetail, etc. Co., 143 Ind. 534 (1896). A creditor cannot maintain a bill to collect unpaid subscriptions where a receiver is in charge, Morgan *v.* Gibian, 115 Ga. 145 (1902).

scriptions may be at law[1] or in equity.[2] He may also maintain a bill in equity for discovery to ascertain the names of the stockholders.[3] A receiver, with the authority of the court, may accept an offer of a number of stockholders to compromise all the claims against them for unpaid subscriptions for a specified sum, even though some of such subscriptions can be collected in full and others not at all, the compromise being a fair one.[4] It has been held that a receiver may hold stockholders liable on "watered" stock,[5] but there is strong authority to the contrary.[6]

1 Where a court of equity makes a call and directs the receiver to collect, his remedy is at law and not in equity. Barkalow *v.* Totten, 53 N. J. Eq. 573 (1895). The receiver may sue each stockholder separately at law. His appointment cannot be questioned. Elderkin *v.* Peterson, 8 Wash. 674 (1894). A suit by the receiver to collect is at law and not in equity. Smith *v.* Johnson, 57 Ohio St. 486 (1898).

2 A receiver of an insolvent corporation appointed by a federal court may file a bill in the United States court to collect unpaid subscriptions. Bausman *v.* Denny, 73 Fed. Rep. 69 (1896). See 79 id. 172. The receiver may file a petition in connection with the main suit, and by this petition bring in the stockholders and compel them to pay their subscriptions. Peck *v.* Elliot, 79 Fed. Rep. 10 (1897). The enforcement of the liability of a subscriber to the stock of a corporation by an auxiliary suit in equity, brought by the receiver of the corporation appointed in a creditors' suit instituted upon its insolvency, does not infringe the constitutional right of such subscriber to a trial by jury. Ross-Meehan, etc. Co. *v.* Southern, etc. Co., 72 Fed. Rep. 957 (1896).

3 See § 519, *supra*. A broker may be compelled to disclose the name of his customer for whom he purchased stock and put the stock in the name of a clerk. A receiver of the corporation may file a bill of discovery for that purpose in order that an assessment may be levied on the stock for the unpaid subscription price. Brown *v.* Palmer, 157 Fed. Rep. 797 (1907).

4 Morrison *v.* Lincoln, etc. Co., 89 N. W. Rep. 996 (Neb. 1902). See also § 171, *supra*, and § 222, *infra*.

5 The liability on stock issued for property at an overvaluation may be enforced by a receiver. See *v.* Heppenheimer, 69 N. J. Eq. 36 (1905). See cases in §§ 46, 47, *supra*. In the case Gillett *v.* Chicago Title & T. Co., 222 Ill. 254 (1907), where stock had been issued for property at an overvaluation and the holders were held liable, interest was not allowed from the commencement of the suit to the time of decree, a supplemental decree to that effect not having been appealed.

6 A railroad construction contract by which the work is paid for by stock and bonds is not a stock subscription nor a sale of the stock, but is merely a contract, and the receiver of the railroad cannot hold a contractor liable for the alleged value of the stock and bonds, he being estopped the same as the corporation itself, and there being no promise to pay the par value of the stock. Bostwick *v.* Young, 118 N. Y. App. Div. 490 (1907). A promoter's possible liability and the liability of stockholders on unpaid stock will not be adjusted and offset in the distribution among bondholders after foreclosure sale, even though the bondholders were promoters and stockholders. Independent suits must be instituted for that purpose especially as general creditors are interested. Land, etc.

There has been considerable controversy as to whether a stockholder who is sued by a receiver on a subscription may set up defenses which were good as against the corporation, but which are no longer good as against corporate creditors. The question is theoretically difficult because the receiver represents the corporation as well as corporate creditors. Practically, however, a receivership means insolvency and the final elimination of the corporation, and the just rule seems to be that defenses which are not good as against corporate creditors are not good as against a receiver of an insolvent corporation.[1] A receiver's suit on notes given in payment for stock cannot be defeated on the ground that all the creditors have been paid.[2]

An assignee for the benefit of the creditors of a corporation, like a receiver, represents both the corporation and the creditors, and should collect unpaid subscriptions.[3] An Illinois assignee for the benefit of creditors of an insolvent Illinois corporation may file a bill in equity in a New York court to collect the subscription liability of New York stockholders in such Illinois corporation.[4]

Co. *v.* Tatnall, 132 Fed. Rep. 305 (1904). See also §§ 38, 46, 47, *supra.*

1 Cole *v.* Satsop, etc. R. R., 9 Wash. 487 (1894). *Cf.* Republic L. Ins. Co. *v.* Swigert, 135 Ill. 150 (1890); Winters *v.* Armstrong, 37 Fed. Rep. 508, 521 (1889); §§ 46, 47, *supra.*

2 Pope *v.* Merchants' T. Co., 103 S. W. Rep. 792 (Tenn. 1907).

3 Cook *v.* Carpenter, 212 Pa. St. 165 (1905). Shockley *v.* Fisher, 75 Mo. 498 (1882); Vanderwerken *v.* Glenn, 85 Va. 9 (1888); Beal *v.* Dillon, 5 Kan. App. 27 (1896). *Cf.* Germantown Pass. Ry. *v.* Fitler, 60 Pa. St. 124 (1869); Eppright *v.* Nickerson, 78 Mo. 482 (1883), holding that an insolvent corporation may include in an assignment for the benefit of its creditors the liability of its stockholders for unpaid stock for which no call has been made. An action at common law on subscriptions must be in the company's name and not in the name of the assignee of the company. Glenn *v.* Marbury, 145 U. S. 499 (1892). An assignee of the corporation for the benefit of creditors may sue. Cartwright *v.* Dickinson, 88 Tenn. 476 (1890). An assignment for the benefit of creditors, made by order of a directors' meeting at which three directors were present and the other two were not notified, is invalid and no bar to a creditor's action to collect unpaid subscriptions. Doernbecher *v.* Columbia, etc. Co., 21 Oreg. 573 (1892). It has been held that the assignee cannot sue to set aside a fraudulent device by which a stockholder has escaped payment of his subscription. Bouton *v.* Dement, 123 Ill. 142 (1887). Where the corporation has been dissolved, and its assets distributed, and its trustees discharged by a decree of court, a creditor who was a party to the suit cannot afterward maintain a bill against the trustees to reach unpaid subscriptions. Chavent *v.* Schefer, 59 Fed. Rep. 231 (1894).

4 Stoddard *v.* Lum, 159 N. Y. 265 (1899). A trustee in insolvency may collect unpaid subscriptions without any order from the court. In a suit the trustee need not allege what the amount is needed to pay the debts, but may prove the same upon the trial. Johnston *v.* Allis, 71 Conn. 207 (1898). An assignee of an insolvent

A trustee in bankruptcy may collect unpaid subscriptions by a suit in equity, and the statutory liability of the directors is not considered as an asset in estimating the amount necessary to be collected from the stockholders.[1]

§ 209. *The judgment against the corporation impeachable only for fraud or want of jurisdiction.*—That a judgment conclusively settles all matters of controversy involved in the suit, so far as parties or their privies are concerned, excepting where it may be impeached for fraud or want of jurisdiction, is well-established law.[2] When, therefore, a corporate creditor has obtained judgment against the corporation, and execution is returned unsatisfied, and he then proceeds to enforce his remedy against the holders of stock not paid up, the question arises whether the stockholders may set up in defense matters which the corporation might have set up or did set up to defeat the creditor's claim against the corporation.

It has been strenuously insisted that they might. This was Chancellor Kent's contention in the case of Slee *v.* Bloom;[3] but the

corporation in Maine may collect unpaid subscriptions without any assessment by the court where the deficiency is equal to the unpaid stock. Dunn *v.* Howe, 96 Fed. Rep. 160 (1899), rev'd on another point in 107 Fed. Rep. 849.

1 *In re* Crystal, etc. Co., 96 Fed. Rep. 945 (1899). The right to collect unpaid subscriptions passes to a trustee in bankruptcy. Commercial, etc. *v.* Warthen, 119 Ga. 990 (1904). A trustee in bankruptcy of a corporation succeeds to its right to collect unpaid subscriptions. Rathbone *v.* Ayer, 84 N. Y. App. Div. 186 (1903). The United States bankruptcy court may order an assessment on holders of unpaid stock and may direct the trustee in bankruptcy to bring suit at law therefor in the state court. Clevenger *v.* Moore, 71 N. J. L. 148 (1904). An order of the bankrupt court is the same as a call. Allen *v.* Grant, 122 Ga. 552 (1905). A trustee in bankruptcy may collect unpaid subscriptions, but cannot enforce a statutory liability. Tiger, etc. Co.'s Trustee *v.* Shanklin, 102 S. W. Rep. 295 (Ky. 1907). The bankruptcy court may authorize a trustee in bankruptcy to collect unpaid subscriptions to pay corporate debts. *In re* Remington, etc. Co., 153 Fed. Rep. 345 (1907), holding also that the bankruptcy court will not order an execution to be levied on the stockholders, but will direct the trustee to bring suit. A creditor who is also a holder of unpaid stock will not be allowed to prove his claim in bankruptcy until he has paid his unpaid subscription. *In re* Wiener, etc. Co., 96 Fed. Rep. 949 (1899). A court of bankruptcy may collect unpaid subscriptions. *In re* Miller, etc. Co. 111 Fed. Rep. 515 (1901); Sawyer *v.* Hoag, 17 Wall. 610, 621 (1873); Upton *v.* Tribilcock, 91 U. S. 45 (1875); Sanger *v.* Upton, 91 U. S. 56 (1875); Webster *v.* Upton, 91 U. S. 65 (1875); Chubb *v.* Upton, 95 U. S. 665 (1877); Payson *v.* Stoever, 2 Dill. 427 (1873); s. c., 19 Fed. Cas. 27; Upton *v.* Hansbrough, 3 Biss. 417 (1873); s. c., 28 Fed. Cas. 839. *Cf.* Morgan County *v.* Allen, 103 U. S. 498 (1880).

2 Quoted and approved in Saylor *v.* Commonwealth, etc. Co., 38 Oreg. 204 (1900).

3 5 Johns. Ch. 366 (1820); reversed by 19 Johns. 456, 473 (1822).

authorities have firmly established the rule that, in the absence of fraud and collusion, judgments against the corporation, if the court had jurisdiction, are conclusive against the stockholders, as to the validity and amount of the creditor's claim.[1] Thus, it is held that

[1] Quoted and approved in Montgomery *v.* Whitehead, 90 Pac. Rep. 509 (Col. 1907). Slee *v.* Bloom, 20 Johns. 669 (1822); Hawkins *v.* Glenn, 131 U. S. 319 (1889); Henry *v.* Vermillion, etc. R. R., 17 Ohio, 187 (1848); Hampson *v.* Weare, 4 Iowa, 13 (1856); Milliken *v.* Whitehouse, 49 Me. 527 (1860); Wilson *v.* Pittsburgh, etc. Coal Co., 43 Pa. St. 424 (1862); Bank of Wooster *v.* Stevens, 1 Ohio St. 233 (1853); Stephens *v.* Fox, 83 N. Y. 313 (1881); Marsh *v.* Burroughs, 1 Woods, 463 (1871); s. c., 16 Fed. Cas. 800; Grund *v.* Tucker, 5 Kan. 70 (1869); Bissit *v.* Kentucky, etc. Nav. Co., 15 Fed. Rep. 353, and note, p. 360 (1882); Hawes *v.* Anglo-Saxon Petroleum Co., 101 Mass. 385 (1869); Nichols *v.* Stevens, 123 Mo. 96 (1894); Hawkins *v.* Citizens', etc. Co., 38 Oreg. 544 (1901); Cole *v.* Adams, 19 Tex. Civ. App. 507 (1898). "A stockholder of a corporation is so far a privy to a judgment against the corporation that he cannot attack the judgment in any collateral proceeding." National Foundry, etc. Works *v.* Oconto Water Co., 68 Fed. Rep. 1006 (1895); Bigelow, Estop., 129, 4th ed.; Freeman, Judgm., § 177, 3d ed. So, also, in actions to enforce statutory liability of stockholders, a judgment against the corporation is equally conclusive. See § 224, *infra*. *Cf.* Hudson *v.* Carman, 41 Me. 84 (1856), holding that the judgment obtained may not be conclusive evidence of the organization and existence of the corporation, and if denied they must be proved. The stockholder may, of course, set up that he is not a stockholder, and other similar defenses, such as are specified in chapter X, *supra*. See § 210, *infra*. Johnson *v.* Somerville, etc. Co., 81 Mass. 216 (1860); Glenn *v.* Springs, 26 Fed. Rep. 494 (1885); Powell *v.* Oregonian Ry., 38 Fed. Rep. 187 (1889); Barron *v.* Paine, 83 Me. 312 (1891). Stockholders will not be allowed to intervene in a suit brought by a creditor against the corporation itself, even though they wish to set up the statute of limitations, and even though the directors had directed the company's lawyer to admit the allegations of the complaint, and even though the company is insolvent, and the stockholders are liable on the stock, no fraud being shown. Meyer *v.* Bristol, etc. Co., 163 Mo. 59 (1901). The decree of the court where the corporation is located is conclusive as to whether service was properly made on the corporation, such service being on two directors and the cashier. The decree is also conclusive that no laches existed in bringing suit; that the statute of limitations was no bar to the decree; that the court had authority to make the assessment; that the change in the corporate name did not discharge the stockholders' liability; and that the trustee, Glenn, might sue the stockholders. Lehman *v.* Glenn, 87 Ala. 618 (1889). The judgment against the corporation is conclusive, and it cannot be shown that it arose on a contract which was *ultra vires*. Sumner *v.* Marcy, 3 Woodb. & M. 105 (1847); s. c., 23 Fed. Cas. 384; Baines *v.* Babcock, 95 Cal. 581 (1892). Stockholders cannot attack the debts upon which the judgment was obtained. Hambleton *v.* Glenn, 72 Md. 351 (1890). And it is no defense that the judgment against the corporation was obtained by collusion with one of the directors. Hambleton *v.* Glenn, 72 Md. 351 (1890). In Chestnut *v.* Pennell, 92 Ill. 55 (1879), it was held that a decree against the corporation is not admissible in evidence against

the stockholder cannot take advantage, in the suit against him, of a defect in the service of process upon the corporation in the original suit. His remedy in such a case is by a direct proceeding.[1] A stockholder sued on his liability cannot file a bill in another court to enjoin the suit on the ground that the decree establishing the indebtedness of the corporation was fraudulent.[2] His remedy is in the same court, the suit being still pending.[3] Nor can the judgment be attacked on the ground that the judgment was obtained in the federal court by one to whom the claim was transferred in order to give jurisdiction.[4] In New York, as stated above, the conclusiveness of the judgment in these cases has been

a stockholder who was not a party to the bill or decree, actually or constructively, and that in such a case proof of the liability of the corporation to the creditor should be given. A stockholder's suit on his unpaid subscription to pay a judgment against the corporation may attack the judgment on the ground that it is based on a fraudulent claim. Saylor *v.* Commonwealth, etc. Co., 38 Oreg. 204 (1900). In a garnishment suit against a corporation and a stockholder to reach an unpaid subscription, the stockholder may contest the validity of the claim against the corporation, even though the corporation has defaulted in the suit. Doak *v.* Stahlman, 58 S. W. Rep. 741 (Tenn. 1899). In a suit by a judgment creditor to enforce a liability for stock issued for property at an overvaluation, a stockholder may attack the judgment against the corporation on the ground that it was on a claim for property purchased, which property had been taken back by the vendor. McBryan *v.* Universal, etc. Co., 130 Mich. 111 (1902). The suit may be on the judgment against the corporation, and not on the original claim. Henderson *v.* Turngren, 9 Utah, 432 (1894). The judgment is not conclusive where it was for an excessive amount and was entered by consent of the president, who had an interest in the judgment. Wilson *v.* Kiesel, 9 Utah, 397 (1894). *Cf.* Castleman *v.* Templeman, 87 Md. 546 (1898). A judgment by the corporation against a stockholder is conclusive in a suit by a corporate creditor to obtain the benefit of such judgment. Welch *v.* Sargent, 127 Cal. 72 (1899). The court may investigate whether the judgment of the creditor is such as to bind the stockholders in a proceeding to enforce their subscription and statutory liability. Covell *v.* Fowler, 144 Fed. Rep. 535 (1906). The legislature may enact that a stockholder may set up any defenses that the corporation might set up. Williams *v.* Watters, 97 Md. 113 (1903).

1 Came *v.* Brigham, 39 Me. 35 (1854). The stockholder sued on his subscription may set up that the judgment against the corporation was obtained by service on one who had ceased to be an officer. Beardsley *v.* Johnson, 121 N. Y. 224 (1890). *Cf.* Wheeler *v.* Miller, 24 Hun, 541 (1881); aff'd 90 N. Y. 353. A stockholder may petition the court to have a judgment vacated and that he be allowed to defend in behalf of the corporation, he being still liable as a stockholder. Stanton *v.* Gilpin, 38 Wash. 191 (1905).

2 Furnald *v.* Glenn, 64 Fed. Rep. 49 (1894).

3 See Farwell *v.* Great Western Tel. Co., 161 Ill. 522 (1896); Great Western Tel. Co. *v.* Purdy, 162 U. S. 329 (1896); also §§ 839, 848, *infra*.

4 Tuthill Spring Co. *v.* Smith, 90 Iowa, 331 (1894).

much questioned.[1] In a recent case the New York court of appeals has held that a judgment obtained in England against an American stockholder in an English corporation for an unpaid call, the stockholder not having been served in England, is not enforceable in the United States.[2]

Where the stockholders are liable only on a particular class of corporate debts, or to certain classes of creditors only, the court will

1 New York is practically the only state where this question presents any difficulty, and the confusion which there reigns is largely due to the failure to distinguish between cases of liability for unpaid subscriptions and liabilities created by statute. In some of the cases the meaning of the court is not clear, and often the question did not come up directly for decision. The general rule was originally stated essentially as in the text, by Spencer, C. J., in Slee *v.* Bloom, 20 Johns. 669 (1822), reversing s. c., 5 Johns. Ch. 366 (1821). This was followed by Moss *v.* Oakley, 2 Hill, 265 (1842). Moss *v.* McCullough, 5 Hill, 131 (1843), started a new theory, that the case was the ordinary one of principal and surety, and hence a judgment against the corporation was not even *prima facie* evidence against the stockholder. Although this ruling was overturned on the final determination (s. c., 7 Barb. 279 — 1849), it was followed in Strong *v.* Wheaton, 38 Barb. 616 (1861), which in turn was overruled in 57 Barb. 508. In Belmont *v.* Coleman, 21 N. Y. 96 (1860), on appeal from 1 Bosw. 188, three justices affirmed the ruling below that the judgment was *prima facie* evidence, while the other four refused to commit themselves to that doctrine. Conklin *v.* Furman, 57 Barb. 484 (1865), accepts the original rule as stated by Spencer, C. J. Then follow two later cases, Miller *v.* White, 50 N. Y. 137 (1872), and McMahon *v.* Macy, 51 N. Y. 155 (1872), which reject that rule in strong terms. But both these cases are easily distinguishable on the principle stated *supra*. They were suits to enforce a statutory penalty against trustees for failure to file a certain report. It may be said, then, that, after all, the New York rule, in the cases really covered by the language of the text, differs comparatively little from the general law. The courts, under the influence of some of the earlier decisions, hesitate to accept the rule of conclusiveness; but the court of appeals has used this language: "The creditor thus claims through the corporation, and to entitle him to this statutory subrogation or transfer he need only show that he is a creditor. If he shows this fact by evidence which is binding and conclusive against the corporation, such evidence should be competent against the stockholder to establish the title of the creditor to succeed to the rights of the corporation. A judgment against the corporation, being the highest evidence against it, should be as effectual to pass its title to the fund in question as a deed or any other form of transfer." Stephens *v.* Fox, 83 N. Y. 313, 317 (1881). *Cf.* Wheeler *v.* Miller, 24 Hun, 541 (1881); aff'd 90 N. Y. 353; also § 224, *infra*.

2 Bank of China *v.* Morse, 168 N. Y. 458 (1901). A judgment obtained in England by the liquidators of an English corporation against a New York subscriber to the stock, no personal service having been made upon such subscriber, is not enforceable as a judgment in New York, although such judgment may be legal in England under the statutes in force at the time the subscription was made. An-

not reject evidence tending to show that the debt recovered belongs or does not belong to the class on which the stockholder is liable.[1]

§ 210. *Defenses available against corporate creditors in actions to compel payment of balances of subscriptions.*—There are, of course, certain defenses which subscribers may set up when actions are brought against them on behalf of corporate creditors. These defenses are to a certain extent the same as those which may be set up to defeat an action by the corporation to enforce the subscription.[2] But both in England and in this country the courts do not favor such defenses after the corporation has become insolvent. Moreover, there are many defenses which might defeat an action by the corporation, but which do not prevent the corporate creditor from enforcing the subscription.[3] Any secret agreement limiting the liability of a stockholder on his unpaid subscription is void as against corporate creditors. Such agreement, however, is binding on such corporate creditors as are chargeable with notice thereof.[4] A cred-

derson *v.* Haddon, 33 Hun, 435 (1884). A judgment rendered in Massachusetts against a resident of Nebraska holding the latter liable as a stockholder, without service upon him or appearance by him, cannot be enforced in Nebraska. The judgment of the Massachusetts court is conclusive only as to the amount of debts of the company and the necessity of making an assessment. Commonwealth, etc. Co. *v.* Hayden, 61 Neb. 454 (1901), rev'g 60 Neb. 636.

1 Wilson *v.* Pittsburgh, etc. Coal Co., 43 Pa. St. 424 (1862); Conant *v.* Van Schaick, 24 Barb. 87 (1857); Larrabee *v.* Baldwin, 35 Cal. 155 (1868).

2 See ch. X, *supra*.

3 Such as fraud on the part of the corporation, inducing a subscription. See §§ 163, 164, *supra*. An arrangement entered into between the corporation and its stockholders, for the purpose of defeating the claims of creditors, in pursuance of which the stockholders are allowed, after it is ascertained that the corporation is insolvent, to buy in depreciated and repudiated claims against the company, and thus to extinguish their indebtedness for stock subscribed, is fraudulent and void. Goodwin *v.* McGehee, 15 Ala. 232 (1849); Thompson *v.* Meisser, 108 Ill. 359 (1884). Prominent among these defenses is the defense that the corporation contracted with the defendant that his stock should be deemed fully paid-up stock, although in fact the full par value had never been paid. See ch. III. It is sufficient to allege that the defendant holds stock which has never been paid up. The defense that the defendant did not subscribe for the stock or did not agree to pay for it, or that he is not liable, must be set up in the answer. Atlantic T. Co. *v.* Osgood, 116 Fed. Rep. 1019 (1902).

4 Carnahan *v.* Campbell, 158 Ind. 226 (1902). *Cf.* previous decision in 59 N. E. Rep. 1054. See also § 191. As against a receiver it is no defense that the corporation agreed that the subscriber need pay only fifty per cent. of the par value of the stock, or that fraudulent representations induced him to subscribe, or that the full capital stock was not subscribed, or that the company was defectively organized, or that the name of the company was different from the one contemplated. Cox *v.* Dickie, 93 Pac. Rep. 523 Wash. (1908).

itor may, by express contract, waive his right to compel stockholders to pay their unpaid subscriptions.[1] The defendant may deny that he is a stockholder.[2] If a statute authorizing an increase of stock is unconstitutional, the subscribers therefor are not liable.[3]

The unpaid subscription may be collected in payment of damages for a tort the same as for a contract debt.[4] The burden of proof that a subscription is unpaid is on the judgment creditor.[5] A counter claim or set-off may be a good defense,[6] as may also be the statute of limitations.[7]

1 Bush *v.* Robinson, 95 Ky. 492 (1894). See also § 216, *infra*. Coupons are negotiable, even though the trust deed securing them provides for a waiver of default in and postponed payment of such coupons, inasmuch as such provisions merely control any procedure under the trust deed for enforcing payment. Neither is negotiability destroyed by a provision that the members of the unincorporated joint stock association shall not be personally liable. Hibbs *v.* Brown, 190 N. Y. 167 (1907), a minority of the court holding also that the provision exempting the stockholders from personal liability is void. An agreement of a corporate creditor that he will not hold a stockholder liable on unpaid subscriptions is binding on his assignees, if they took with notice. Carnahan *v.* Campbell, 158 Ind. 226 (1902).

2 Howell *v.* Malmgreen, 112 N. W. Rep. 313 (Neb. 1907).

3 Marion T. Co. *v.* Bennett, 82 N. E. Rep. 782 (Ind. 1907).

4 Powell *v.* Oregonian Ry., 36 Fed. Rep. 726 (1888); s. c., 38 Fed. Rep. 187. In Maine this rule is declared by statute. Grindle *v.* Stone, 78 Me. 176 (1886). For many other defenses, see ch. XII, where defenses were set up to defeat the statutory liability. As to the statute of limitations, see § 195, *supra*.

5 Merrill *v.* Timbrell, 123 Iowa, 375 (1904).

6 See § 193, *supra*, and § 225c, *infra*. While an ordinary corporate debtor may offset claims against the corporation which he has purchased, yet officers, stockholders, or persons occupying a trust relationship cannot do so. Nix *v.* Ellis, 118 Ga. 345 (1903). As against a liability on stock issued on property at an overvaluation a stockholder cannot set off bonds which he holds but which had not been filed as a claim against the corporation and which have been barred by the decree barring creditors. See *v.* Heppenheimer, 69 N. J. Eq. 36 (1905).

7 The statute of limitations does not run against the liability created by the Nebraska constitution on the part of subscribers to stock until after judgment against the corporation and exhaustion of corporate property. As a rule the statute of limitations in law will be followed in a court of equity. Wyman *v.* Bowman, 127 Fed. Rep. 257 (1904). The statute of limitations does not begin to run against an unpaid subscription until judgment and execution are returned unsatisfied, even though the stockholders have turned in property in what they considered full payment for the stock. Montgomery, etc. Works *v.* Roman, 147 Ala. 434 (1906). Where the statute requires a judgment first against the corporation, the statute of limitations does not begin to run until such judgment has been obtained. Vaughn *v.* Alabama Nat. Bank, 143 Ala. 572 (1905). Under the Illinois statute the statute of limitations begins to run from the time when the debt against the corporation falls due, where the suit is at the instance of a

§ 211. *Contribution.*—Corporate creditors compelling stockholders to pay their subscriptions are under no obligation to see that the payments made by the subscribers are proportionately equal.[1] A court of chancery will compel subscribers to pay in full the amount of their unpaid subscriptions if the corporate indebtedness make it necessary, leaving them to seek contribution from the other stockholders.[2] The rule, however, is well settled that a stockholder who has been compelled to pay more than his proportion of the debts of the company may maintain an action against his co-stockholders for contribution.[3] A stockholder who is compelled

creditor. Parmelee *v.* Price, 208 Ill. 544 (1904). The defense of the statute of limitations cannot be first raised on appeal by the stockholders. Easton Nat. Bank *v.* American, etc. Co., 70 N. J. Eq. 732 (1906).

1 Pentz *v.* Hawley, 1 Barb. Ch. 122 (1845). *Cf.* § 206, *supra.*

2 Pentz *v.* Hawley, 1 Barb. Ch. 122 (1845); Evans *v.* Coventry, 25 L. J. Ch. 489 (1856); Marsh *v.* Burroughs, 1 Woods, 463 (1871); s. c., 16 Fed. Cas. 800. The execution should be against each stockholder for his proportionate part of the debts, interest and cost, with a subsequent execution for such part of such debts as turn out to be uncollectible from other subscribers. Van Pelt *v.* Gardner, 54 Neb. 701 (1898). As to whether solvent stockholders are required to make up, for the benefit of creditors, the deficiency of defaulting or insolvent subscribers to the full amount of the former's own unpaid subscriptions, see South Carolina Mfg. Co. *v.* Bank of South Carolina, 6 Rich. Eq. (S. C.) 227 (1854). But actual subscribers are not liable for that part of the capital stock which was never subscribed. Evans *v.* Coventry, 25 L. J. Ch. 489 (1856), and § 243, *infra.* It is no defense to show that notes were given in payment of subscriptions, or that notes by insolvent persons were procured to be given, when it appears that nothing was ever realized from the notes. Nathan *v.* Whitlock, 9 Paige, Ch. 152 (1841). When it is made to appear by proof that some of the stockholders are insolvent, the solvent must pay the proportion of the insolvent, to be apportioned among them according to and up to the amount of their stock subscribed and unpaid. Hodges *v.* Silver Hill Min. Co., 9 Oreg. 200 (1881). All of the stockholders who are defendants will have judgment entered against them for their full liability, and they must seek contribution themselves. Hamilton *v.* Clarion, etc. R. R., 144 Pa. St. 34 (1891). In Maine it is held that stockholders' ratable liability is not increased by reason of the fact some of the stockholders are insolvent or beyond the reach of process. Maine, etc. Co. *v.* Southern, etc. Co., 92 Me. 444 (1899). A creditor having collateral must first exhaust that before holding the stockholders liable on their subscription liability, there being other creditors. Welch *v.* Sargent, 127 Cal. 72 (1899). But see § 473, *infra.* The stockholders' liability may be enforced by a corporate creditor, even though the corporation has given collateral security to such creditor. Dawson *v.* Sholley, 4 Kan. App. 367 (1896). In holding stockholders liable on stock fraudulently issued for property at an overvaluation, the court may hold liable to the full extent of their liability stockholders who reside in the state, leaving the latter to seek contribution from stockholders outside of the state. See *v.* Heppenheimer, 69 N. J. Eq. 36 (1905).

3 Quoted and approved in Putnam *v.* Misochi, 189 Mass. 421 (1905). Win-

to pay a tax levied by the government on liquor distilled by the corporation may have contribution from the other stockholders.[1]

Contribution may properly be enforced in the corporate creditor's suit. It is largely for this purpose that all the delinquent stockholders may be and should be made parties defendant.[2] Even

cock *v.* Turpin, 96 Ill. 135 (1880); Bennison *v.* McConnell, 56 Neb. 46 (1898); Van Pelt *v.* Gardner, 54 Neb. 701 (1898); Millaudon *v.* New Orleans, etc. R. R., 3 Rob. (La.) 488 (1843); Thomson's Succession, 46 La. Ann. 1074 (1894); Marsh *v.* Burroughs, 1 Woods, 463 (1871); s. c., 16 Fed. Cas. 800; Holmes *v.* Sherwood, 16 Fed. Rep. 725 (1881); Umsted *v.* Buskirk, 17 Ohio St. 113 (1866); Matthews *v.* Albert, 24 Md. 527 (1866); Stewart *v.* Lay, 45 Iowa, 604 (1877); Hadley *v.* Russell, 40 N. H. 109 (1860); Erickson *v.* Nesmith, 46 N. H. 371 (1866); Masters *v.* Rossie Lead Min. Co., 2 Sandf. Ch. 301 (1845); Aspinwall *v.* Torrance, 1 Lans. (N. Y.) 381 (1870), aff'd 57 N. Y. 331; Stover *v.* Flack, 30 N. Y. 64 (1864); Farrow *v.* Bivings, 13 Rich. Eq. (S. C.) 25 (1866); Allen *v.* Fairbanks, 45 Fed. Rep. 445 (1891). *Cf.* Andrews *v.* Callender, 30 Mass. 484 (1833); Gray *v.* Coffin, 63 Mass. 192 (1852); Sutton's Case, 3 De G. & Sm. 262 (1850). In Pennsylvania the right to contribution is said to be purely statutory. Brinham *v.* Wellersburg Coal Co., 47 Pa. St. 43 (1864). A liability for contribution on subscriptions does not cease upon the death of the stockholders. Allen *v.* Fairbanks, 40 Fed. Rep. 188 (1889). The remedy of one stockholder against another for contribution is in equity and not at law. Koons *v.* Martin, 66 Hun, 554 (1893); aff'd 143 N. Y. 672. A stockholder may have contribution. Van Pelt *v.* Gardner, 54 Neb. 701 (1898). Stockholders who are held liable on their stock by reason of its not being paid up may have contribution from other stockholders, even though all the stock was originally issued for property taken at an over-valuation. See *v.* Heppenheimer, 69 N. J. Eq. 36 (1905). A stockholder who has been obliged to pay his unpaid subscription to a corporate creditor may have contribution from other stockholders, and his suit may be instituted in the state where the other stockholders reside. Putnam *v.* Misochi, 189 Mass. 421 (1905). Where several stockholders assign as security to a corporate note their unpaid subscriptions and the holder of the note enforces the same against a part of them they may have contribution from the others. Hart *v.* Sickles, 45 N. Y. Misc. Rep. 174 (1904). Even though the judgment against a stockholder is for more than is necessary to pay the creditors the judgment is good because he may recover back the surplus. *In re* New, etc. Co., 113 La. 404 (1904). A judgment in a suit between the corporation and the president which fixes his liability, is not binding on stockholders in a suit to adjust equities among the stockholders on winding up. Gund *v.* Ballard, 73 Neb. 547 (1905). See also § 227, *infra.*

1 Wolters *v.* Henningsan, 114 Cal. 433 (1896).

2 N. Y. Code Civ. Proc., §§ 1791–1794; Masters *v.* Rossie Lead Min. Co., 2 Sandf. Ch. 301 (1845); Holmes *v.* Sherwood, 3 McCrary, 405 (1881); Hadley *v.* Russell, 40 N. H. 109 (1860); Umsted *v.* Buskirk, 17 Ohio St. 113 (1866); Hodges *v.* Silver Hill Min. Co., 9 Oreg. 200 (1881). In a suit for contribution between guarantors of the company's note, liabilities on stock cannot be adjusted unless all solvent stockholders are made parties. Smith *v.* Dickinson, 100 Wis. 574 (1898). In a judgment creditors' suit to collect unpaid subscriptions, the

though several creditors join in a suit against one stockholder, a release by one of them does not affect the others.[1]

court may, in the judgment, order contribution as between the stockholders where some of the stockholders are also creditors. Richardson *v.* Chicago, etc. Co., 63 Pac. Rep. 74 (Cal. 1900).

[1] Welch *v.* Sargent, 127 Cal. 72 (1899). A voluntary payment to one creditor is no release, under the California statute, but the stockholder is entitled to come in as a creditor to the extent of such payment. Welch *v.* Sargent, 127 Cal. 72 (1899). It is no defense that judgment against the defendant stockholder for the full amount of his liability has been recovered by other creditors, and that he settled the same at a discount. Kunkelman *v.* Rentchler, 15 Ill. App. 271 (1884).

CHAPTER XII.

STATUTORY LIABILITY OF STOCKHOLDERS TO CORPORATE CREDITORS.

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226. Priority among creditors.
227–229. Contribution among stockholders.

A. EXTENT OF THE LIABILITY.

§§ 212, 213. *Statutory liability in general—Constitutionality.*—Probably the most characteristic feature of a corporate existence is the fact that, by being a corporation, its stockholders are liable only for the par value of the stock held by them, and when that is once paid in money or property there is no further liability. This exemption from liability need not be declared in the charter, but arises from the very fact of incorporation. For this reason legislatures are very careful, in giving joint-stock companies special powers, to distinctly declare that the company shall not thereby become a corporation. The very fact of incorporation by itself releases subscribers for stock from all liability for corporate debts, except to the extent of their unpaid subscriptions. The state legis-

latures, however, in many instances, desire to increase the liability of stockholders to corporate creditors. Accordingly, statutes are passed expressly declaring that the stockholders shall be liable for a specified sum, in addition to their unpaid subscriptions. This is called the statutory liability of stockholders. It rarely exists as regards stockholders in railroad corporations, but frequently exists in the case of manufacturing and various other corporations, and nearly always exists as against stockholders in banks.

This additional liability may be imposed by the state constitution, or by the charter, or by a general statute. A statute imposing additional liability upon the stockholders cannot be repealed so as to affect those who were corporate creditors previous to the repeal.[1] Where a statutory liability is imposed by a provision existing at the time of the creation of the corporation, there is no doubt of its constitutionality. But where the liability is created by a statute or constitutional provision enacted after the corporation was incorporated, then there arise difficult questions of constitutional validity. A full discussion, however, of the constitutionality of such a statute is contained elsewhere.[2] A statute rendering directors liable may apply to rent becoming due thereafter on a lease made before the passage of such statute.[3]

§ 214. *This liability is strictly construed and limited.*[4]—Inasmuch as all statutes creating an additional liability on the part of stockholders are in derogation of the common law, they are to be strictly construed. They are a wide departure from established rules, and, though supposed to be founded on considerations of public policy and general convenience, are not to be extended beyond the plain intent of the words of the statute.[5] A statute imposing such a lia-

1 See § 497, *infra*.

2 See § 497, *infra*. It is constitutional for the legislature, at the time of enacting a general incorporating act, to provide for an extra liability of directors who make false reports. Huntington *v.* Attrill, 118 N. Y. 365 (1890).

3 Stieffel *v.* Tolhurst, 67 N. Y. App. Div. 521 (1902).

4 Wing *v.* Slater, 19 R. I. 597 (1896); Tradesman Pub. Co. *v.* Knoxville Car Wheel Co., 95 Tenn. 634 (1895).

5 In the case Brunswick T. Co. *v.* Nat'l Bank, etc., 192 U. S. 386 (1904) the court, in speaking of a statutory liability, said: "As it is in derogation of the common law the statute cannot be extended beyond the words used." Gray *v.* Coffin, 63 Mass. 192 (1852); O'Reilly *v.* Bard, 105 Pa. St. 569 (1884); Chase *v.* Lord, 77 N. Y. 1 (1879); Means's Appeal, 85 Pa. St. 75 (1877); Dane *v.* Dane Mfg. Co., 80 Mass. 488 (1860); Chamberlin *v.* Huguenot Mfg. Co. 118 Mass. 532 (1875); Grose *v.* Hilt, 36 Me. 22 (1853); Coffin *v.* Rich, 45 Me. 507 (1858); Wheatley *v.* Glover, 125 Ga. 710 (1906); Smathers *v.* Western, etc. Bank, 135 N. C. 410 (1904); Windham Provident Inst. *v.* Sprague, 43 Vt. 502 (1871); Dauchy *v.* Brown, 24 Vt. 197 (1852); Moyer *v.* Pennsylvania Slate Co., 71 Pa. St. 293 (1872);

bility is not construed to apply to existing corporations unless the statute expressly so provides.[1] Hence, a provision of the general statutes imposing a personal liability upon directors of a corporation is not incorporated into a special charter by a clause declaring that that corporation shall possess all the general powers and privileges and be subject to all the liabilities conferred and imposed upon corporations organized under the general act.[2] And where congress granted to a California corporation certain moneys, and took corporation bonds therefor, it being the clear intent of congress, as shown by the statutes, to treat such California corporation as a part of a general plan for the building of a railroad through many states, the statutory liability of all stockholders in California corporations does not apply to such a debt.[3] A statute rendering directors liable for not filing reports is highly penal and is strictly construed.[4] The

Youghiogheny Shaft Co. *v.* Evans, 72 Pa. St. 331 (1872); Diven *v.* Lee, 36 N. Y. 302 (1867); Lowry *v.* Inman, 46 N. Y. 119 (1871); Salt Lake City Nat. Bank *v.* Hendrickson, 40 N. J. L. 52 (1878). *Cf.* Priest *v.* Essex Hat Mfg. Co., 115 Mass. 380 (1874); Ripley *v.* Sampson, 27 Mass. 371 (1830); Knowlton *v.* Ackley, 62 Mass. 93 (1851); Bassett *v.* St. Albans Hotel Co., 47 Vt. 313 (1875); Davidson *v.* Rankin, 34 Cal. 503 (1868); Mokelumne Hill, etc. Co. *v.* Woodbury, 14 Cal. 265 (1859); Dewey *v.* St. Albans Trust Co., 57 Vt. 332 (1885). A contrary rule seems to have been adopted in Carver *v.* Braintree Mfg. Co., 2 Story, 432 (1843); s. c., 5 Fed. Cas. 235, where liability for debts contracted during membership was held to include "dues owing." Also in Rider *v.* Fritchey, 49 Ohio St. 285 (1892); Freeland *v.* McCullough, 1 Denio, 414 (1845). The liability is strictly construed and "courts will not hunt excuses to carry it beyond the plain provisions of the statute." Foster *v.* Row, 120 Mich. 1 (1899). A statutory liability of stockholders in corporations, except manufacturing corporations, does not apply to a manufacturing corporation, even though it has engaged in a non-manufacturing business without authority from its charter. Senour, etc. Co. *v.* Church, etc. Co., 81 Minn. 294 (1900). A corporation amending its charter in accordance with a new statute thereby subjects its stockholders to a statutory liability provided for in such new statute. Senn *v.* Levy, 111 Ky. 318 (1901). The constitution of the state of Nebraska is construed to forbid the imposition of any statutory liability except in the case of banks. Van Pelt *v.* Gardner, 54 Neb. 701 (1898). The Iowa provision that the stockholder shall be liable for the debts unless there is published a statement of the time and conditions on which the capital stock was paid, will be strictly construed, and the further provision that they shall be liable if there are defects in the organization does not apply to errors after incorporation. Brinkley, etc. Co. *v.* Curfman, 114 N. W. Rep. 12 (Iowa, 1907).

1 See § 2, *supra*, § 497, *infra*.

2 Park Bank *v.* Remsen, 158 U. S. 337 (1895).

3 United States *v.* Stanford, 161 U. S. 412 (1896).

4 Manhattan Co. *v.* Kaldenberg, 165 N. Y. 1 (1900). Where a report is mailed to the secretary of state, but is lost in the mail, a director is not liable under the statute rendering him liable if reports are not filed with the secretary of state. Ford, etc. Co.

failure of a national bank director to perform his duty, as required by the act of congress, subjects him to damages only when he knowingly violated the national banking act as specified in the act, and there is no common-law liability.[1]

§ 215. *Particular statutes construed.*—The character, nature and extent of the liability imposed by constitutional provisions or by statute upon stockholders, in addition to their common-law liability, vary, of course, widely, and the extent of the liability created by each statute will depend entirely upon the particular words of the statute itself.[2] Occasionally, however, a provision imposing additional liability is found to be substantially repeated in the statutes of many states. Such is the case with the provision that stockholders shall be liable "to an amount equal to their stock." This is con-

v. Perron, 111 N. W. Rep. 1074 (Mich. 1907). The constitutional provision in California rendering directors liable for moneys misappropriated is highly penal and will be strictly construed, inasmuch as it renders an honest official liable for the embezzlements of a dishonest official. Winchester *v.* Howard, 136 Cal. 432 (1902). In the case of Train *v.* Marshall, etc. Co., 180 Mass. 513 (1902), being a suit to enforce the statutory liability of directors, the court held that a judgment against the corporation after it had been discharged in bankruptcy was not sufficient to satisfy the statute, and the court said: "The liability is a statutory liability, and we perceive no clear indication of policy that should carry it beyond the conditions precedent in the form in which they are expressed." Bonds secured by a mortgage are debts within the meaning of the New York statute making the directors personally liable for failure to file annual reports. Morgan *v.* Hedstrom, 164 N. Y. 224 (1900). The court will not allow an amendment of a bill in equity to enforce a highly penal liability of directors where a demurrer has been sustained and there has been long delay. Boston, etc. Co. *v.* Parr, 98 Fed. Rep. 483 (1899). Liability for debts contracted by officers while officers does not apply to debts existing when they became officers. Bagley, etc. Co. *v.* Lenning, 61 N. Y. App. Div. 26 (1901). Under the Indiana statute making directors in certain corporations liable for "all damages" resulting from failure to make certain reports unliquidated as well as liquidated damages are included. The plaintiffs claimed in this case that they were damaged, in that by the failure to make reports they believed that the company was solvent. MacVeagh *v.* Wild, 95 Fed. Rep. 84 (1899). A court has no power to extend the time within which, by statute, directors must file a certificate or else be personally liable for the debts. Cannon *v.* Breckenridge, etc. Co., 18 Colo. App. 38 (1902). See also note 1, p. 548, *infra.*

1 Yates *v.* Jones Nat. Bank, 206 U. S. 158 (1907), rev'g 105 N. W. Rep. 287.

2 Root *v.* Sinnock, 120 Ill. 350 (1887), citing many cases; Wheeler *v.* Millar, 90 N. Y. 353, 359 (1882); U. S. Trust Co. *v.* U. S. F. Ins. Co, 18 N. Y. 199, 218 (1858); Ohio L. Ins. Co. *v.* Merchants' Ins. Co., 11 Humph. (Tenn.) 1, 23 (1850); Lewis *v.* St. Charles County, 5 Mo. App. 225 (1878). *Cf.* Briggs *v.* Penniman, 8 Cow. 387 (1826); Bank of Poughkeepsie *v.* Ibbotson, 24 Wend. 473 (1840).

strued to impose a double liability.[1] When it has been enforced, each share of stock will have been paid for twice—once on the subscription and once on the statutory liability. In Maryland it is held that a statute making stockholders liable to creditors for "double the amount" of the par value of their stock, makes them liable for three times the par value of their stock; once on the subscription and twice on the statute.[2]

Under a statute providing that "each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company contracted or incurred, . . . for

1 A liability "to an amount equal to the amount of stock held by them respectively" has been construed to create the double liability. Booth *v.* Campbell, 37 Md. 522 (1872); Matthews *v.* Albert, 24 Md. 527 (1866); Norris *v.* Johnson, 34 Md. 485 (1871); Hager *v.* Cleveland, 36 Md. 476, 491 (1872). The former constitutional provision in Alabama that stockholders were "liable to the extent of their stock" meant a double liability. McDonnell *v.* Alabama, etc. Ins. Co., 85 Ala. 401 (1888). To same effect, Willis *v.* Mabon, 48 Minn. 140 (1882). A liability of stockholders for "double" the amount of their stock means a liability once for the unpaid subscriptions and then an additional liability of twice the par value of the stock, making a triple liability altogether. Dreisbach *v.* Price, 133 Pa. St. 560 (1890). A liability "equally and ratably to the extent of their respective shares of stock" does not authorize a judgment against one for any more than his proportion. Buenz *v.* Cook, 15 Colo. 38 (1890). The constitution of Missouri formerly contained a provision, now repealed, imposing a double liability. Perry *v.* Turner, 55 Mo. 418 (1874); Provident Sav. Inst. *v.* Jackson Place, etc. Rink, 52 Mo. 552 (1873). A provision in the constitution of 1875, taken from an amendment of 1870, that "in no case shall any stockholder be individually liable in any amount over and above the amount of the stock owned by him," was construed in Schricker *v.* Ridings, 65 Mo. 208 (1877), to limit liability to unpaid subscriptions. But see Miller *v.* Great Republic Ins. Co. 50 Mo. 55 (1872); Ochiltree *v.* Railroad Co., 21 Wall. 249 (1874). A statute imposing a liability to the amount of the stock has been held in Texas to be merely declaratory of the subscription liability. Walker *v.* Lewis, 49 Tex. 123 (1878). A liability "to the amount of what remains unpaid upon his subscription to the capital stock" is declaratory and creates no liability beyond the subscription price. Burch *v.* Taylor, 1 Wash. St. 245 (1890); Root *v.* Sinnock, 120 Ill. 350 (1887). In Massachusetts, by statute, stockholders in manufacturing corporations are liable as tenants in common to creditors to the extent of the capital stock until it has been divided into shares. Hawes *v.* Anglo-Saxon Petroleum Co., 101 Mass. 385 (1869); s. c., 111 Mass. 200 (1872). *Cf.* Burnap *v.* Haskins Steam Engine Co., 127 Mass. 586 (1879); Hager *v.* Cleveland, 36 Md. 476 (1872); Norris *v.* Johnson, 34 Md. 485 (1871). In the case Reid *v.* De Jarnette, 123 Ga. 787 (1905), the provision that stockholders shall be liable to the amount of their unpaid subscriptions and for an additional equal amount, was held to apply only to the original subscribers and not to transferees.

2 Murphy *v.* Wheatley, 102 Md. 501 (1906).

the recovery of which joint or several actions may be . . . prosecuted," it has been held that the liability of the stockholders is substantially that of partners, but may be enforced at law.[1] A general joint and several liability for all the corporate debts makes the stockholders liable as partners, as though there had been no incorporation.[2] Under the provisions of the constitution and statutes of Ohio, and of other states, it is held that while the undertaking of the stockholder is not primary, and is to be resorted to only in case of the insolvency of the corporation, still the liability, when it does properly arise, is essentially that of partners.[3] This

1 Davidson *v.* Rankin, 34 Cal. 503 (1868). *Cf.* Young *v.* Rosenbaum, 39 Cal. 646 (1870); Larrabee *v.* Baldwin, 35 Cal. 155 (1868); McAuley *v.* York Min. Co., 6 Cal. 80 (1856); Adkins *v.* Thornton, 19 Ga. 325 (1856) [this case is frequently miscited, owing to a misprint in the original report, as Dozier *v.* Thornton]; Branch *v.* Baker, 53 Ga. 502 (1874); Dane *v.* Young, 61 Me. 160 (1872); Castleman *v.* Holmes, 4 J. J. Marsh. (Ky.) 1 (1830). *Cf.* Fuller *v.* Ledden, 87 Ill. 312 (1877); Brown *v.* Hitchcock, 36 Ohio St. 678 (1881). The constitutional and statutory liability of stockholders in California is a contract obligation, and may be enforced by attachment. Kennedy *v.* California Sav. Bank, 97 Cal. 93 (1892). The liability of a stockholder in a California bank for his proportion of a corporate debt was enforced at law in Barling *v.* Bank of British North America, 50 Fed. Rep. 260 (1892). See also, in general, Southmayd *v.* Russ, 3 Conn. 52 (1819); Middletown Bank *v.* Magill, 5 Conn. 28, 45 (1823); Deming *v.* Bull, 10 Conn. 409 (1835); Conant *v.* Van Schaick, 24 Barb. 87 (1857); Allen *v.* Sewall, 2 Wend. 327 (1829); Moss *v.* Oakley, 2 Hill, 265 (1842); Harger *v.* McCullough, 2 Denio, 119 (1846); McCullough *v.* Moss, 5 Denio, 567 (1846); Corning *v.* McCullough, 1 N. Y. 47 (1847); Moss *v.* Averell, 10 N. Y. 449 (1853); Wiles *v.* Suydam, 64 N. Y. 173, 176 (1876); Conklin *v.* Furman, 57 Barb. 484 (1865); Abbott *v.* Aspinwall, 26 Barb. 202 (1857); Erickson *v.* Nesmith, 46 N. H. 371 (1866); White *v.* Blum, 4 Neb. 555 (1876); New England Com. Bank *v.* Newport Steam Factory, 6 R. I. 154 (1859); Moies *v.* Sprague, 9 R. I. 541 (1870); Parker *v.* Carolina Sav. Bank, 53 S. C. 583 (1898). The statutory liability of stockholders in a Colorado corporation "in double the amount of the par value of the stock owned by them, respectively," is a triple liability; in other words, is a double liability in addition to the subscription liability. Zang *v.* Wyant, 25 Colo. 551 (1898).

2 Planters' Bank *v.* Bivingsville Cotton Mfg. Co., 10 Rich. L. (S. C.) 95 (1856).

3 And that although the stated extent of the stockholder's liability, as provided by the statute, cannot be exceeded, still, up to the full measure of his liability, he may be charged, although it be shown that, if other solvent stockholders had contributed their full proportion, it would not be necessary for him to pay. Wehrman *v.* Reakirt, 1 Cin. Super. Ct. (Ohio), 230 (1871); Brown *v.* Hitchcock, 36 Ohio St. 678 (1881); Harpold *v.* Stobart, 46 Ohio St. 397 (1889). This case holds also that a stockholder in Ohio "is liable to creditors of the corporation for such portion only of the debts existing while he held the stock and remaining due (not in excess of the amount of stock assigned), as will be equal to the proportion which the capital stock assigned by him bears to the entire capital stock held by solv-

class of cases holds that, unless the statute prescribes otherwise, the common-law rules as to the liability of partners, and the remedies for enforcing that liability, apply to the statutory liability of stockholders in incorporated companies.[1]

A very common statutory liability is that which makes stockholders liable for debts due from the corporation to its servants or

ent stockholders, liable in respect of the same debts, who are within the jurisdiction, to be ascertained at the time judgment is rendered." *Cf.* Stewart *v.* Lay, 45 Iowa, 604 (1877); Crease *v.* Babcock, 51 Mass. 525 (1846). Article XIII, § 3, of the constitution of Ohio of 1851, providing that dues from corporations be secured by individual liability of the stockholders as may be prescribed by law to a further sum over and above their stock at least equal to the amount of such stock, is not so far self-executing that it may be enforced outside of the jurisdiction of that state without compliance with the requirements of the state statute fixing the amount of the liability and the method of enforcing it. Middletown Nat. Bank *v.* Toledo, etc. Ry., 197 U. S. 394 (1904). In Wisconsin stockholders in banking corporations are liable by statute as original and principal debtors, substantially as though they were partners, except, as in Ohio, that the responsibility of each is limited to a sum equal to his shares of stock. Coleman *v.* White, 14 Wis. 700 (1862).

1 Story *v.* Furman, 25 N. Y. 214, 221, 222 (1862); New England Com. Bank *v.* Newport Steam Factory, 6 R. I. 154, 189 (1859); Moies *v.* Sprague, 9 R. I. 541 (1870). It is sometimes held that a general statutory liability means a liability on the part of the stockholder only in the proportion which his interest bears to the total indebtedness of the corporation. Boyd *v.* Hall, 56 Ga. 563 (1876); Reynolds *v.* Feliciana Steamboat Co., 17 La. Rep. 397 (1841). In such a case, where the stockholders are jointly and severally personally liable for debts contracted by the corporation, which it cannot or does not pay, in proportion to the number of shares they own, it seems to be settled that they are to be held principal debtors and not mere sureties for the corporation. Harger *v.* McCullough, 2 Denio, 119 (1846); Corning *v.* McCullough, 1 N. Y. 47 (1847), the court saying that the stockholders stand towards the creditors "on the same ground and under the same responsibility . . . as they would if unincorporated have stood;" Moss *v.* Averell, 10 N. Y. 449 (1853); Simonson *v.* Spencer, 15 Wend. 548 (1836), sustaining the action for debt; Bailey *v.* Bancker, 3 Hill, 188 (1842), holding also that a creditor must sue a stockholder upon the original demand and not upon the judgment against the company; Southmayd *v.* Russ, 3 Conn. 52 (1819), holding that, since the liability is original, *scire facias* will not lie against a stockholder, but he must be sued as if there were no incorporation; Marcy *v.* Clark, 17 Mass. 330 (1821). In Michigan it is held that they are sureties. Hanson *v.* Donkersley, 37 Mich. 184 (1877). *Cf.* Grand Rapids Sav. Bank *v.* Warren, 52 Mich. 557 (1884). It has been held that they are not sureties for each other. Lane *v.* Harris, 16 Ga. 217, 234 (1854); Crease *v.* Babcock, 51 Mass. 525 (1846). *Cf.* Larrabee *v.* Baldwin, 35 Cal. 155 (1868). This seems to be the rule, in general, as to all statutory liability. Young *v.* Rosenbaum, 39 Cal. 646 (1870); Erickson *v.* Nesmith, 46 N. H. 371 (1866); Thompson *v.* Meisser, 108 Ill. 359 (1884).

laborers. There has been difficulty in determining what persons are to be classed as servants, but the courts are not inclined to give a broad application to the word.[1]

1 It may be stated as the rule, that only those who perform menial or manual services are within the class contemplated in the statute; "that he who performs them must be of a class whose members usually look to the reward of a day's labor or service for immediate or present support, from whom the company does not expect credit, and to whom its future ability to pay is of no consequence." Wakefield *v.* Fargo, 90 N. Y. 213, 217 (1882). *Cf.* Adams *v.* Goodrich, 55 Ga. 233 (1875). This overrules some of the earlier New York cases; *e. g.*, Vincent *v.* Bamford, 1 Jones & S. 506 (1871); s. c., 12 Abb. Pr. (N. S.) 252, which held an engineer and foreman, who sometimes also acted as superintendent, to be a servant within the meaning of the rule; Harris *v.* Norvell, 1 Abb. N. Cas. 127 (1876), which held a reporter employed by a newspaper company, and a city or assistant editor, if not an officer of the company, to be a servant; Hovey *v.* Ten Broeck, 3 Rob. (N. Y.) 316 (1865), holding an overseer and book-keeper within the protection of the act. The word "employees" includes salesmen on salaries. Palmer *v.* Van Santvoord, 153 N. Y. 612 (1897). An attorney is not an employee within the statute making stockholders personally liable for debts to laborers, servants, or employees. Bristor *v.* Smith, 158 N. Y. 157 (1899). An attorney of a railroad company is not a laborer or employee entitled to a preference, under the Arkansas statute. Latta *v.* Lonsdale, 107 Fed. Rep. 585 (1901). A preference given by statute to the wages of employees, etc., does not apply to clerks, book-keepers, superintendents, shop foremen, and draftsmen. Matter of Stryker, 158 N. Y. 526 (1899). A superintendent of a mine is not a laborer, servant, or operative. Cocking *v.* Ward, 48 S. W. Rep. 287 (Tenn. 1898). A preference to laborers does not include a corporation, especially where the latter's claim is for printing and binding books. *In re* Barr-Dinwiddie, etc. Co., 42 Atl. Rep. 575 (N. J. 1899). A salesman who is paid partly in cash and partly by commissions may be an employee. Matter of Luxton & Black Co., 35 N. Y. App. Div. 243 (1898). A general manager is not a workman within the meaning of the bankruptcy act. *In re* Grubbs-Wiley, etc. Co., 96 Fed. Rep. 183 (1899). A book-keeper is an "employee," that word being of a wider meaning than "laborers and operatives." People *v.* Beveridge Brewing Co., 91 Hun, 313 (1895). Book-keepers, superintendents, and foremen paid by the month are not employees, operatives, and laborers entitled to prior payment under the New York statute. *Re* Stryker, 73 Hun, 327 (1893); aff'd, 158 N. Y. 526 (1899). The president is not a "workman or employee" in the sense of the New Jersey statute giving a preference. Weatherby *v.* Saxony, etc. Co., 29 Atl. Rep. 326 (N. J. 1894). The salary of a general traveling agent is not a debt "owing for labor" and is not entitled to a preference. Clark's Appeal, 100 Mich. 448 (1894). A master-mechanic and superintendent of works is a servant or laborer. Sleeper *v.* Goodwin, 67 Wis. 577 (1887). A superintendent of laborers is a "laborer" himself. Pendergast *v.* Yandes, 124 Ind. 159 (1890). An expert employed to adjust and start the machinery is entitled to the statutory lien for "labor." Black's Appeal, 83 Mich. 513 (1890). A traveling salesman is a "clerk" within the meaning of the statute rendering stockholders liable for debts

Many of the states have statutes rendering stockholders or directors liable to creditors unless certain reports or certificates are

to "clerks," etc. Hand *v.* Cole, 88 Tenn. 400 (1890).

The following employees have been held not to be servants or laborers within the protection of the rule: The secretary of a manufacturing company. Coffin *v.* Reynolds, 37 N. Y. 640 (1868), overruling Richardson *v.* Abendroth, 43 Barb. 163 (1864), and perhaps Williamson *v.* Wadsworth, 49 Barb. 294 (1867), which is the case of a civil engineer and traveling agent at a fixed salary. A civil engineer. Pennsylvania, etc. R. R. *v.* Leuffer, 84 Pa. St. 168 (1877). *Contra*, Conant *v.* Van Schaick, 24 Barb. 87 (1857). *Cf.* Williamson *v.* Wadsworth, 49 Barb. 294 (1867). A consulting engineer. Ericsson *v.* Brown, 38 Barb. 390 (1862). An assistant chief engineer. Brockway *v.* Innes, 39 Mich. 47 (1878). *Cf.* Peck *v.* Miller, 39 Mich. 594 (1878). An overseer on a plantation. Whitaker *v.* Smith, 81 N. C. 340 (1879). *Contra*, Hovey *v.* Ten Broeck, 3 Rob. (N. Y.) 316 (1865). A contractor. Rogers *v.* Dexter, etc. R. R., 85 Me. 372 (1893); Boutwell *v.* Townsend, 37 Barb. 205 (1860); Aikin *v.* Wasson, 24 N. Y. 482 (1862); Balch *v.* New York, etc. R. R., 46 N. Y. 521 (1871); Atcherson *v.* Troy, etc. R. R., 6 Abb. Pr. (N. S.) 329 (1856). *Cf.* Kent *v.* New York Cent. R. R., 12 N. Y. 628 (1855); McCluskey *v.* Cromwell, 11 N. Y. 593 (1854). An agent of a mining corporation employed to take charge of its mines in a foreign country. Hill *v.* Spencer, 61 N. Y. 274 (1874); Dean *v.* De Wolf, 16 Hun, 186 (1878); aff'd, 82 N. Y. 626; Krauser *v.* Ruckel, 17 Hun, 463 (1879). A book-keeper and general manager. Wakefield *v.* Fargo, 90 N. Y. 213 (1882). A superintendent. Kincaid *v.* Dwinelle, 59 N. Y. 548 (1875). *Cf.* Gordon *v.* Jennings, L. R. 9 Q. B. D. 45 (1882). And compare also Gurney *v.* Atlantic, etc. Ry., 58 N. Y. 358 (1874). Counsel is not an "employee." Louisville, etc. R. R. *v.* Wilson, 138 U. S. 501 (1891). A contractor is not an employee under the Indiana statute. Vane *v.* Newcombe, 132 U. S. 220 (1889). A statutory preference to servants and employees gives no preference to the secretary. Wells *v.* Southern Minn. Ry., 1 Fed. Rep. 270 (1880). In general, only manual or menial laborers are protected by the statute. Adams *v.* Goodrich, 55 Ga. 233 (1875); People *v.* Remington, 45 Hun, 329 (1887); aff'd, 109 N. Y. 631. *Cf.* Heebner *v.* Chave, 5 Pa. St. 115 (1847); Harrod *v.* Hamer, 32 Wis. 162 (1873).

Under the mechanic's lien laws of the several states, a wider meaning has been given to the word "laborers." These cases are frequently confused with the statutes considered herein. Stryker *v.* Cassidy, 76 N. Y. 50 (1879); Mutual Benefit L. Ins. Co. *v.* Rowand, 26 N. J. Eq. 389 (1875); Bank of Pennsylvania *v.* Gries, 35 Pa. St. 423 (1860); Arnoldi *v.* Gouin, 22 Grant, Ch. (Up. Can.) 314 (1875); Mulligan *v.* Mulligan, 18 La. Ann. 20 (1866); Knight *v.* Norris, 13 Minn. 473 (1868); Raeder *v.* Bensberg, 6 Mo. App. 445 (1879); Foushee *v.* Grigsby, 12 Bush. (Ky.) 75 (1876); Smallhouse *v.* Kentucky, etc. Co., 2 Mont. 443 (1876); Capron *v.* Strout, 11 Nev. 304 (1876). The mere fact that one does some manual labor incidental to his position as manager or foreman or superintendent will not constitute him a laborer within the intent of these statutes. Krauser *v.* Ruckel, 17 Hun, 463 (1879); Ericsson *v.* Brown, 38 Barb. 390 (1862). *Cf.* Wakefield *v.* Fargo, 90 N. Y. 213 (1882). But where a foreman did so much manual labor that it was not a mere incident of his foremanship, it was held that he might recover as a laborer. Short

filed,[1] and the statutes often impose a personal liability on the

v. Medberry, 29 Hun, 39 (1883). For construction of the Pennsylvania liability for labor and supplies, see Weiss *v.* Mauch Chunk Iron Co., 58 Pa. St. 295 (1868); Reading Industrial Mfg. Co. *v.* Graeff, 64 Pa. St. 395 (1870); Moyer *v.* Pennsylvania Slate Co., 71 Pa. St. 293 (1872), where a statute imposing liability for debts due workmen, etc., and materials furnished was construed not to include debts for hauling, repairing wagons, lumber for erecting machinery, powder for blasting, etc.; Weigley *v.* Coal Oil Co., 5 Phila. 67 (1862). A claim against stockholders on their statutory liability to laborers is assignable. Day *v.* Vinson, 78 Wis. 198 (1890). A laborer having recourse by statute against stockholders may assign his rights. Day *v.* Buckingham, 87 Wis. 215 (1894). The liability for debts to laborers applies to such debts though due to non-residents. Clokus *v.* Hollister Min. Co., 92 Wis. 325 (1896). A person having a claim against a director on a liability of the latter, created by statute, may assign that claim, and the assignee may enforce it. Bedford *v.* Sherman, 68 Hun, 317 (1893).

1 As to whether this liability is a penal liability, see § 223, *infra.* Such a liability is strictly construed. See § 214, *supra.* Cases on statutes of this character are given throughout this chapter. The following cases may also aid in giving an idea of this kind of liability: Under a statute rendering the stockholders liable to corporate creditors to the extent of the unpaid portion of the par value of their stock, unless a true statement of the affairs of the company is made annually, the stockholders are so liable if the statement which is filed is a false statement. Congdon *v.* Winsor, 17 R. I. 236 (1891), refusing to follow Stedman *v.* Eveleth, 47 Mass. 114 (1843). There is no debt existing for goods bought until the goods are delivered, under the Rhode Island statute making the stockholders liable for failure to file a report. Wing *v.* Slater, 19 R. I. 597 (1896). Directors are not liable by statute requiring an annual report, where such report is filed, even though it be false. If the statute makes them liable for knowingly making a false report, knowledge must be averred. Matthews *v.* Patterson, 16 Colo. 215 (1891). A corporation which files its certificate of incorporation with the Secretary of State, but not with the County Clerk, as required by statute, and transacts no business except to authorize the issue of stock for property, which issue is never made, is not even a *de facto* corporation, and hence the directors are not liable for failing to file a report as required by statute. Emery *v.* De Peyster, 77 N. Y. App. Div. 65 (1902). This statutory liability of directors for failure to file reports is not avoided by the fact that the company is insolvent and has gone out of business. Gans *v.* Switzer, 9 Mont. 408 (1890). The California statute, allowing any stockholder to collect $1,000 from the directors in a mining company if they fail to post a balance sheet monthly, was construed in Ball *v.* Tolman, 119 Cal. 358 (1897). Where the directors of a mining corporation are liable for $1,000 unless they file weekly reports of the receipts, disbursements, number of employees, and wages, no damage need be proved by a stockholder in suing for the $1,000. Shanklin *v.* Gray, 111 Cal. 88 (1896); Miles *v.* Woodward, 115 Cal. 308 (1896). A statutory liability of officers for a false report applies only to debts created after the false report is made. Torbett *v.* Godwin, 62 Hun, 407 (1891). The statutory liability of directors for corporate debts, where they fail to give notices of the debts of the company, is not available to

directors for making loans in excess of the capital stock.[1] A state may, by its statutes, impose a personal liability on the stockholders of

any creditors except those giving credit after the directors should have given notice. Gorder *v.* Plattsmouth Canning Co., 36 Neb. 548 (1893). "Wilful neglect" or refusal does not arise from mere neglect of a director under a statute calling for an annual report. Gennert *v.* Ives, 102 Mich. 547 (1894). Where a water-works company issues $197,000 of stock and $150,000 of bonds for work which is worth only the amount of the bonds, the Indiana statute rendering directors personally liable for not causing the capital stock to be paid up within eighteen months is applicable. The court said, "the plan of the promoters, stockholders and directors of the company was to build a water-works without capital and without risk of expense to themselves," and that by taking all the stock and all the bonds they left the corporation where it was unable to pay any other debts, either by the sale of stock or bonds. Brown *v.* Clow, 158 Ind. 403 (1902). In Illinois by statute the directors are personally liable for debts incurred before all "stock named in the articles of incorporation shall be subscribed in good faith." Kent *v.* Clark, 181 Ill. 237 (1899). The Illinois statute rendering a director personally liable for the debts of a corporation where the incorporating act is not complied with in certain particulars was applied in Edwards *v.* Armour, etc. Co., 190 Ill. 467 (1901). Under the former New York law a director was liable for debts contracted after he became a director where no report had been filed before he became such director and no report was filed after he became a director. Union Bank *v.* Keim, 52 N. Y. App. Div. 135 (1900); aff'd, 169 N. Y. 587. As to the statute in Colorado rendering the directors liable for the debts where they fail to file specified reports, see Thatcher *v.* Salomon, 16 Colo. App. 150 (1901). In Minnesota by statute directors who participate in an *ultra vires* act are liable for all debts thereafter contracted, even though they go out of office. Citizens' State Bank *v.* Story, etc. Co., 84 Minn. 408 (1901). See also n. 4, p. 541, *supra.*

[1] Where directors are liable for corporate debts in excess of the subscribed capital stock, the capital stock includes that paid for by property as well as in cash. Moore *v.* Lent, 81 Cal. 502 (1889). A director liable by statute for debts in excess of a certain amount is liable only to creditors holding such excess. Hilliard *v.* Lyman, 138 Fed. Rep. 469 (1905); aff'd, 154 Fed. Rep. 339. In enforcing a liability of directors for debts in excess of the capital, a creditor must sue for the benefit of all, and can recover only a proportion of the excess over such capital stock. Anderson *v.* Speers, 21 Hun, 568 (1880). A director cannot enforce a statutory liability of the directors for debts contracted by the corporation in excess of the capital stock, the directors being liable "jointly and severally" by statute; but such debt due to the director is counted. Thacher *v.* King, 156 Mass. 490 (1892). Where the constitution of an unincorporated association limits the debts and the directors incur a larger amount of debts, the directors cannot obtain contribution from the stockholders. McFadden *v.* Leeka, 48 Ohio St. 513 (1891). The liability of directors in New York for excessive debts can be enforced only in a suit in which all the directors are joined. Milsom, etc. Co. *v.* Baker, 16 N. Y. App. Div. 581 (1897); aff'd, 153 N. Y. 687. Where creditors are enjoined from suing the corporation they need not obtain a judgment against the

a foreign corporation that does business in such state, to the extent at least that its business is done in that state, especially where the charter provided for the carrying on of the principal part of the business in such state.[1] A statute giving a remedy against directors of a corporation, who are guilty of fraud, applies to directors in foreign corporations, as well as those in domestic corporations, unless its language is clearly to the contrary.[2] A liability imposed by a con-

corporation before suing to hold directors personally liable by statute, by reason of the debts exceeding the paid-up capital stock. Whitney *v.* Pugh, 58 N. Y. App. Div. 316 (1901). The statutory liability of stockholders for a failure to file a certificate that the capital stock has been fully paid, and the statutory liability of directors for debts in excess of the capital stock, do not apply to a judgment in an action of tort. Leighton *v.* Campbell, 17 R. I. 51 (1890). As to the liability of directors of a national bank for loans in excess of the amount allowed by law, see Witters *v.* Sowles, 43 Fed. Rep. 405 (1890); Stephens *v.* Overstolz, 43 Fed. Rep. 771 (1890). The liability of directors under the National Banking Act for loans to separate persons of amounts in excess of one-tenth of the capital stock can be enforced only in a court of equity. Welles *v.* Graves, 41 Fed. Rep. 459 (1890); Peters *v.* Foster, 56 Hun, 607 (1890). As regards the remedy under the National Bank Act, see also Kennedy *v.* Gibson, 8 Wall. 498 (1869); Casey *v.* Galli, 94 U. S. 673 (1876), and Act of June 30, 1876, ch. 44; Witters *v.* Sowles, 32 Fed. Rep. 767 (1887); Richmond *v.* Irons, 121 U. S. 27 (1887), as to joinder of causes of action. A statute rendering directors liable for debts in excess of the capital stock does not prohibit the incurring of such debts. In Massachusetts this statutory liability does not apply to past debts which have been reduced to less than the capital stock at the time suit is commenced. Flint *v.* Boston, etc. Co., 183 Mass. 114 (1903).

[1] Pinney *v.* Nelson, 183 U. S. 144 (1901).

[2] Miller *v.* Quincy, 179 N. Y. 294 (1904); rev'g Miller *v.* Barlow, 88 N. Y. App. Div. 529. Under the statutes of New York where a New Jersey corporation, doing business in New York, pays dividends from the capital stock, a director participating in declaring the dividend is personally liable therefor, and if the corporation refuses to bring the action a stockholder may bring it in behalf of himself and other stockholders. Hutchinson *v.* Stadler, 85 N. Y. App. Div. 424 (1903). Where an officer of a foreign corporation signs and delivers to the commissioner of corporations a certificate which states that its copyrights and privileges are worth $120,000 when in fact they were worth only $10,000, he is liable to the corporate creditors under the statutes of Massachusetts, and it is no defense that the stockholders did not intend to sell the stock. Heard *v.* Pictorial Press, 182 Mass. 530 (1903). A Montana statute rendering directors liable for corporate debts if they fail to file a specified report applies to foreign as well as domestic corporations. Nelson *v.* Bank of Fergus County, 157 Fed. Rep. 161 (1907). The Massachusetts statute making corporate officers liable for corporate debts unless the capital stock has been paid in and a certificate filed, does not apply to foreign corporations. Standard, etc. Co. *v.* Merrimack, etc. Co., 81 N. E. Rep. 262

stitution may or may not be self-executing without any statutory provision, according to the wording of the constitutional provision itself.[1] An increase or reduction of the capital stock leads often

(Mass. 1907). A Montana statute rendering directors liable for corporate debts if they fail to file a specified report applies to foreign as well as domestic corporations. Nelson *v.* Bank of Fergus County, 157 Fed. Rep. 161 (1907). A statutory liability of a director in a foreign corporation, doing business in New York, for failure to file a report required by the New York statutes, was sustained in Staten Island, etc. R. R. *v.* Hinchliffe, 170 N. Y. 473 (1902).

1 A constitutional liability may not be enforceable where no statute has been passed to enforce it; as, for example, the provision that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law." Morley *v.* Thayer, 3 Fed. Rep. 737 (1880). Under the Ohio constitutional provision imposing a liability on stockholders, a general act authorizing incorporations must contain a provision to that effect or the act will be void. State *v.* Sherman, 22 Ohio St. 411 (1872). Where the United States Circuit Court of Appeals is in doubt as to whether a constitutional provision creating a double liability is self-executing the case will be referred to the Supreme Court of the United States for decision. Middletown, etc. Bank *v.* Toledo, etc. Ry., 127 Fed. Rep. 85 (1903). A constitutional provision that stockholders shall be liable to the extent of their stock is self-executing and applies to all corporations. Willis *v.* Mabon, 48 Minn. 140 (1892). The Kansas constitution is self-enforcing as to stockholder's liability. Sterne *v.* Atherton, 7 Kan. App. 20 (1897); Fowler *v.* Lamson, 146 Ill. 472 (1893). The Nebraska constitutional provision imposing a double liability on stockholders in banks is self-executing. Farmers' L. & T. Co. *v.* Funk, 49 Neb. 353 (1896). The New York constitutional provision imposing a double liability on stockholders is not self-executing. Marshall *v.* Sherman, 148 N. Y. 9 (1895). The constitutional liability of stockholders in California is not self-executing. A statute which applies it "in proportion" to the amount of stock held by each stockholder is too vague for enforcement. United States *v.* Stanford, 69 Fed. Rep. 25 (1895); aff'd, 161 U. S. 412. The term "self-executing," as applied to a constitution imposing a liability on stockholders, refers to whether the provision is enforceable without a specific remedy being created. Eau Claire, etc. Bank *v.* Benson, 106 Wis. 624 (1900). The Kansas constitutional liability of stockholders is not self-executing. Woodworth *v.* Bowles, 61 Kan. 569 (1900). A constitutional provision that "dues from corporations, other than banking, shall be secured by such individual liability of the corporators, or other means, as may be prescribed by law," does not render unconstitutional a general statute for incorporation which does not prescribe any statutory liability of stockholders, and hence that defense is not available to a subscriber who is sued on his subscription. Williams *v.* Citizens', etc. Co., 153 Ind. 496 (1899). A constitutional provision making the directors liable for moneys misappropriated by officers during their term of office is self-executing, and they are liable for using the funds to purchase worthless paper from a bank which they wish to keep going. The liability is not penal, inasmuch as it is not a punishment, but a compensation for a loss.

to complications in addition to the usual ones incident to the statutory liability.[1] Various decisions on the liability of stockholders and directors under particular statutes are given in the notes below.[2]

A creditor who became such after the misappropriation may maintain a suit as well as one before, and he need not bring a suit in behalf of all, nor first obtain a judgment against the corporation. Rice *v.* Howard, 69 Pac. Rep. 77 (Cal. 1902).

1 See §§ 288, 289, *infra*, concerning this subject.

2 Under the Illinois statute making directors liable for debts before the statute is complied with as to incorporation, and the issue by the secretary of state of a certificate of completed organization and recording of the same in the county where the principal office is, the directors are liable if such certificate is not so recorded. Liability may be enforced even by a corporate creditor who has filed his claim with an assignee of the corporation for the benefit of its creditors. Loverin *v.* McLaughlin, 161 Ill. 417 (1896). The Illinois statute rendering personally liable directors and officers of a pretended corporation which has not complied with the statutes does not apply to an unincorporated joint stock association Gay *v.* Kohlsaat, 79 N. E. Rep. 77 (Ill. 1906). By statute in Iowa stockholders are liable for debts if a notice of incorporation is not published. Houts *v.* Sioux City, etc., 110 N. W. Rep. 166 (Iowa 1907). Under the Iowa statute a stockholder is liable for corporate debts where the notice of incorporation was not published as required by statute, it appearing that he became a stockholder during the time allowed for the publication. Clinton, etc. Works *v.* Neiting, 111 N. W. Rep. 974 (Iowa 1907). A debt guaranteed by a corporation is not a debt of the corporation and until it becomes such the stockholders are not liable for it under the Kansas statute. McHale *v.* Moore, 66 Kan. 267 (1903). Where a director in a bank is liable by statute for failure to become familiar with its affairs, it is no defense that even if he had examined the books he could not have discovered the fraud of the cashier. Forbes *v.* Mohr, 69 Kan. 342 (1904). In Florida by statute the stockholders are liable for the debts the same as partners where the statute relative to incorporation is not complied with. Heinberg Bros. *v.* Thompson, 47 Fla. 163 (1904). In New Hampshire stockholders are liable for corporate debts until the whole amount of the capital stock has been paid in. Carter, etc. Co. *v.* Samuel, etc. Co., 72 N. H. 549 (1904). On the sale of bank stock for nonpayment of an assessment, levied to make good impaired capital stock, as allowed by the Indiana statute, the price at which the stock sells belongs to the stockholder in default. Chicago, etc. Co. *v.* State Bank, 121 Fed. Rep. 58 (1902). Even though the president buys treasury stock from the company at two cents a share and sells it for twenty cents a share, this is not a misappropriation of its funds rendering the directors liable under the California statute. Hercules, etc. Co. *v.* Hocknell, 91 Pac. Rep. 341 (Cal. 1907). Under the Massachusetts statute of 1906 making directors of street railways liable for all debts to the extent of the capital stock until it is all paid in, and a certificate to that effect filed, the directors continue liable if the certificate is untrue. A judgment against the company is not first necessary. Westinghouse, etc. Co. *v.* Reed, 80 N. E. Rep. 621 (Mass. 1907). The United States statute making every person interested in a still of liquors liable for the tax thereon renders the stockholders of the distilling corporation

It remains to add that this class of statutes, except in the case of banks, have on the whole proved signal failures. They drive cor-

liable, and one who pays the tax may have contribution from the others. Richter *v.* Henningsan, 110 Cal. 530 (1895). A statute may require the word "limited" to be a part of the corporate name, and may render the stockholders personally liable for omitting the same. Lehman *v.* Knapp, 48 La. Ann. 1148 (1896). The liability of stockholders under the Michigan statute, relative to goods sold, is applied in Kirkpatrick *v.* Mehalitch, 113 Mich. 631 (1897). There is no statutory liability of stockholders in ordinary corporations in New Jersey. Thomson, etc. Co. *v.* Murray, 60 N. J. L. 20 (1897). Under the Iowa statutes the stockholders are liable as partners where the certificate of incorporation failed to state the highest amount of indebtedness which the company might incur. Heuer *v.* Carmichael, 82 Iowa, 288 (1891). "Dues" include insurance policies. McDonnell *v.* Alabama, etc. Ins. Co., 85 Ala. 401 (1888). The case of Austin *v.* Berlin, 13 Colo. 198 (1889), holds that new directors are not liable for the statutory delinquencies of the old. A debt contracted in the midst of acts for which directors are liable by statute is contracted "after such violation." Patterson *v.* Stewart, 41 Minn. 84 (1889). In Maine, by statute, stockholders were formerly liable as subscribers if their stock was paid for by property taken at an overvaluation. Libby *v.* Tobey, 82 Me. 397 (1890). Under the Iowa statute rendering officers, etc., liable for diversion of funds, a policyholder may recover where a consolidation with another company has been made and plaintiff was excluded from the new company. Grayson *v.* Willoughby, 78 Iowa, 83 (1889). A complaint to enforce a stockholder's liability for labor done in the construction of the road is not good if it omits the allegation as to the construction of the road. Toner *v.* Fulkerson, 125 Ind. 224 (1890). Where stockholders are liable for debts other than mortgage debts, an agreement of the company to pay another company's mortgage debt is not a mortgage debt of its own such as would exempt its stockholders from liability. Barron *v.* Paine, 83 Me. 312 (1891). Where the constitution renders the stockholders liable doubly except in manufacturing and mechanical corporations, a statute exempting from liability the stockholders in companies engaged in dealing in mineral lands is unconstitutional. Anderson *v.* Anderson Iron Co., 65 Minn. 281 (1896). The double liability in Minnesota on all stockholders excepting corporations engaged in manufacturing or mechanical business does not apply to a mining corporation, that being a mechanical business. Cowling *v.* Zenith Iron Co., 65 Minn, 263 (1896). The constitutional liability of stockholders applies if a part of the business as set forth in the charter consists of mercantile business. The objection that all stockholders and creditors are not joined must be raised by answer. Densmore *v.* Shepard, 46 Minn. 54 (1891). Where stockholders are liable unless the corporation is a manufacturing corporation, they are liable if the corporation is to manufacture and "deal" in certain articles. Commercial Bank *v.* Azotine, etc. Co., 66 Minn. 413 (1896); aff'd, 69 Minn. 232 (1897). The Minnesota statutory liability, being absolute, will not be construed as a proportionate liability only (First Nat. Bank *v.* Winona Plow Co., 58 Minn. 167—1894), where the stockholders not made parties are shown to be insolvent, dead, or beyond the reach of process. Clarke *v.* Cold Spring, etc. Co., 58 Minn. 16 (1894). The statutory liability of

porations from a state, are rarely relied upon by creditors, and are productive of interminable litigation.

§ 216. *Waiver by corporate creditors of their statutory rights against stockholders.*—A corporate creditor may, by express contract, when the debt is incurred, waive his right to collect, from the stockholder, debts which the corporation fails to pay.[1] And the corporation in its contracts with third persons may, it is held in England, lawfully stipulate for the exemption of its members from the liability imposed upon them by statute in the event of the insolvency of the corporation,[2] and it has been held to be competent

officers of corporations in Minnesota for any "unfaithfulness" means "unfaithfulness" to the creditor who is suing. This suit may be at law. First Nat. Bank *v.* Harper, 61 Minn. 375 (1895). Where stockholders in manufacturing corporations are not liable, but in other companies are liable, under a statute, yet, if the charter authorizes other business than manufacturing, they are liable although only the manufacturing business is pursued. Arthur *v.* Willius, 44 Minn. 409 (1890).

1 Quoted and approved in Bush *v.* Robinson, 95 Ky. 492 (1894), (a case of waiver of recourse to unpaid subscriptions) and Hull *v.* Standard, etc. Co., 11 Ohio Circuits 331 (1900); Robinson *v.* Bidwell, 22 Cal. 379 (1863); French *v.* Teschemaker, 24 Cal. 518 (1864); Basshor *v.* Forbes, 36 Md. 154 (1872); Brown *v.* Eastern Slate Co., 134 Mass. 590 (1883), where the waiver was oral. The written agreement of the vendor of property to the corporation that the subscribers for stock are not to be personally liable therefor is a good defense against their subscription liability, so far as it is to be used to pay that debt, even though such agreement is made prior to incorporation. Carnahan *v.* Campbell, 158 Ind. 226. *Cf.* previous decision in 59 N. E. Rep. 1054 (1902). A corporate creditor's agreement that stockholders should not be individually liable on a debt does not relieve directors from their statutory liability, and the court intimated that it would not have been legal if it had relieved the directors from their liability. Swancoat *v.* Remsen, 78 Fed. Rep. 592 (1897). An oral agreement prior to incorporation that the stockholders should not be personally liable is not binding on the creditors. Oswald *v.* Minneapolis Times Co., 65 Minn. 249 (1896). In United States *v.* Stanford, 70 Fed. Rep. 346 (1895); aff'd, 161 U. S. 412, the court held that the complainant had by its acts waived the statutory liability of a stockholder in a California corporation. Corporate creditors may waive the stockholders' statutory liability. Wells *v.* Black, 117 Cal. 157 (1897). A partnership may, by contract with a party with whom it is dealing, limit the liability of the partners. Sentell *v.* Hewitt, 50 La. Ann. 3 (1898). Where the party loaning money to the association agrees orally to rely on it alone, he cannot afterwards hold its officers liable. Elwell *v.* Tatum, 6 Tex. Civ. App. 397 (1893). The agreement of a corporation to pay a specified sum of money, with the provision that it shall not be chargeable against a certain part of the capital stock, can be enforced in equity only, inasmuch as an accounting is involved. Heflin, etc. Co. *v.* Hilton, 124 Ala. 365 (1899).

2 *Re* Athenæum L. Ass. Soc., 3 De G. & J. 660 (1859); Halket *v.* Merchant Traders', etc. Assoc., 13 Q. B. 960 (1849); Durham's Case, 4 Kay & J. 517 (1858). *Cf.* Shelford, Joint-stock

for any one dealing with the company to contract to hold the stockholders responsible to only a limited extent, to no extent at all, or to any specified extent mutually agreed upon.[1] A New York court has

Companies (2d London ed.), 4. Where the agreement limits the liability of members to the unpaid part of their stock, a stockholder who is also a creditor cannot collect in excess of this par value. So also with a bank, one of whose members is a stockholder. *In re* Worcester, etc. Co., 3 De G., M. & G. 180 (1853). Although the subscribers themselves may stipulate with each other for such a restricted liability, nothing is more clear than that, as to the rest of the world, each stockholder is liable for the whole amount of the debts of the company. Nor will notice that a stipulation of this kind has been entered into between the stockholders prevent a creditor from holding each of them liable to the full extend of his demand. See Greenwood's Case, 3 De G., M. & G. 459 (1854); *Re* State Fire Ins. Co., 1 N. R. 510 (V.-C. W., 1863).

1 Quoted and approved in Hull *v.* Standard, etc. Co., 11 Ohio Circuits, 331 (1900). *Re* State F. Ins. Co., 1 Hem. & M. 457 (1863); s. c., 1 De G., J & S. 634; 36 L. J. (Ch.) 634; 34 L. J. (Ch.) 436; Hassell *v.* Merchant Traders' Assoc., 4 Exch. 525 (1849); Talbot's Case, 5 De G. & Sm. 386 (1852); s. c., 21 L. J. (Ch.) 846. See also Reid *v.* Allan, 4 Exch. 326 (1849); s. c., 19 L. J. (Exch.) 39. And compare *Re* Independent Assurance Co., 1 Sim. (N. S.) 54 (1850); Sunderland Marine Ins. Co. *v.* Kearney, 16 Q. B. 925 (1851); s. c., 20 L. J. (Q. B.) 417; Peddell *v.* Gwyn, 1 Hurl. & N. 590 (1857); s. c., 26 L. J. (Exch.) 199; Gordon *v.* Sea F. & L. Ass. Soc., 1 Hurl. & N. 599 (1857); s. c., 26 L. J. (Exch.) 202. And see Hess *v.* Werts, 4 Serg. & R. (Pa.) 356, 361 (1818); King *v.* Accumulative, etc. Ass. Co., 3 C. B. (N. S.) 151 (1857). *Cf.* Hallett *v.* Dowdall, 18 Q. B. (N. S.) 2 (1852). The mere fact that the articles of association of an unincorporated company provide against personal liability is no defense, even though the contracts say that they are subject to the provisions in such articles. Sullivan *v.* Campbell, 2 Hall (N. Y.), 271 (1829); Hess *v.* Werts, 4 Serg. & R. (Pa.) 356 (1818); Greenwood's Case, 3 De G., M. & G. 459 (1854). They are liable, even though their articles of association provided otherwise. Manning *v.* Gasharie, 27 Ind. 399 (1866). The unincorporated association is a partnership "and subject to the rules governing that branch of the law." But if the by-laws limit the amount of debts which the directors may incur, and they exceed it, they cannot have contribution from non-assenting stockholders. McFadden *v.* Leeka, 48 Ohio St. 513 (1891). The same rule prevails in an ordinary copartnership. Bromley *v.* Elliot, 38 N. H. 287 (1859). Directors are bound to know of the restriction and have no recourse to the stockholders; nor does a firm in which a director is a member. *Re* Worcester Corn Exch. Co., 3 De G., M. & G. 180 (1853). A contract that promoters shall not be personally liable binds an engineer. Landman *v.* Entwistle, 7 Exch. 632 (1852). Where promoters stipulate that they shall not be liable, the party who tacitly assents to that condition is bound. Giles *v.* Smith, 11 Jur. 334 (1847). See also ch. XLIII, *infra;* 3 Kent, Com. 27; Story, Partn., § 164. A contrary doctrine seems to have prevailed in Davis *v.* Beverly, 2 Cranch, C. C. (U. S.) 35 (1811); s. c., 7 Fed. Cas. 112; Riggs *v.* Swann, 3 Cranch, C. C. 183 (1827); s. c., 20 Fed. Cas. 788; reversed on another point by Mandeville *v.* Riggs, 2 Pet. 482 (1829). The exemption from liability must be

said: "There can be no doubt that it is competent for the members of a joint stock association to have the contracts so drawn as to confine the liability to the assets, and thus create the same situation as to their rights and liabilities as if the joint stock association were a corporation and they were stockholders."[1] A by-law cannot release stockholders from their statutory liability.[2] The underwriters of an unincorporated Lloyds insurance association may be liable personally on its policies, even though by the terms of the policy each underwriter assumed only his proportionate part of the loss, where that provision is not prominently set forth. The rule is that the members of an association may contract against personal liability, but the notice to that effect must be so plain and fair that the person contracting with the association knew of it, or it was his own fault that he did not know of it.[3]

§ 217. *Statutory liability not enforceable to pay damages recovered against the corporation in tort.*—The statutory liability imposed upon the stockholders in corporations is a liability exclusively for debts and demands accruing against the corporation by reason of its contracts. It cannot, therefore, be enforced to pay damages recovered against the corporation in an action in tort.[4]

clearly proved. Skinner *v.* Dayton, 19 Johns. 513, 537 (1822). A stipulation against holding stockholders liable has been held to refer to statutory liability and not to the subscription liability. Preston *v.* Cincinnati, etc. R. R., 36 Fed. Rep. 54 (1888). Aff'd in Lloyd *v.* Preston, 146 U. S. 630 (1892). A provision in an insurance policy that the directors shall not be liable, although the statute makes them liable, is not good. Greene *v.* Walton, 59 Hun, 102, 618 (1891).

1 Hibbs *v.* Brown, 112 N. Y. App. Div. 214 (1906). On appeal in this case it was held that coupons are negotiable, even though the trust deed securing them provides for a waiver of default in and postponed payment of such coupons, inasmuch as such provisions merely control any procedure under the trust deed for enforcing payment. Neither is negotiability destroyed by a provision that the members of the unincorporated joint stock association shall not be personally liable. Hibbs *v.* Brown, 190 N. Y. 167 (1907), a minority of the court holding also that the provision exempting the stockholders from personal liability is void.

2 Wells *v.* Black, 117 Cal. 157 (1897). A provision inserted in a certificate of incorporation under the Nebraska statutes limiting the liability of the stockholders so that they are not even liable for the subscription price is void. Van Pelt *v.* Gardner, 54 Neb. 701 (1898).

3 Imperial, etc. Co. *v.* Jewett, 169 N. Y. 143 (1901).

4 Heacock *v.* Sherman, 14 Wend. 58 (1835). In this case the stockholders in a company which owned a bridge, and against which a judgment had been recovered for damages because the bridge was out of repair, were held not to be liable upon such a demand, since the act imposing a personal liability upon them contemplated a liability only for demands arising *ex contractu*. In general, the word "debt," as used in statutes imposing a personal liability upon stock-

B. THE ENFORCEMENT OF THE LIABILITY.

§ 218. *The statutory liability can be enforced by corporate creditors only — Stockholders and directors as creditors — Receivers — National banks.*—The statutory liability of the stockholder is created exclusively for the benefit of corporate creditors. It is not to be numbered among the assets of the corporation, and the corporation has no right to or interest in it.[1] It cannot enforce it by an assessment upon the stockholders.[2] Nor can the corporation, upon the insolvency, assign it to a trustee for the benefit of creditors.[3] It is a liability running directly and immediately from the stockholders to the corporate creditors.[4] Accordingly, a receiver of an insolvent

holders, is construed to include only liabilities arising *ex contractu*, and not to include liability for damages recovered against the corporation in actions sounding in tort. Child *v.* Boston, etc. Iron Works, 137 Mass. 516 (1884), where a judgment for infringement of patent was not enforced; Leighton *v.* Campbell, 17 R. I. 51 (1890); Mill Dam Foundry *v.* Hovey, 38 Mass. 417, 455 (1839), sustaining an unliquidated claim for damages; Dryden *v.* Kellogg, 2 Mo. App. 87 (1876), enforcing a judgment for breach of warranty of title; Doolittle *v.* Marsh, 11 Neb. 243 (1881); Esmond *v.* Bullard, 16 Hun, 65 (1878); s. c., aff'd *sub nom.* Losee *v.* Bullard, 79 N. Y. 404 (1880); Archer *v.* Rose, 3 Brewst. (Pa.) 264 (1871). The Kansas statutory liability of stockholders is for the benefit of claims founded on tort as well as in contract. Henley *v.* Myers, 93 Pac. Rep. 168 (Kan. 1907). A director's statutory liability for debts does not apply to a judgment for damages for tort. Savage *v.* Shaw, 81 N. E. Rep. 303 (Mass. 1907). Cable *v.* McCune, 26 Mo. 371 (1858), defeating a judgment for damages for loss of a steamboat; Bohn *v.* Brown, 33 Mich. 257, 263 (1876), refusing to enforce herein a judgment against a common carrier for negligence. *Cf.* Stanton *v.* Wilkeson, 8 Ben. 357 (1876); s. c., 22 Fed. Cas. 1074; Chase *v.* Curtis, 113 U. S. 452 (1885); Carver *v.* Braintree Mfg. Co., 2 Story, 432, 448 (1843); s. c., 5 Fed. Cas. 235; Wyman *v.* American Powder Co., 62 Mass. 168, 182 (1851); Zimmer *v.* Schleehauf, 115 Mass. 52 (1874). But the stockholders' *subscription* liability may be enforced to pay damages arising from torts. Powell *v.* Oregonian Ry., 36 Fed. Rep. 726 (1888); 38 Fed. Rep. 187. The word "dues," as contained in the Ohio constitution, rendering stockholders individually liable, renders them liable not only on contracts of the corporation, but on torts committed by the corporation. Rider *v.* Fritchey, 49 Ohio St. 285 (1892). "Dues" include corporate liability for personal injuries. Flenniken *v.* Marshall, 43 S. C. 80 (1895). Under the Kansas statute stockholders are liable only on debts and dues, and not for damages for a tort. Brown *v.* Trail, 89 Fed. Rep. 641 (1898).

1 Quoted and approved in Colton *v.* Mayer, 90 Md. 711 (1900).

2 Umsted *v.* Buskirk, 17 Ohio St. 113 (1866); Liberty Female College Assoc. *v.* Watkins, 70 Mo. 13 (1879).

3 Wright *v.* McCormack, 17 Ohio St. 86, 95 (1866); Dutcher *v.* Marine Nat. Bank, 12 Blatchf. 435 (1875); s. c., 8 Fed. Cas. 152. See also Cuykendall *v.* Corning, 88 N. Y. 129 (1882).

4 Bristol *v.* Sandford, 12 Blatchf. 341 (1874); s. c., 4 Fed. Cas. 163; Lane *v.* Morris, 8 Ga. 468 (1850); s. c., 10 Ga. 162; Arenz *v.* Weir, 89 Ill.

corporation has no power to enforce such a liability as this;[1] but in many of the states, in order to avoid a multiplicity of suits, and conflict of interest and collusive settlements and doubt as to the remedy, statutes have been passed authorizing receivers to enforce

25 (1878). This was an action by a judgment creditor against a stockholder after a distribution of corporate assets by a receiver. The creditor was held to stand "on an independent platform, above that of the receiver, having no concern with the corporation, and the stockholder is bound, under the law, to answer to him."

1 Quoted and approved in Stocker *v.* Davidson, 74 Kan. 214 (1906). Hancock Nat. Bank *v.* Ellis, 166 Mass. 414 (1896); s. c., 172 Mass. 39; Colton *v.* Mayer, 90 Md. 711 (1900); Fidelity, etc. Co. *v.* Mechanics' Sav. Bank, 97 Fed. Rep. 297 (1899); King *v.* Cochran, 72 Vt. 107 (1900); Minneapolis, etc. Co. *v.* City Bank, 66 Minn. 441 (1896); Billings *v.* Robinson, 94 N. Y. 415 (1884); Farnsworth *v.* Wood, 91 N. Y. 308 (1883); Cuykendall *v.* Corning, 88 N. Y. 129 (1882); Arenz *v.* Weir, 89 Ill. 25 (1878); Jacobson *v.* Allen, 20 Blatchf. 525 (1882); Cutting *v.* Damerel, 88 N. Y. 410 (1882); Bauer *v.* Platt, 72 Hun, 326 (1893); Steinke *v.* Loofbourow, 17 Utah, 252 (1898); McLaughlin *v.* Kimball, 20 Utah, 254 (1899). *Cf.* Davis *v.* Gray, 16 Wall. 203 (1872); Attorney-General *v.* Guardian, etc. Ins. Co., 77 N. Y. 272 (1879). A receiver cannot enforce the statutory liability except at the instance of the creditors and of the court after the corporate assets have been exhausted and the creditors' claims fixed. Hamilton, etc. Bank *v.* American, etc. Co., 66 Neb. 67 (1902). A receiver appointed under the general equity powers of the court, and not under a statutory power, in the state where the corporation exists, to enforce the stockholders' statutory liability, cannot maintain a suit at law in another jurisdiction against a non-resident stockholder. Hilliker *v.* Hale, 117 Fed. Rep. 220 (1902); aff'd 188 U. S. 70. The appointment of a receiver of a corporation does not prevent creditors from enforcing the directors' liability. Patterson *v.* Stewart, 41 Minn. 84 (1889). But see Minnesota, etc. Mfg. Co. *v.* Langdon, 44 Minn. 37 (1890). At common law the statutory liability cannot be enforced in the receivership proceedings. The creditor must institute an independent suit. Spilman *v.* Mendenhall, 57 N. W. Rep. 468 (Minn. 1894). The creditor may proceed to judgment though a receiver has been appointed. Mason *v.* N. Y. Silk Mfg. Co., 27 Hun, 307 (1882). In Farmers' L. & T. Co. *v.* Funk, 49 Neb. 353 (1896), the court intimated that a receiver could bring the suit where the liability is for the benefit of all the creditors ratably. In Cushing *v.* Perot, 175 Pa. St. 66 (1896), the court held that a receiver and not a corporate creditor was the proper party to enforce the statutory liability. In a later decision the court held that a suit to enforce the liability of a stockholder in a Kansas corporation need not be brought by a receiver, but (following the decision of the supreme court of Kansas) might be brought by a creditor. Ball *v.* Anderson, 196 Pa. St. 86 (1900). Even though the receiver does not file a bill to enforce the statutory liability until more than six years after his appointment, yet the statute of limitations may not be a bar. Andrews *v.* Bacon, 38 Fed. Rep. 777 (1889). Where a receiver of a bank has been appointed without notice to the bank, a suit by him against the stockholders to enforce the statutory liability will fail. Andrews *v.* Holcomb, 113 N. W. Rep. 204 (Neb. 1907), 84 N.E. Rep. 827.

the statutory liability of stockholders.[1] Where by a statute every creditor has the right to bring suit to enforce the stockholders' liability, a subsequent statute taking away this right and giving it to a

[1] By the statutes of Kansas of 1899, the receiver is given the sole power to enforce the statutory liability of stockholders. Kisseberth *v.* Prescott, 95 Fed. Rep. 357 (1899). A judgment creditor may enforce the statutory liability of a stockholder in a Kansas corporation, although a receiver is in charge. Brown *v.* Trail, 89 Fed. Rep. 641 (1898). In Michigan by statute the receiver of an insolvent bank may enforce the stockholders' statutory liability, and the order of the court stating the amount necessary to so collect is binding on the stockholders and the court need not wait until the assets are exhausted before enforcing the same. Foster *v.* Row, 120 Mich. 1 (1899). In Minnesota now, by statute, a receiver may enforce the statutory liability. Ueland *v.* Haugan, 70 Minn. 349 (1897). And a creditor will not be allowed to sue except by leave of the court. Anderson *v.* Seymour, 70 Minn. 358 (1897). Under the Minnesota statute the receiver may join with creditors in enforcing the liability. Finney *v.* Guy, 106 Wis. 256 (1900). A receiver may enforce the statutory liability of stockholders in a bank organized under the Iowa statutes. State *v.* Union, etc. Bank, 103 Iowa, 549 (1897), holding also that any matter determined at the time of the assessment cannot be disputed by the stockholder. In Georgia the receiver of an insolvent state bank may enforce the statutory liability of stockholders and the corporation need not be joined in his suit. Moore *v.* Ripley, 106 Ga. 556 (1899). Where a receiver is enforcing the statutory liability a creditor will not be allowed to interfere. Brown *v.* Brink, 57 Neb. 606 (1899). The statutory liability of stockholders in a Washington bank may, under the statutes, be enforced by a receiver, and the order of the court fixing the amount of liability is binding on all stockholders. Howarth *v.* Ellwanger, 86 Fed. Rep. 54 (1898). In Washington the statutory liability of stockholders in banks can be enforced only by a receiver. Watterson *v.* Masterson, 15 Wash. 511 (1896); Wilson *v.* Book, 13 Wash. 676 (1896). A receiver can enforce the statutory liability of stockholders in a Washington bank, inasmuch as the statutes so provide. It is no defense that the stockholder was induced to subscribe by fraud. Sheafe *v.* Larimer, 79 Fed. Rep. 921 (1897). Under the Washington statute, after the statutory liability of stockholders has been determined by a decree of the court, a receiver may bring a suit at law against any stockholder to enforce his liability. Shuey *v.* Adair, 24 Wash. 378 (1901). Even though a receiver is entitled to enforce the statutory liability, yet where an assessment has been levied for the full amount of the liability, the remedy of the receiver is at law and not in equity. Hale *v.* Allison, 102 Fed. Rep. 790 (1900); aff'd 188 U. S. 56. In New York by statute the receiver is now the only person who can enforce the statutory liability of stockholders in state banks, unless he refuses to do so. Ch. 441, L. 1897. A statute that a receiver may enforce the statutory liability does not prevent suit by a creditor who commences suit before the receiver is appointed. Mahoney *v.* Bernhard, 45 N. Y. App. Div. 499 (1899); aff'd 169 N. Y. 589. A receiver suing under a statute need not allege that the creditors requested that the suit be brought. It is sufficient that the court authorized the suit. Wheatley *v.* Glover, 125 Ga. 710 (1906). A stockholder sued by a re-

receiver is unconstitutional.[1] A receiver appointed not under a statutory power, but under the general jurisdiction of the court of equity, cannot maintain a suit in another state to enforce the statutory liability of stockholders, especially where in such other state receivers have no such power.[2] The New York statute limiting

ceiver under the Minnesota statute cannot set up that the money is not needed to pay the debts. Robinson *v.* Brown, 126 Fed. Rep. 429 (1903). A receiver may file a bill in equity to enforce the statutory liability of stockholders in banks in North Carolina, and he may sue either in his own name or in the name of the corporation. Smathers *v.* Western, etc. Bank, 135 N. C. 410 (1904).

1 Woodworth *v.* Bowles, 61 Kan. 569 (1900). The Kansas statute of 1889, repealing the old method of enforcing the stockholders' statutory liability and providing that the receiver shall enforce the liability, is unconstitutional as against creditors whose claims arose prior to such statute. Evans *v.* Nellis, 101 Fed. Rep. 920 (1900); aff'd, 187 U. S. 271 (1902). A statute authorizing a receiver to enforce the statutory liability does not prevent a creditor enforcing that liability on a contract existing at the time of the passage of the statute. Webster *v.* Bowers, 104 Fed. Rep. 627 (1900). The legislature may authorize the liability to be enforced by a receiver, even in corporations which have passed into a receiver's hands prior to the enactment of the statute. Persons *v.* Gardner, 42 N. Y. App. Div. 490 (1899). As regards corporate debts already incurred, a statute is unconstitutional which provides that the stockholder's statutory liability shall be enforced only by a receiver. Harrison *v.* Remington, etc. Co., 140 Fed. Rep. 385 (1905). A statute authorizing a court to marshal the assets of an insolvent corporation and levy assessments upon stockholders and to appoint a special receiver to collect the same is constitutional, even though it applies to corporations existing at the time of the passage of the statute. Robinson *v.* Brown, 126 Fed. Rep. 429 (1903). A statute authorizing a receiver to enforce the statutory liability applies to a liability already existing. Wheatley *v.* Glover, 125 Ga. 710 (1906). The statute that a receiver shall collect a stockholder's liability is not valid as to a corporate creditor having a judgment when the statute was enacted. Pusey, etc. Co. *v.* Love, 66 Atl. Rep. 1013 (Del. 1906). A stockholder cannot claim that a statute authorizing a receiver to enforce his liability is unconstitutional. Henley *v.* Myers, 93 Pac. Rep. 168 (Kan. 1907).

2 Hale *v.* Allison, 188 U. S. 56 (1903); aff'g 106 Fed. Rep. 258. An ordinary receiver of an insolvent bank has no power to sue in another jurisdiction to enforce a liability of stockholders. Covell *v.* Fowler, 144 Fed. Rep. 535 (1906). A Minnesota receiver of an insolvent Minnesota corporation cannot enforce in Wisconsin the statutory liability of a Wisconsin stockholder in such corporation. Finney *v.* Guy, 189 U. S. 335 (1903). Massachusetts stockholders in a Nebraska state bank, being liable on their stock by statute, are bound by a final decree of the Nebraska court that the corporation has been wound up and has no more property and has unpaid judgments against it, and that the receiver will bring suit against the stockholders. Such a receiver may on such decree bring suits at law in the Massachusetts courts against Massachusetts stockholders, even though they were not parties to the Nebraska suit, and they cannot maintain a bill in equity to enjoin such suits at law. Francis

the time within which a stockholder may be held liable for a corporate debt does not apply to a suit brought in the United States court in New York by a receiver to enforce the statutory liability of a citizen of New York in a Minnesota corporation.[1] An assignee of an insolvent corporation for the benefit of its creditors cannot enforce the statutory liability of stockholders.[2] A trustee in bankruptcy of a Kansas corporation may enforce the double liability of stockholders and no judgment against the corporation need first be obtained.[3] An agent selected by the stockholders of an insolvent

v. Hazlett, 192 Mass. 137 (1906). Where a foreign receiver of a foreign corporation has title to its assets and by statute has power to collect the statutory liability of stockholders he may sue non-resident stockholders in the state where they reside, and if the amount of liability has been determined by valid proceedings in the first named state, in accordance with its statutes, the suit in the other states may be at law for the amounts so determined. King *v.* Cochran, 76 Vt. 141 (1904). The Ohio statutory liability may be enforced in the United States court in Kentucky against a Kentucky stockholder where it is shown that the Ohio stockholders have been assessed to the full amount of their liability, and that the corporation is insolvent, and that the liabilities of the corporation exceed the assets, together with the stockholders' liability; and where, under the statutes of Ohio, a receiver may enforce the liability, such receiver may maintain such suits in the United States courts in other states for that purpose. Kirtley *v.* Holmes, 107 Fed. Rep. 1 (1901). A receiver of a Kansas corporation cannot maintain a suit in the United States court in New York against a New York stockholder to enforce his statutory liability, unless the receiver has first brought suit in Kansas and the amount of the liability of all resident stockholders has been fixed, such being the requirement of the Kansas statute, and there being no common-law right of the receiver to institute such suit. Evans *v.* Nellis, 187 U. S. 271 (1902). The court may authorize a receiver to enforce the statutory liability of stockholders under the Ohio statute. Zieverink *v.* Kemper, 50 Ohio St. 208 (1893). In the case of Hale *v.* Hardon, 89 Fed. Rep. 283 (1898), where the receiver appointed by a court in Minnesota brought suit in the United States court in Massachusetts to enforce the statutory liability of a Massachusetts stockholder in a Minnesota corporation, the court held that the suit would not lie at the instance of such a receiver. In the case of Hale *v.* Hardon, 95 Fed. Rep. 747 (1899), a receiver appointed by a Minnesota court was held to have power to enforce the statutory liability of Massachusetts stockholders in a Minnesota corporation. A receiver appointed in Washington of an insolvent state bank in that state may bring suit in the New York courts to enforce the statutory liability of a New York stockholder in such bank, it appearing that no New York creditor of such bank will be prejudiced thereby. Howarth *v.* Angle, 39 N. Y. App. Div. 151 (1899); aff'd, 162 N. Y. 179.

[1] Bernheimer *v.* Converse, 206 U. S. 516 (1907).

[2] Runner *v.* Dwiggins, 147 Ind. 238 (1897). An assignee of an insolvent corporation in Colorado cannot enforce the statutory liability of stockholders. Zang *v.* Wyant, 25 Colo. 551 (1898).

[3] Stocker *v.* Davidson, 74 Kan. 214 (1906). A trustee in bankruptcy

national bank to wind up the bank cannot enforce the statutory liability.[1]

It has been held that the statutory liability of stockholders cannot be enforced by the directors as "creditors." [2]

It is uncertain whether a stockholder, who is also a creditor of the corporation, may bring an action at law against his co-stockholders to enforce a statutory liability. In Massachusetts,[3] Illinois,[4] and New York[5] the rule is settled that such an action cannot be

may enforce the liability of stockholders for stock issued for property fraudulently and knowingly. Allen *v.* Grant, 122 Ga. 552 (1905). A trustee in bankruptcy may collect unpaid subscriptions, but cannot enforce a statutory liability. Tiger, etc. Co.'s Trustee *v.* Shanklin, 102 S. W. Rep. 295 (Ky. 1907).

1 Church *v.* Ayer, 80 Fed. Rep. 543 (1897).

2 McDowall *v.* Sheehan, 129 N. Y. 200 (1891). A director who is a creditor cannot in certain cases share with the other creditors and prove a claim due to him from the corporation. Neither can such claim be proved where it belongs to a firm or company of which the director was a member, or to the assignee of such firm or company. Thacher *v.* King, 156 Mass. 490 (1892). A director may enforce his claim as a creditor. Janney *v.* Minneapolis, etc. Exposition, 79 Minn. 488 (1900).

3 Thayer *v.* Union Tool Co., 70 Mass. 75 (1855).

4 Meisser *v.* Thompson, 9 Ill. App. 368 (1881); s. c., Thompson *v.* Meisser, 108 Ill. 359 (1884).

5 Mathez *v.* Neidig, 72 N. Y. 100 (1878); Clark *v.* Myers, 11 Hun, 608 (1877); Bailey *v.* Bancker, 3 Hill, 188 (1842) (overruling upon this point Simonson *v.* Spencer, 15 Wend. 548—1836); Beers *v.* Waterbury, 8 Bosw. 396 (1861); Richardson *v.* Abendroth, 43 Barb. 162 (1864); Deming *v.* Puleston, 33 N. Y. Super. Ct. 231 (1871). *Cf.* Sanborn *v.* Lefferts, 58 N. Y. 179 (1874); Garrison *v.* Howe, 17 N. Y. 458 (1858). To same effect, Perkins *v.* Sanders, 56 Miss. 733 (1879). *Cf.* Slee *v.* Bloom, 5 Johns. Ch. 366, 382 (1821); Terry *v.* Bank of Cape Fear, 20 Fed. Rep. 777 (1884); Weber *v.* Fickey, 47 Md. 196 (1877); s. c., 52 Md. 501. See also Emmert *v.* Smith, 40 Md. 123 (1874); Hollister *v.* Hollister Bank, 2 Abb. App. Dec. 367 (1865). In this case stockholders of an insolvent bank, after paying the judgments had against them to enforce their individual liabilities, turned around and asked to be made, to the extent of those judgments, creditors of the bank, and thus entitled to participate *pro rata* with other creditors. *Held*, nothing is to be repaid to the stockholders until all the debts of the bank are paid. An assignee of a stockholder's claim against the corporation may enforce the statutory liability of other stockholders where he is the assignee also of the claim from a creditor who is not a stockholder. Montgomery *v.* Brush, etc. Co., 48 N. Y. App. Div. 12 (1900); aff'd, 168 N. Y. 657. A creditor who is also a stockholder cannot sue to enforce the statutory liability of another stockholder unless he has paid his own liability. Milford Sav. Bank *v.* Joslyn, 55 Pac. Rep. 756 (Kan. 1898). Where a creditor who is also a stockholder seeks to enforce a statutory liability, he is entitled, not to the entire amount claimed by him as creditor, but only to contribution, and his bill in equity must be based on that theory. Cocking *v.* Ward, 48 S. W. Rep. 287 (Tenn. 1898).

maintained. In those jurisdictions the only remedy for such a creditor in such a case is by a bill in equity for contribution.[1] But in Pennsylvania,[2] Maine,[3] Minnesota,[4] and California,[5] the rule is otherwise, and it is no objection to the creditor's action that he is himself also a stockholder.[6] Where an insolvent bank in the hands of a receiver is indebted to a stockholder, and the stockholder is also insolvent, the court will not allow such stockholder to participate in the distribution of the assets, but will offset his interest in the assets against his statutory liability on the stock, even though the stockholder has assigned to another his interest in the assets.[7] Where directors and officers of an insolvent bank are also creditors,

1 But see Potter *v.* Stevens Machine Co., 127 Mass. 592 (1879); Savings Assoc. *v.* O'Brien, 51 Hun, 45 (1889), and § 218, *infra.*

2 Brinham *v.* Wellersburg Coal Co., 47 Pa. St. 43 (1864).

3 Fowler *v.* Robinson, 31 Me. 189 (1850).

4 Oswald *v.* Minneapolis Times Co., 65 Minn. 249 (1896); Mendenhall *v.* Duluth, etc. Co., 72 Minn. 312 (1898).

5 Brown *v.* Merrill, 107 Cal. 446 (1895); Knowles *v.* Sandercock, 107 Cal. 629 (1895).

6 In a suit in equity to enforce stockholders' statutory liability, a plea that the decedent of one of the complainants was also a stockholder, and no offer to pay his liability had been made, is not a good plea. Newberry *v.* Robinson, 41 Fed. Rep. 458 (1890). In New York it seems that the assignee of a judgment may bring the suit to enforce the statutory liability, though the assignee be a stockholder. Woodruff, etc. Iron Works *v.* Chittenden, 4 Bosw. 406 (1859). See also Garrett *v.* Sayles, 1 Fed. Rep. 371 (1880); aff'd, 110 U. S. 288; Potter *v.* Stevens Machine Co., 127 Mass. 592 (1879). A judgment creditor of a Kansas corporation may enforce the statutory liability of a stockholder therein, even though the former is a stockholder himself, but he can enforce the liability only for a balance due after deducting from the claim his own liability. Brown *v.* Trail, 89 Fed. Rep. 641 (1898). A stockholder who has paid his statutory liability is not subrogated to the claims so paid, and hence cannot participate in any dividends from the corporate assets. Sacramento Bank *v.* Pac. Bank, 124 Cal. 147 (1899). As to the purchase of claims or judgments by the stockholders, see also § 225 (*e*), *infra.*

7 King *v.* Armstrong, 50 Ohio St. 222 (1893). Even though stockholders are liable by statute, yet if they endorse a note of the corporation they may have contribution thereon as sureties. Kellogg *v.* Lopez, 145 Cal. 497 (1904). Under the New Jersey statute where stockholders are held liable to corporate creditors on stock issued for property taken at a fraudulent overvaluation, a creditor is entitled to participate, even though he is also one of the stockholders and took part in the illegal issue. Easton Nat. Bank *v.* American, etc. Co., 70 N. J. Eq. 732 (1906); rev'g in part 69 N. J. Eq. 326. Where a stockholder is also a creditor, the court will offset his liability against his claims so far as possible. Harper *v.* Carroll, 66 Minn. 487 (1896). Where by the charter the stockholders are liable for all debts, and they buy some of the company's bonds, the remaining bonds will be paid first out of the proceeds of foreclosure. Shaw *v.* Saranac, etc. Co., 78 Hun, 7 (1894); aff'd on another point in 144 N. Y. 220. The receiver cannot set off a

their liability for negligence may be offset against their claims as creditors.[1]

Stockholders in national banks are subject to a double liability. Not only that, but if at any time the capital stock of the bank becomes diminished by losses, the comptroller of the currency may compel the stockholders to either discontinue business or assess themselves to replace the loss.[2] An assessment levied by stockholders in a national bank upon themselves, in accordance with the order of the comptroller, cannot be collected by suit, inasmuch as a remedy is given by the act of Congress, such remedy being a sale of the stock itself.[3]

The double liability of stockholders in national banks is fixed by an order of the comptroller of the currency, and under the national bank act the comptroller of the currency has absolute authority to direct at what time, and to what extent, the stockholders' statutory liability shall be enforced.[4] Successive assessments may be made

stockholder's statutory liability or debts against a claim by a party whose money was deposited in the stockholder's name. Fisher *v.* Knight, 61 Fed. Rep. 491 (1894).

[1] Elliott *v.* Farmers' Bank, etc., 57 S. E. Rep. 242 (W. Va. 1907).

[2] See U. S. Rev. Stat., § 5205. Where stock in a national bank is sold on account of a stockholder failing to pay the assessment levied upon it under section 5205 of the United States Revised Statutes, the sale is illegal unless the stock brings the amount of the assessment. Merchants' Nat. Bank *v.* Fouche, 103 Ga. 851 (1898).

[3] Hulitt *v.* Bell, 85 Fed. Rep. 89 (1898). The stockholders and not the directors in a national bank are to decide whether the stock shall be assessed in order to restore the impaired capital stock. Commercial, etc. Bank *v.* Weinhard, 192 U. S. 243 (1904), the court saying: "It would be going far beyond the usual powers conferred upon directors to permit them to thus control the corporation. . . . The origin and continuation of the association would seem to be matters in which the owners and not the managers of the bank are primarily interested. . . . Action upon the comptroller's order involves extraordinary action of the association, and determines its future operations or liquidation, and is not found within the powers conferred upon the directors for the management of the business of the bank. If this were not so, then the decision of a question of such vital importance is left to the directors, who may or may not be large holders of stock. As it is a matter foreign to the powers of such boards and not conferred by statute or required for the transaction of the business of the bank, we think it was intended to be vested in the shareholders. Whether a given power is to be exercised by the directors or the shareholders depends upon its nature and the terms of the enabling act."

[4] King *v.* Armstrong, 50 Ohio St. 222 (1893). The comptroller in assessing national bank stock need not have any previous judicial ascertainment of the necessity therefor. Bushnell *v.* Leland, 164 U. S. 684 (1897). It is for him to determine whether, and to what extent, the statutory liability of the stockholders shall be enforced. Casey *v.* Galli, 94 U. S. 673 (1876); Kennedy *v.* Gibson, 8 Wall.

on national bank stockholders upon the insolvency of the bank, not exceeding in amount the par value of the stock.[1] The receiver of a national bank is the proper person to enforce this liability of the stockholders.[2] In the voluntary liquidation of a national bank, a

498 (1869); Strong *v.* Southworth, 8 Ben. 331 (1875); s. c., 23 Fed. Cas. 254; National Bank *v.* Case, 99 U. S. 628 (1878). The decision of the comptroller as to the amount of assessments on stockholders in a national bank is conclusive. De Weese *v* Smith, 97 Fed. Rep. 309 (1899); Aldrich *v.* Campbell, 97 Fed. Rep. 663 (1899). A voluntary assessment of the stockholders by themselves does not affect or decrease this statutory liability. Delano *v.* Butler, 118 U. S. 634 (1886). It is no defense to an assessment levied by the comptroller on a stockholder in a national bank that the full amount of the assessment will probably not be required to pay the debts. O'Connor *v.* Witherby, 111 Cal. 523 (1896). As to the procedure for enforcing the liability of stockholders in a national bank, see Williamson *v.* American Bank, 115 Fed. Rep. 793 (1902).

[1] Studebaker *v.* Perry, 184 U. S. 259 (1902). A second assesment may be levied by the comptroller on stockholders in an insolvent national bank and collected by the receiver, but the aggregate assessments cannot exceed the par value of the stock. The statute of limitations does not begin to run until the assessment is levied. Deweese *v.* Smith, 106 Fed. Rep. 438 (1901); Aldrich *v.* Campbell, 97 Fed. Rep. 663 (1899). A second assessment on national bank stockholders cannot be made to pay unpaid first assessments. Lease *v.* Barschall, 106 Fed. Rep. 762 (1900).

[2] A receiver of a national bank may by suit in equity in the United States court collect an assessment levied on the stockholders. Rankin *v.* Herod, 140 Fed. Rep. 661 (1905). A suit to enforce the statutory liability of directors in a national bank for negligence can be brought by the receiver only. Boyd *v.* Schneider, 124 Fed. Rep. 239 (1903). The United States district court has jurisdiction of an action by the receiver of an insolvent national bank to collect assessments on stock. Stephens *v.* Bernays, 44 Fed. Rep. 642 (1890). A receiver of a national bank may collect assessments in the federal court even though the amount is less than two thousand dollars. Brown *v.* Smith, 88 Fed. Rep. 565 (1898). The personal liability of officers in national banks cannot be enforced by creditors after a receiver has gone in. The receiver may enforce it. Bailey *v.* Mosher, 63 Fed. Rep. 488 (1894). As to the allegations to support a receiver's action to enforce the statutory liability in national banks, see Nead *v.* Wall, 70 Fed. Rep. 806 (1895). The federal courts have jurisdiction of a suit brought against a receiver of a national bank to compel him to recognize a depositor's claim, even though both parties are citizens of the same state. Bartley *v.* Hayden, 74 Fed. Rep. 913 (1896). A receiver of a national bank may enforce the statutory liability of stockholders. King *v.* Armstrong, 50 Ohio St. 222 (1893). The receiver of a national bank may sue a stockholder in the state courts to recover an assessment. Peters *v.* Foster, 56 Hun, 607 (1890). The United States circuit court has jurisdiction of an action by the receiver of an insolvent national bank to collect assessments on stock. Thompson *v.* Pool, 70 Fed. Rep. 725 (1895). The statutory liability of stockholders in a national bank may be enforced by an action at law, and the assessment as made by the comptroller is conclusive. Young *v.* Wempe, 46 Fed. Rep. 354 (1891). A receiver of a

trustee appointed by the stockholders cannot enforce the stockholders' liability. Such liability can be enforced only by a bill in equity filed by a creditor.[1] The defenses to this liability are substantially the same as in other cases of statutory liability.[2] The failure of a national bank director to perform his duty, as required by the act of Congress, subjects him to damages only when he knowingly violated the national banking act as specified in the act, and there is no common-law liability.[3]

§ 219. *Judgment and execution must be obtained against the corporation before the stockholder's statutory liability can be enforced.* Even when not expressly provided by statute, it is the rule, according to the weight of authority, that corporate creditors, before they can proceed against the stockholders upon their statutory liability, must first exhaust their remedy against the corporation and its assets.[4] This rule arises from the fact that the liability of the stockholder is

national bank suing in another state may be compelled to give security for costs, unless the suit was expressly directed by the comptroller. Platt *v.* Adriance, 90 Fed. Rep. 772 (1898).

1 Williamson *v.* American Bank, 109 Fed. Rep. 36 (1901); aff'd, 115 Fed. Rep. 793.

2 A holder of increased capital stock of a national bank cannot defeat the statutory liability on the ground that the increase was irregularly made and was fraudulently made, in that the directors issued it to themselves without paying therefor. Latimer *v.* Bard, 76 Fed. Rep. 536 (1896). The state statute of limitations runs against the stockholder's liability in a national bank from the day when the assessment levied by the comptroller becomes payable, and this statute is a bar both at law and in equity. Thompson *v.* German Ins. Co., 76 Fed. Rep. 892 (1896). A holder of stock in a national bank is not entitled to offset against an assessment ordered by the comptroller upon his stock the amount of his deposits at the time the bank became insolvent. Wingate *v.* Orchard, 75 Fed. Rep. 241 (1896). Where a depositor is also a stockholder in an insolvent national bank, his claim as a depositor may be set off by the receiver of the bank to the extent of the statutory liability on the stock. This set-off may be made, although the party has assigned his right to the deposit before an assessment had been levied upon the stock, the assignment having been after the insolvency of the bank. King *v.* Armstrong, 50 Ohio St. 222 (1893). Where stockholders in a national bank have been assessed irregularly and a surplus remains after paying creditors, the stockholders who have paid the irregular assessments will first be repaid out of the surplus assets. *In re* Hulitt, 96 Fed. Rep. 785 (1899). The court refused to compromise a judgment against a stockholder under the national bank act in the case *In re* Earle, 96 Fed. Rep. 678 (1899).

3 Yates *v.* Jones Nat. Bank, 206 U. S. 158 (1907); rev'g 105 N. W. Rep. 287.

4 Quoted and approved in Ewing *v.* Stultz, 9 Ind. App. 1 (1894); Means's Appeal, 85 Pa. St. 75 (1877); Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747 (1887); Allen *v.* Arnold, 18 R. I. 809 (1895); Globe Pub. Co. *v.* State Bank, 41 Neb. 175 (1894); Com'l Nat. Bank *v.* Gibson, 37 Neb. 750 (1893); Bay-

not the usual fund for the payment of corporate debts, but that the corporate treasury is the primary resource. Accordingly, the statutory liability of the stockholders is not to be resorted to, if the assets of the corporation, including the unpaid subscriptions for stock, will suffice to pay the debts.[1] There is, however, a line of authorities in

liss *v.* Swift, 40 Iowa, 648 (1875); McClaren *v.* Franciscus, 43 Mo. 452 (1869); Wright *v.* McCormack, 17 Ohio St. 86 (1866); Wehrman *v.* Reakirt, 1 Cin. Super. Ct. (Ohio), 230 (1871); Lane *v.* Harris, 16 Ga. 217 (1854); Drinkwater *v.* Portland Marine Ry., 18 Me. 35 (1841); Dauchy *v.* Brown, 24 Vt. 197 (1852); Wilson *v.* Book, 13 Wash. 676 (1896); Cambridge Waterworks *v.* Somerville Dyeing Co., 86 Mass. 239 (1862); Toucey *v.* Bowen, 1 Biss. 81 (1855); s. c., 24 Fed. Cas. 70. *Cf.* Patterson *v.* Wyomissing Mfg. Co., 40 Pa. St. 117 (1861); Harper *v.* Union Mfg. Co., 100 Ill. 225 (1881); Hatch *v.* Burroughs, 1 Woods, 439 (1870); s. c., 11 Fed. Cas. 795. In Colorado stockholders liable by statute may be joined as parties defendant in the original suit against the corporation. Tabor *v* Goss, etc. Co., 11 Colo. 419 (1888). The statutory liability of directors for debts contracted in excess of a certain amount is secondary and can be enforced only after execution returned unsatisfied against the corporation. Auburn Nat. Bank *v.* Dillingham, 147 N. Y. 603 (1895). A judgment of a justice of the peace is sufficient. Voight *v.* Dregge, 97 Mich. 322 (1893). A claim for unliquidated damages for breach of contract must first be reduced to judgment. Hill *v.* Weidinger, 110 N. Y. App. Div. 683 (1906). Judgment against the corporation is first necessary. Where some of the creditors are proceeding against the stockholders without first obtaining judgment against the corporation, a creditor who has procured a judgment and exhausted his remedy against the corporation may enjoin the other creditors from pursuing their remedy. Hoyt *v.* Bunker, 50 Kan. 574 (1893). If no judgment has been obtained, the stockholders can set up such defenses as would have been available to the company. Railroad Co. *v.* Smith, 48 Ohio St. 219 (1891). In an action by a judgment creditor to enforce a statutory liability, claims by himself and others not yet reduced to judgment may be proved. Thacher *v.* King, 156 Mass. 490 (1892). *Cf.* Baines *v.* West Coast Lumber Co., 104 Cal. 1 (1894).

In the case of Train *v.* Marshall, etc. Co., 180 Mass. 513 (1902), being a suit to enforce the statutory liability of directors, the court held that a judgment against the corporation after it had been discharged in bankruptcy was not sufficient to satisfy the statute, and the court said "the liability is a statutory liability, and we perceive no clear indication of policy that should carry it beyond the conditions precedent in the form in which they are expressed."

In Vermont it is held that the liability cannot be enforced until a receiver has been appointed and the assets collected and exhausted. Barton, etc. Bank *v.* Atkins, 72 Vt. 33 (1899). Stockholders will not be allowed to intervene in a suit brought by a creditor against the corporation itself, even though they wish to set up the statute of limitations, and even though the directors had directed the company's lawyer to admit the allegations of the complaint, and even though the company is insolvent, and the stockholders are liable on the stock, no fraud being shown. Meyer *v.* Bristol, etc. Co., 163 Mo. 59 (1901).

[1] Stewart *v.* Lay, 45 Iowa, 604 (1877); Wright *v.* McCormack, 17 Ohio St. 86 (1866). Where a stockholder has guaranteed the bonds of a

support of the proposition that a judgment against the corporation is not a prerequisite to the enforcement of the stockholders' statutory liability.[1]

Frequently the statutes themselves which impose this additional liability upon stockholders provide that a creditor shall obtain judgment against the corporation, and that an execution duly levied there-

corporation and allowed the mortgage to cover some of his own property and the corporation becomes insolvent, other stockholders when sued on their statutory liability cannot set up that this guaranty and mortgage should first be exhausted before they are held liable. Winthrop, etc. Bank *v.* Minneapolis, etc. Co., 77 Minn. 329 (1899).

[1] Perkins *v.* Church, 31 Barb. 84 (1859); Southmayd *v.* Russ, 3 Conn. 52 (1819); Culver *v.* Third Nat. Bank, 64 Ill. 528 (1871); Davidson *v.* Rankin, 34 Cal. 503 (1868); Young *v.* Rosenbaum, 39 Cal. 646 (1870); Morrow *v.* Superior Court, 64 Cal. 383 (1883); Bird *v.* Calvert, 22 S. C. 292 (1884). No prior judgment against a corporation is necessary to enforce the liability of directors in Illinois for debts in excess of the capital stock. Wolverton *v.* George, etc. Co., 157 Ill. 485 (1895). No prior judgment or execution is necessary in a suit against a stockholder in a California corporation. Aldrich *v.* Anchor, etc. Co., 24 Oreg. 32 (1893). No previous judgment against the corporation is necessary in enforcing directors' statutory liability in Minnesota. Patterson *v.* Stewart, 41 Minn. 84 (1889). Under the Wisconsin statute it is unnecessary to exhaust the assets of the corporation if it is clear that the statutory liability must be resorted to. Booth *v.* Dear, 96 Wis. 516 (1897). In Alabama the remedy against the corporation need not be first exhausted unless the statutes expressly require it. McDonnell *v.* Alabama, etc. Ins. Co., 85 Ala. 401 (1888). *Cf.* § 200, *supra.* In these cases it is held in general that the stockholder's liability under the statute is unconditional, original, and immediate, not dependent on the insufficiency of the corporate assets, and not collateral to that of the corporation upon the event of its insolvency. Thus, in Manufacturing Co. *v.* Bradley, 105 U. S. 175 (1881), it was held that, upon a bill being filed against the corporation for the collection of a debt, the stockholders might properly be made parties in order to avoid a multiplicity of suits, and upon the ground that the stockholders were immediately liable under that provision of their charter which made members of the company "jointly and severally liable for all debts and contracts made by the company until the whole amount of capital stock fixed and limited by the company" is paid in. A trustee in bankruptcy of a Kansas corporation may enforce the double liability of stockholders and no judgment against the corporation need first be obtained. Stocker *v.* Davidson, 74 Kan. 214 (1906). A creditor of a national bank may hold the stockholders liable under the statute without first obtaining a judgment against the corporation. Wyman *v.* Wallace, 201 U. S. 230 (1906). Under the New York act of 1875 (now repealed) a stockholder could be sued before judgment against the corporation, but could not be held liable until after such judgment. Walton *v.* Coe, 110 N. Y. 109 (1888). The statutory liability of directors in Michigan for failure to file their report may be enforced by one suit against all of them, and no prior judgment against the creditors is necessary if the failure to file the report was wilful. Wilcox C. & S. Co. *v.* Mosher, 114 Mich. 64 (1897).

under shall have been returned wholly or partially unsatisfied, before the creditor has a right to proceed against the stockholders individually.[1] Where, however, the proceedings against the corporation would be nugatory or impossible, they need not be had.[2] Where the

1 Handy *v.* Draper, 89 N. Y. 334 (1882). Sometimes the statute provides that a specific demand shall have been made. Haynes *v.* Brown, 36 N. H. 545 (1858); Hicks *v.* Burns, 38 N. H. 141 (1839). In Wisconsin, by statute, there need be no precedent judgment against the corporation. Sleeper *v.* Goodwin, 67 Wis. 577 (1887). In Michigan, by statute, the receiver of an insolvent bank may enforce the stockholders' statutory liability, and the order of the court stating the amount necessary to so collect is binding on the stockholders, and the court need not wait until the assets are exhausted before enforcing the same. Foster *v.* Row, 120 Mich. 1 (1899).

2 See § 200, *supra*. *Cf.* Shellington *v.* Howland, 53 N. Y. 371 (1873), where proceedings required as conditions precedent to liability were rendered impossible by the operation of United States bankruptcy law. See also State Sav. Assoc. *v.* Kellogg, 52 Mo. 583 (1873); Dryden *v.* Kellogg, 2 Mo. App. 87 (1876). *Cf.* Ansonia Brass, etc. Co. *v.* New Lamp, etc. Co., 53 N. Y. 123 (1873); s. c., aff'd, 91 U. S. 656 (1875); Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747 (1887); Paine *v.* Stewart, 33 Conn. 516 (1866), where, under a statute providing that the property of stockholders could not be levied upon while corporate property could be found to satisfy the debt, it was held that evidence that the corporate property was in the hands of a receiver was sufficient to prove the condition; Chamberlain *v.* Huguenot Mfg. Co., 118 Mass. 532 (1875), holding that proceedings in bankruptcy do not, in Massachusetts, prevent recovering judgment against the bankrupt corporation for the purpose of perfecting the liability of stockholders. Where, by reason of an injunction or other cause, it is impossible to obtain judgment against the corporation, it may be excused. Hunting *v.* Blun, 143 N. Y. 511 (1894). Even where the statute requires it, a suit to enforce a statutory liability need not be delayed until the corporate property has all been applied to the payment of debts, if it be clear that such property will be insufficient to pay everything. Munger *v.* Jacobson, 99 Ill. 349 (1881). Or where the corporation is clearly insolvent, and it would be idle to wait the return of the execution. Flash *v.* Conn, 109 U. S. 371 (1883); Kincaid *v.* Dwinelle, 59 N. Y. 458 (1875). Judgment against the corporation is first necessary, even if it is insolvent. Gause *v.* Boldt, 188 N. Y. 546 (1907). If the corporation is insolvent and has gone into voluntary liquidation, a judgment against it is not first necessary. George *v.* Wallace, 135 Fed. Rep. 286 (1904); aff'd, 201 U. S. 230. Owing to the doubt as to whether a judgment against the corporation is first necessary, where the corporation is insolvent, a bankrupt court will allow the creditors to obtain such judgments, but proceedings thereon will be enjoined and only one proceeding allowed for the benefit of all, with the trustee in bankruptcy as a party. *In re* Remington, etc. Co., 119 Fed. Rep. 441 (1902). An allegation that the company is insolvent and has no property excuses the actual issue of execution. Andrews *v.* O'Reilly, 25 R. I. 231 (1903). No judgment and execution are necessary if the company has assigned for the benefit of creditors. Minneapolis, etc. Co. *v.* Swinburne Co., 66 Minn. 378 (1896). *Cf.* Toucey *v.* Bowen, 1 Biss. 81 (1855); s. c., 24

corporation has been dissolved and an injunction issued against suits against the corporation itself, no judgment against the corporation is necessary.[1]

Thus, where the statutes provide for an enforcement of the stockholder's statutory liability only upon the dissolution of the corporation, it is held that, so far as such liability is concerned, a dissolution takes place when the corporation comes into the condition of having debts and no assets, or has ceased to act and exercise its corporate functions, or has suffered acts to be done which end the object for which it was created.[2] But an injunction against bring-

Fed. Cas. 70; Munger *v.* Jacobson, 99 Ill. 349 (1881). Or the corporation is dissolved. Patterson *v.* Lynde, 112 Ill. 196 (1884). A judgment against the corporation is not necessary to enforce the stockholder's liability when the corporation is insolvent, has ceased to do business, and has made an assignment for the benefit of creditors. Morgan *v.* Lewis, 46 Ohio St. 1 (1888). Judgment against the corporation need not first be obtained if the corporation has been dissolved. Hardman *v.* Sage, 124 N. Y. 25 (1891). The issue and return of an execution unsatisfied against the corporation is necessary where the corporation is a going concern, but not where it is insolvent and has assigned for the benefit of its creditors. Barrick *v.* Gifford, 47 Ohio St. 180 (1890). A judgment and execution are first necessary unless the corporation is dissolved or has ceased business for more than a year. Merrill *v.* Meade, 6 Kan. App. 620 (1897). See also note 2 below.

If the corporation has been adjudged a bankrupt or is notoriously insolvent or has been dissolved, the wholly idle and useless issue of execution is not required. Knight & Wall Co. *v.* Tampa, etc. Co., 46 S. Rep. 285 (Fla. 1908).

1 Lang *v.* Lutz, 180 N. Y. 254 (1905).

2 Bank of Poughkeepsie *v.* Ibbotson, 24 Wend. 473 (1840); Slee *v.* Bloom, 19 Johns. 456 (1822); Penniman *v.* Briggs, 1 Hopk. Ch. 300 (1824); s. c. *sub nom.* Briggs *v.* Penniman, 8 Cow. 387 (1826); State Sav. Assoc. *v.* Kellogg, 52 Mo. 583 (1873); Dryden *v.* Kellogg, 2 Mo. App. 87 (1876); Perry *v.* Turner, 55 Mo. 418 (1874); Central Agric. etc. Assoc. *v.* Alabama, etc. Ins. Co., 70 Ala. 120 (1881); McDonnell *v.* Alabama, etc. Ins. Co., 85 Ala. 401 (1888). Where an assignee for the benefit of creditors is in charge, the creditors may enforce the statutory liability of stockholders if it is evident that there are no corporate assets and that a suit against the corporation would be unavailing. Zang *v.* Wyant, 25 Colo. 551 (1898). Insolvency may be dissolution sufficient to enforce statutory liability. Sleeper *v.* Norris, 59 Kan. 555 (1898). Under the Kansas statute, if the judgment is "dormant," no execution can be issued upon it as preliminary to enforcing a stockholder's liability. Chenault *v.* Chappell, 8 Kan. App. 807 (1899). Execution need not be returned, etc., where the corporation is insolvent. Parker *v.* Carolina Sav. Bank, 53 S. C. 583 (1898). Notwithstanding bankruptcy proceedings against a corporation, the statutory liability of stockholders may be enforced. *In re* Marshall Paper Co., 95 Fed. Rep. 419 (1899). *Cf.* Morley *v.* Thayer, 3 Fed. Rep. 737 (1880), holding that bankruptcy of the corporation is not a dissolution of a corporation within the meaning of the statute of Massachusetts imposing liability upon stockholders. In Florida, upon dissolution, the stockholders are

ing suits against a corporation is no excuse where no effort is made to modify such injunction.[1]

A judgment must be obtained and execution issued and returned in the state where suit is brought, or good reason must be shown why they are not.[2]

§ 220. *Difficulties in determining whether the creditor's remedy is at law or in equity—Special remedies.*—Perhaps the most difficult, unsettled, and unsatisfactory question concerning the statutory liability of stockholders is the question whether that liability must be enforced at law or must be in equity, or may be in either a court of law or of equity. After determining this point there arises the further difficulty of ascertaining who shall be parties plaintiff and parties defendant—whether one corporate creditor may sue, or all must join; whether one stockholder may be pursued as a single defendant, or all the stockholders must be brought in. Not only must the decisions of the state in which the action is brought be examined, but it is necessary also to note carefully the wording of the statute creating the liability. Where the statute prescribes expressly the form of the remedy, it is the well-established rule that the remedy was intended by the legislature to exclude every other, and it must be strictly pursued.[3] In Ohio the statutory liability may be enforced in proceedings to wind up and distribute the assets of the corpo-

liable "to an extent equal in amount to the amount of stock by him owned, together with any amount unpaid thereon." The dissolution need not be by judicial decree to that effect. It is sufficient if there are debts and no assets, and the corporation has ceased to act and exercise its corporate functions, or has suffered acts to be done which end the object for which it was created. Suit against the corporation first is not necessary in such a case. Gibbs *v.* Davis, 27 Fla. 531 (1891). See note 2, p. 569.

1 United, etc. Co. *v.* Vary, 152 N. Y. 121 (1897). Where creditors are enjoined from suing the corporation they need not obtain a judgment against the corporation before suing to hold directors personally liable by statute by reason of the debts exceeding the paid-up capital stock. Whitney *v.* Pugh, 58 N. Y. App. Div. 316 (1901).

2 See § 223, *infra.*

3 Lowry *v.* Inman, 46 N. Y. 119, 127 (1871); Morley *v.* Thayer, 3 Fed. Rep. 737, 741 (1880); Haskins *v.* Harding, 2 Dill. 99 (1873); s. c., 11 Fed. Cas. 778; Allen *v.* Walsh, 25 Minn. 543 (1879); Windham, etc. Inst. *v.* Sprague, 43 Vt. 502 (1871); Dauchy *v.* Brown, 24 Vt. 197 (1852); Bassett *v.* St. Albans Hotel Co., 47 Vt. 313 (1875); Pollard *v.* Bailey, 20 Wall. 520 (1874); Knowlton *v.* Ackley, 62 Mass. 93, 98 (1851); Erickson *v.* Nesmith, 81 Mass. 221 (1860); Brinham *v.* Wellersburg Coal Co., 47 Pa. St. 43 (1864); Hoard *v.* Wilcox, 47 Pa. St. 51 (1864); Youghiogheny Shaft Co. *v.* Evans, 72 Pa. St. 331 (1872). *Cf.* Andrews *v.* Callender, 30 Mass. 484 (1833); Potter *v.* Stevens Machine Co., 127 Mass. 592 (1879); Grose *v.* Hilt, 36 Me. 22 (1853); Diven *v.* Lee, 36 N. Y. 302 (1867); Wehrman *v.* Reakirt, 1 Cin. Super. Ct. (Ohio), 230 (1871).

ration,[1] and in Kansas a stockholder may be brought into the original suit.[2] But the Kansas statute authorizing a levy of execution upon the property of stockholders, without a regular suit against such stockholders, does not prevent the creditor proceeding by suit instead of resorting to the execution first.[3] In other words, although collection may be by notice in the original suit against the corporation, yet this does not prevent an independent suit.[4]

Another remedy still is to allow the plaintiff creditor to join stockholders as defendants in his original suit against the corporation.[5] A remedy by motion exists in Florida.[6] These special remedies may operate to prevent the enforcement of the liability in the courts of other states.[7] An attachment lies to enforce the statutory liability of stockholders.[8]

§ 221. *The remedy at law.*—In New York the stockholder's liability, imposed by the statute of 1848, was held to be such that any creditor who had recovered a judgment against the company, and sued out an execution thereon, which had been returned unsatisfied, might sue any stockholder and recover to the extent provided by the statute in an action at law.[9] A similar conclusion was reached in

1 Peter *v.* Farrel, etc. Co., 53 Ohio St. 534 (1895).

2 Buist *v.* Citizens' Sav. Bank, 4 Kan. App. 700 (1896). See also § 201, *supra*. The summary method of enforcing the statutory liability under the Kansas statutes is not good as against an estate being wound up in the proper court. Achenbach *v.* Pomeroy Coal Co., 2 Kan. App. 357 (1895). As to the character of the notice to be served on the stockholder before execution is issued against him under the Kansas statute, see McClelland *v.* Cragun, 54 Kan. 599 (1895). The summary method in Kansas is not available until the remedy against the corporation has been exhausted. Carey Lumber Co. *v.* Neal, 3 Kan. App. 399 (1895). Proceeding under the Kansas statute to enforce a stockholder's liability by motion for an execution is construed to be an independent proceeding. Fox *v.* First, etc. Bank, 9 Kan. App. 18 (1899).

3 Bank of North America *v.* Rindge, 57 Fed. Rep. 279 (1893).

4 McVickar *v.* Jones, 70 Fed. Rep. 754 (1895).

5 Milroy *v.* Spurr Mountain, etc. Co., 43 Mich. 231 (1880), holding that, if the statute authorizes a suit against the corporation alone or jointly with one or more stockholders, a creditor who elects to sue it alone cannot afterwards proceed upon the same debt against the corporation and stockholders jointly. One of the creditors who is a party to the sequestration proceedings may in those proceedings enforce the stockholder's statutory liability. McKusick *v.* Seymour, etc. Co., 48 Minn. 158 (1892).

6 Hood *v.* French, 37 Fla. 117 (1896).

7 See § 223, *infra*.

8 Adams *v.* Clark, 36 Colo. 65 (1906).

9 Abbott *v.* Aspinwall, 26 Barb. 202 (1857); Wiles *v.* Suydam, 64 N. Y. 173 (1876); Shellington *v.* Howland, 53 N. Y. 371 (1873); Handy *v.* Draper, 89 N. Y. 334 (1882); Rocky Mountain Nat. Bank *v.* Bliss, 89 N. Y.

Illinois,[1] Pennsylvania,[2] Massachusetts, and Georgia.[3] So also when it is provided by statute that the stockholders "shall, to the amount of the stock by them held, be jointly and severally liable for all the debts and responsibilities of such company," it is held that an action at law may be maintained on the individual liability by any corporate creditor against any individual stockholder.[4] Where, by statute, a

338 (1882); Mathez *v.* Neidig, 72 N. Y. 100 (1878); Flash *v.* Conn, 109 U. S. 371, 380 (1883); Weeks *v.* Love, 50 N. Y. 568 (1872); Bank of Poughkeepsie *v.* Ibbotson, 24 Wend. 473 (1840). *Cf.* Van Hook *v.* Whitlock, 3 Paige, 409 (1832); Simonson *v.* Spencer, 15 Wend. 548 (1836); Walton *v.* Coe, 110 N. Y. 109 (1888). The creditor must sue one or all. Dean *v.* Whiton, 16 Hun, 203 (1878).

1 In Illinois, under the charter provision that "each stockholder shall be liable to double the amount of stock" owned, it was held that the stockholders were severally and individually liable; that is, that an action at law against one or all of them would lie. McCarthy *v.* Lavasche, 89 Ill. 270 (1878); Hull *v.* Burtis, 90 Ill. 213 (1878); Fuller *v.* Ledden, 87 Ill. 310 (1877).

2 In Pennsylvania, under the statute relating to the incorporation of manufacturing companies, the corporate creditor proceeds against the stockholders in an action at law upon the original contract, making the corporation and all the stockholders parties defendant. Brinham *v.* Wellersburg Coal Co., 47 Pa. St. 43 (1864); Mansfield Iron Works *v.* Willcox, 52 Pa. St. 377 (1866); Hoard *v.* Wilcox, 47 Pa. St. 51 (1864); McHose *v.* Wheeler, 45 Pa. St. 32 (1863). See Patterson *v.* Wyom. Mfg. Co., 40 Pa. St. 117 (1861). To same effect, Thompson *v.* Jewell, 43 Mich. 240 (1880).

3 Pope *v.* Leonard, 115 Mass. 286 (1874). Under a Georgia statute, by the provisions of which each stockholder in banking corporations in that state is made liable to redeem his proportionate share of the outstanding circulation, a single creditor may have his action at law against any individual stockholder. Lane *v.* Harris, 16 Ga. 217 (1854); Lane *v.* Morris, 8 Ga. 468 (1850); s. c., 10 Ga. 162; Branch *v.* Baker, 53 Ga. 502 (1874); Hatch *v.* Burroughs, 1 Woods, 439 (1870); s. c., 11 Fed. Cas. 795. *Cf.* Bank of Poughkeepsie *v.* Ibbotson, 24 Wend. 473 (1840).

4 Grund *v.* Tucker, 5 Kan. 70 (1869); Norris *v.* Johnson, 34 Md. 485 (1871). See Bullard *v.* Bell, 1 Mason, 243 (1817), by Story, J.; s. c., 4 Fed. Cas. 625. *Cf.* Matthews *v.* Albert, 24 Md. 527 (1866); Culver *v.* Third Nat. Bank, 64 Ill. 528 (1871); Bond *v.* Appleton, 8 Mass. 472 (1812). The Missouri statute may be enforced at law. Savings Assoc. *v.* O'Brien, 51 Hun, 45 (1889). By statute in California the remedy may be at law. Berland *v.* Haven, 37 Fed. Rep. 394 (1888). The double liability of stockholders in a Colorado corporation can be enforced at law only. Auer *v.* Lombard, 72 Fed. Rep. 209 (1896). In Whitman *v.* National Bank, 83 Fed. Rep. 288 (1897), a Pennsylvania bank, as a judgment creditor of a Kansas corporation, enforced in the United States court in New York the statutory liability of a New York stockholder in such Kansas corporation. The action was at law. The New York statute of 1892 (now repealed) rendering stockholders liable jointly and severally to creditors to the amount of their stock, until the whole capital stock issued and outstanding is paid in, may be enforced by a suit at law brought by any creditor against any one or more stockholders, and the receiver need

statutory liability may be enforced by any creditor in a separate action at law against any stockholder, the statute cannot be changed so that the remedy is a suit in behalf of all creditors against all the stockholders, so far as existing creditors are concerned.[1]

Where an action at law can be maintained, and the stockholder's liability is limited and several, each stockholder being made liable for a sum certain, a separate action will lie against each one.[2] And unless the remedy at law has been enlarged by statute, so as to allow judgment separately against each one of several defendants before the court in the same proceeding, the suit must be by one creditor against one stockholder.[3] A corporate creditor's suit against direc-

not be made a party. Lang *v.* Lutz, 180 N. Y. 254 (1905). The stockholders' statutory liability in a South Dakota bank may be enforced by a creditor in a suit at law against a single stockholder, and the suit may be on the judgment obtained against the bank. Union, etc. Bank *v.* Halley, 19 S. Dak. 474 (1905). Under the Kentucky statute the court may enforce the statutory liability of the one stockholder without the others being joined. Gamewell, etc. Co. *v.* Fire, etc. Co., 116 Ky. 759 (1903).

1 Myers *v.* Knickerbocker T. Co., 139 Fed. Rep. 111 (1905), involving a Maryland statute, the court refusing to follow Miners', etc. Bank *v.* Snyder, 100 Md. 57 (1904).

2 Bank of Poughkeepsie *v.* Ibbotson, 24 Wend. 473 (1840); Perry *v.* Turner, 55 Mo. 418 (1874); Boyd *v.* Hall, 56 Ga. 563 (1876), where the liability was *pro rata;* Paine *v.* Stewart, 33 Conn. 516 (1866); Culver *v.* Third Nat. Bank, 64 Ill. 528 (1871); Abbott *v.* Aspinwall, 26 Barb. 202 (1857); Garrison *v.* Howe, 17 N. Y. 458 (1858); Terry *v.* Little, 101 U. S. 216 (1879). In the action at law, other stockholders need not be joined, under the Kansas decisions. McVicar *v.* Jones, 70 Fed. Rep. 754 (1895). As to the character of the pleading for the defendant in the United States court sitting in Maryland in an action at law by a judgment creditor of a Kansas corporation to enforce the statutory liability of a Maryland stockholder, see Brown *v.* Trail, 89 Fed. Rep. 641 (1898).

3 Abbott *v.* Aspinwall, 26 Barb. 202 (1857); Paine *v.* Stewart, 33 Conn. 516 (1866); *Re* Hollister Bank, 27 N. Y. 393 (1863); Perry *v.* Turner, 55 Mo. 418 (1874); Bank of Poughkeepsie *v.* Ibbotson, 24 Wend. 473 (1840). *Cf.* Milroy *v.* Spurr Mountain, etc. Co., 43 Mich. 231 (1880). In Medberry *v.* Troutman, 94 Fed. Rep. 952 (1899), the court held that the remedy of a creditor of a Kansas corporation to enforce the statutory liability of stockholders is at law only. Even though a receiver may by statute enforce the statutory liability, yet after the amount of liability of each stockholder has been adjudicated, he must enforce such liability at law and not in equity. Hale *v.* Allison, 188 U. S. 56 (1903). The receiver of an insolvent Iowa bank cannot file a bill in equity in the United States court in Pennsylvania to hold several stockholders liable on their statutory liability. There must be a suit at law against each one separately. Tompkins *v.* Craig, 93 Fed. Rep. 885 (1899). Where the stockholder's liability is held to be like that of a partner, then all must be joined as defendants, and the omission of any one is ground for a plea in abatement. Allen *v.* Sewall, 2 Wend. 327 (1829), but holding that it cannot be taken advantage of on the trial; Reynolds *v.* Feliciana

tors for fraud and in assumpsit cannot include also a claim for a statutory penalty.[1]

§ 222. *The remedy in a court of equity.*—The remedy in equity is the favorite remedy of the courts. It is just, certain, impartial, and clear. It enforces once for all the liability of the stockholders, and at the same time provides for contribution. It distributes the assets equally and equitably among all the corporate creditors. It prevents a multiplicity of suits, and avoids the difficult question as to whether a suit at law will lie. The only and great objection to the remedy in equity is that it is protracted, vexatious and expensive.[2]

Frequently the courts have held that an action at law to enforce a statutory liability is not a proper proceeding, but that the rights of all parties can be properly adjusted only in a court of equity,

Steamboat Co., 17 La. Rep. 397 (1841); Dean *v.* Whiton, 16 Hun, 203 (1878); Bonewitz *v.* Van Wert County Bank, 41 Ohio St. 78 (1884), holding that the sheriff's return showing clearly that other stockholders are out of the jurisdiction must be in proof. *Cf.* Dodge *v.* Minnesota, etc. Co., 16 Minn. 368 (1871); Culver *v.* Third Nat. Bank, 64 Ill. 528 (1871); Branson *v.* Oregonian Ry., 10 Oreg. 278 (1882); Hoag *v.* Lamont, 60 N. Y. 96 (1875); Abbott *v.* Aspinwall, 26 Barb. 202, 207 (1857). As to the joinder of parties in Pennsylvania, see Mansfield Iron Works *v.* Willcox, 52 Pa. St. 377 (1866); McHose *v.* Wheeler, 45 Pa. St. 32 (1863); Hoard *v.* Wilcox, 47 Pa. St. 51 (1864). A creditor suing directors on a statutory liability need not join all creditors nor all directors. Patterson *v.* Stewart, 41 Minn. 84 (1889). The corporation need not be joined as a party defendant. The suit may be against the estate of a deceased stockholder. It may be a separate suit from that against the corporation. Nolan *v.* Hazen, 44 Minn. 478 (1890). In Pennsylvania the corporation also should be made a party defendant. Hoard *v.* Wilcox, 47 Pa. St. 51 (1864); Mansfield Iron Works *v.* Willcox, 52 Pa. St. 377 (1866). *Cf.* Deming *v.* Bull, 10 Conn. 409 (1835); Middletown Bank *v.* Magill, 5 Conn. 28 (1823). In Vermont a provision that stockholders "shall be personally holden" is held to create only a joint liability. Windham Prov. Inst. *v.* Sprague, 43 Vt. 502 (1871). The suit may be at law and by one creditor against one stockholder. The corporation need not be joined. Gibbs *v.* Davis, 27 Fla. 531 (1891). The liability of stockholders under the Kansas statute is several and not joint. The creditors cannot join several stockholders in one suit. Each must be sued separately. Abbey *v.* Grimes, etc. Co., 44 Kan. 415 (1890). In Minnesota a single creditor cannot sue a single stockholder. Hence such a claim cannot be enforced in the probate court. *Re* Martin's Estate, 56 Minn. 420 (1894). Under the Montana statute rendering directors liable for not filing a report, any creditor may sue any director at law, and the right of action may be assigned. Fitzgerald *v.* Weidenbeck, 76 Fed. Rep. 695 (1896).

1 Wachusett, etc. Bank *v.* Steel, 135 Mich. 688 (1904).

2 Thus, with reason, the court said, in Mason *v.* Alexander, 44 Ohio St. 318 (1886): "By reason of the great number of stockholders, the frequent transfers of stock, the decease of parties, and of other causes, delays—vexatious, expensive, and almost interminable—seem to be inevitable in

and that the latter remedy is exclusive of all others.[1] Such are the

all such proceedings; so much so, indeed, that such liability has grown to be looked upon as furnishing next to no security at all for the debts of corporations."

[1] A suit in equity is the exclusive remedy to enforce the usual double liability of stockholders for corporate debts. Marshall *v.* Sherman, 148 N. Y. 9 (1895). The statutory liability of directors for debts over a certain amount can be enforced only in equity. Auburn Nat. Bank *v.* Dillingham, 147 N. Y. 603 (1895). Under the New York statute of 1848 the statutory liability of stockholders and directors may be enforced in a judgment creditor's suit to set aside an illegal transfer of property of the company and to enforce such liability. Bagley, etc. Co. *v.* Lenning, 61 N. Y. App. Div. 26 (1901). The statutory liability in Ohio of incorporators for any deficiency in the ten per cent. of the capital stock which is to be paid upon incorporation is enforcible in equity, and may be joined with a suit to enforce liability for unpaid stock. Hessler *v.* Cleveland, etc. Co., 61 Ohio St. 621 (1900). A suit in equity is the proper remedy. Barton, etc. Bank *v.* Atkins, 72 Vt. 33 (1899). A court of equity is the proper court to enforce the double liability of stockholders. Maine, etc. Co. *v.* Southern, etc. Co., 92 Me. 444 (1899). The statutory liability of stockholders for failure of the corporation to publish a notice as required by the statute, can be enforced only by a receiver or by a creditor suing in behalf of himself and others, all stockholders being joined as defendants. Emanuel *v.* Barnard, 71 Neb. 756 (1904). The statutory liability of directors for corporate debts in excess of two-thirds of the capital stock can be enforced only in equity for the benefit of all the corporate creditors. Lyman *v.* Hilliard, 154 Fed. Rep. 339 (1907). Under the Massachusetts statute of 1906 making directors of street railways liable for all debts to the extent of the capital stock until it is all paid in, and a certificate to that effect filed, the directors continue liable if the certificate is untrue. The remedy is in equity and not in law. Westinghouse, etc. Co. *v.* Reed, 80 N. E. Rep. 621 (Mass. 1907). The New Jersey statute prohibiting suits at law to enforce the statutory liability of stockholders in foreign corporations, and prescribing that the remedy shall be in equity only, is unconstitutional so far as liabilities existing at the time of the pasage of the statute are concerned. Western, etc. Bank *v.* Reckless, 96 Fed. Rep. 70 (1899). The remedy of a corporate creditor to enforce the liability of a director under the constitution of California for moneys misappropriated by him is in equity for the benefit of all creditors. Winchester *v.* Mabury, 122 Cal. 522 (1898). The liability of stockholders in banks in Nebraska can be enforced only by one creditor or a receiver suing in equity in behalf of all. Farmers' L. & T. Co. *v.* Funk, 49 Neb. 353 (1896); Pickering *v.* Hastings, 56 Neb. 201 (1898); Hastings *v.* Barnd, 55 Neb. 93 (1893); German Nat. Bank *v.* Farmers' & M. Bank, 54 Neb. 593 (1898). The remedy must be in equity. Harper *v.* Carroll, 66 Minn. 487 (1896). As to the form of the plea that the remedy is in equity, see Glens Falls Nat. Bank *v.* Cramton, 72 Fed. Rep. 734 (1896). Thus, under a charter provision that stockholders shall "be bound respectively for all the debts of the bank in proportion to their stock holden therein," it was held that an action at law by a single creditor against a single stockholder would not lie. Pollard *v.* Bailey, 20 Wall. 520 (1874); Hatch *v.* Dana, 101 U. S. 205 (1879); Terry *v.* Little, 101 U. S. 216 (1879); Smith *v.* Huckabee, 53 Ala. 191 (1875); Jones *v.* Jarman,

latest decisions in New York. The New York court of appeals holds, however, that a suit in equity does not lie to enforce a statutory liability where the liability is unlimited and there is no fund to be protected and distributed.[1] A statute changing the remedy

34 Ark. 323 (1879). *Cf.* Wright *v.* McCormack, 17 Ohio St. 86 (1866); Sands *v.* Kimbark, 39 Barb. 108, 120 (1863); Cushman *v.* Shepard, 4 Barb. 113 (1848). Nor under a statute making the stockholders of a banking company "individually responsible to the amount of their respective share or shares of stock for all its indebtedness and liabilities of every kind." Sleeper *v.* Goodwin, 67 Wis. 577 (1887); Carpenter *v.* Marine Bank, 14 Wis. 705, n. (1862). The remedy is in equity. Foster *v.* Posson, 105 Wis. 99 (1899). Under the statutes of Wisconsin the affairs of an insolvent corporation may be wound up and the directors held liable for fraud or negligence, and stockholders held liable under statutory liability, all in one suit. Gager *v.* Marsden, 101 Wis. 598 (1899). A suit to enforce the liability in a Kansas corporation must be in equity. Waller *v.* Hamer, 65 Kan. 168 (1902). Another ground is that at law the indebtedness of the corporation and the several liabilities of the members could not be equitably adjusted. Low *v.* Buchanan, 94 Ill. 76 (1879), where the directors were held liable for an excess of indebtedness; Queenan *v.* Palmer, 117 Ill. 619 (1886); Stewart *v.* Lay, 45 Iowa, 604 (1877); Garrison *v.* Howe, 17 N. Y. 458 (1858); Story *v.* Furman, 25 N. Y. 214 (1862). *Cf.* Flash *v.* Conn, 109 U. S. 371 (1883).

Where, in South Carolina, the charter of a bank provided that upon the failure of the bank "each stockholder shall be liable and held bound . . . for any sum not exceeding twice the amount of . . . his . . . shares," it was held by the supreme court of the United States that a suit in equity by or on behalf of all the creditors is the only appropriate mode of enforcing the liability incurred by such a failure. Terry *v.* Little, 101 U. S. 216 (1879); Harris *v.* First Parish, 40 Mass. 112 (1839); Coleman *v.* White, 14 Wis. 700 (1862); Ladd *v.* Cartwright, 7 Oreg. 329 (1879); Smith *v.* Huckabee, 53 Ala. 191 (1875). See Patterson *v.* Lynde, 106 U. S. 519 (1882). In Illinois there was some doubt as to whether the bill in equity would lie, but the case of Tunesma *v.* Schuttler, 114 Ill. 156 (1885), holds that, in case the corporation is insolvent and the corporate creditors numerous, a bill in equity is the proper remedy. Under the Manufacturing Company's Act of Illinois, the creditor's remedy is held to be clearly in equity. Rounds *v.* McCormick, 114 Ill. 252 (1885); Harper *v.* Union Mfg. Co., 100 Ill. 225 (1881); Low *v.* Buchanan, 94 Ill. 76 (1879). See Pierce *v.* Milwaukee Constr. Co., 38 Wis. 253 (1875), for the rule in that state. Where under a creditor's bill a receiver is appointed and the assets administered, and then by a supplemental bill the stockholder's liability enforced, a creditor who received a dividend under the original bill cannot sue a stockholder at law. Tunesma *v.* Schuttler, 114 Ill. 156 (1885). The remedy is in equity alone, and non-joinder of any stockholders as defendants will render the bill demurrable. Friend *v.* Powers, 93 Ala. 114 (1891).

[1] Marsh *v.* Kaye, 168 N. Y. 196 (1901). The liability of a director for debts to a certain amount is contractual and for the benefit of all creditors, and hence a creditor may maintain a suit in equity to enforce the same. Bauer *v.* Parker, 82 N. Y. App. Div. 289 (1903). Under the statutes of New York where a New Jersey corporation, doing business in

from law to equity is unconstitutional as against prior creditors.[1] In some jurisdictions the rule prevails that creditors in these cases have a concurrent remedy, either at law or in equity. The action at law will lie upon the debt, while, on the other hand, the equitable jurisdiction arises from the power of a court of chancery to compel contribution among the stockholders and to effect an equitable distribution among the creditors.[2] The tendency is to hold that a suit in equity is always a proper remedy, even though it may not be the exclusive remedy.[3] The Supreme court of the United

New York, pays dividends from the capital stock, a director participating in declaring the dividend is personally liable therefor, and if the corporation refuses to bring the action a stockholder may bring it in behalf of himself and other stockholders. Hutchinson *v.* Stadler, 85 N. Y. App. Div. 424 (1903).

1 Knickerbocker T. Co. *v.* Northern, etc. Co., 140 Fed. Rep. 973 (1905). A statute may provide that the sole remedy shall be in equity and that pending suits at law shall abate. Murphy *v.* Wheatley, 100 Md. 358 (1905); Miners' & Merchants' Bank, etc. *v.* Snyder, 100 Md. 57 (1904). But see Myers *v.* Knickerbocker T. Co., 139 Fed. Rep. 111 (1905).

2 Bank of United States *v.* Dallam, 4 Dana (Ky.), 574 (1836); Van Hook *v.* Whitlock, 3 Paige, 409 (1832); Bank of Poughkeepsie *v.* Ibbotson, 24 Wend. 473 (1840); Masters *v.* Rossie Lead Min. Co., 2 Sandf. Ch. 301 (1845); Pfohl *v.* Simpson, 74 N. Y. 137 (1878); Eames *v.* Doris, 102 Ill. 350 (1882); Culver *v.* Third Nat. Bank, 64 Ill. 528 (1871); Perry *v.* Turner, 55 Mo. 418 (1874); Norris *v.* Johnson, 34 Md. 485, 489 (1871); Matthews *v.* Albert, 24 Md. 527 (1866). *Cf.* Weeks *v.* Love, 50 N. Y. 568 (1872); Garrison *v.* Howe, 17 N. Y. 458 (1858). And see the following New York cases, wherein it is held that a remedy in equity is preferable: Morgan *v.* New York, etc. R. R., 10 Paige, 290 (1843); Sherwood *v.* Buffalo, etc. R. R., 12 How. Pr. 136 (1855); Hinds *v.* Canandaigua, etc. R. R., 10 How. Pr. 487 (1855); Courtois *v.* Harrison, 12 How. Pr. 359 (1856)—the last three cases relating to supplementary proceedings. The Kansas liability may be enforced by a bill in equity to reach both the statutory and subscription liability. New York, etc. Co. *v.* Beard, 80 Fed. Rep. 66 (1897). The Kansas statutory liability against a non-resident stockholder may be enforced against land in Kansas owned by such stockholder. Cooper *v.* Ives, 62 Kan. 395 (1901). The remedy in equity is proper even if a remedy at law is allowed. Parker *v.* Carolina Sav. Bank, 53 S. C. 583 (1898).

3 A bill in equity by one creditor in behalf of himself and all others and against all stockholders is proper. Harper *v.* Carroll, 62 Minn. 152 (1895); s. c., 66 Minn. 487. Where by statute directors are liable for debts in excess of the capital stock, a part of the creditors cannot enforce the liability for their claims alone. Moulton *v.* Connell, etc. Co., 93 Tenn. 377 (1894). A liability by statute of directors for a specified amount of the debts of the company may be enforced by a creditor suing in equity in behalf of himself and others, and all of the directors may be joined as parties defendant. The corporation is not a necessary party defendant, and the other creditors are not necessary parties plaintiff. Bauer *v.* Platt, 72 Hun, 326 (1893). All the stockholders need not be joined, but those who are

States has recently held, however, that the jurisdiction of a court of equity, on the ground of preventing a multiplicity of suits, exists only where such is the actual situation.[1]

In general in the courts of the United States it has been the rule that, where a stockholder's statutory liability is by the terms of the statute a joint and several or several liability, the creditor may, after the remedy against the corporation has been exhausted, enforce his rights in an action at law; but, in all other cases of statutory liability, the remedy must be in equity, as in cases of unpaid subscriptions.[2] The corporation and all solvent stockholders in the juris-

joined may bring in the others by a cross-bill. Palmer *v.* Woods, 149 Ill. 146 (1894).

[1] The Supreme Court of the United States in passing on the question of whether a court of equity has jurisdiction to enforce the statutory liability of stockholders, said: "It is easy to say it rests upon the prevention of a multiplicity of suits, but to say whether a particular case comes within the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation, and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any. The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than would be compensated for by the convenience of a single plaintiff; and where the case is not covered by any controlling precedent the inconvenience might constitute good ground for denying jurisdiction.

"We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases in behalf of a single complainant against a number of defendants, although there is no common title nor community of rights or interest in the subject-matter among such defendants, but where there is a community of interest among them in the questions of law and fact involved in the general controversy." Hale *v.* Allison, 188 U. S. 56 (1903); aff'g 106 Fed. Rep. 258. The court in this case declined to sustain the jurisdiction of a court in equity and held that the sole remedy was at law. Equity has no jurisdiction on the ground of multiplicity of suits where each complainant has a separate and independent claim, and an adjudication as to one does not apply to the others. Miller *v.* Willett, 65 Atl. Rep. 981 (N. J. 1907).

[2] Pollard *v.* Bailey, 20 Wall. 520 (1874); Terry *v.* Little, 101 U. S. 216 (1879); Terry *v.* Tubman, 92 U. S. 156 (1875); Andrews *v.* Bacon, 38 Fed. Rep. 777 (1889); Cuykendall *v.* Miles, 10 Fed. Rep. 342 (1882), where

diction should be joined as defendants.[1] A bill in equity for discovery lies at the instance of a judgment creditor of a corporation to ascertain the names and addresses of the stockholders, the

the court said: "The supreme court hold that the mode in which a liability of this sort is to be enforced depends entirely upon the particular law governing the corporation. If that law merely provides for a proportionate liability of all stockholders for all debts, there should be a bill in equity for the benefit of all the creditors and against all the stockholders. (Citing cases.) But if the law of the state authorizes an action by one creditor against one stockholder, that remedy may be pursued." Patterson *v.* Lynde, 106 U. S. 519 (1882). As to joinder of parties, see U. S. Rev. Stat., § 737. The liability of subscribers for stock under the Maine statutes, where the stock is not properly paid up, cannot be enforced in the federal courts by a suit in equity, even though the statutes of Maine authorize such a suit. 74 Fed. Rep. 29. See 188 U. S. 56. An action at law lies in the federal courts, when that remedy is apropriate. Bullard *v.* Bell, 1 Mason, 243 (1817); s. c., 4 Fed. Cas. 625. Or where the courts of the state creating the liability hold that an action at law will lie. Mills *v.* Scott, 99 U. S. 25 (1878); National Park Bank *v.* Peavey, 64 Fed. Rep. 912 (1894). In the feleral courts a suit to enforce a director's statutory liability is in equity. Stone *v.* Chisolm, 113 U. S. 302 (1884). The liability of stockholders under the Ohio law is several and to all creditors. Newberry *v.* Robinson, 41 Fed. Rep. 458 (1890). When the equitable remedy is pursued, the corporation and all the solvent stockholders within the jurisdiction who are known must be made defendants. Contribution among the stockholders is of the essence of the proceeding, and that is best effected when all are made parties. Walser *v.* Memphis, etc. R. R., 2 McCrary, 156 (1881); s. c., 6 Fed. Rep. 797, and 19 Fed. Rep. 152. The liability of directors in a national bank for excessive loans may be enforced in equity where the board of directors change during the existence of such loans. Cockrill *v.* Cooper, 86 Fed. Rep. 7 (1898). Where a receiver has power by statute to enforce the statutory liability and files a bill in equity in the state court against various stockholders to recover an assessment already levied by the court, a non-resident stockholder who is one of the defendants may remove his part of the case into the federal court. Calderhead *v.* Downing, 103 Fed. Rep. 27 (1900).

[1] All the stockholders should be made parties, but the defect may be waived. Arthur *v.* Willius, 44 Minn. 409 (1890); Erickson *v.* Nesmith, 46 N. H. 371 (1866); Hadley *v.* Russell, 40 N. H. 109 (1860). In a creditor's suit in equity to enforce a stockholder's statutory liability all the stockholders must be joined, and hence such a suit against one stockholder will not lie. Miller *v.* Smith, 26 R. I. 146 (1904). Stockholders who are dead and their estates unrepresented, and stockholders beyond the jurisdiction of the court, may be omitted as defendants. Wheatley *v.* Glover, 125 Ga. 710 (1906). The joinder of all the stockholders may be dispensed with in a case where it is shown to be impracticable. Umsted *v.* Buskirk, 17 Ohio St. 113 (1866); Pettibone *v.* McGraw, 6 Mich. 441 (1859); Pierce *v.* Milwaukee Constr. Co., 38 Wis. 253 (1875); Coleman *v.* White, 14 Wis. 700 (1862); Crease *v.* Babcock, 51 Mass. 525 (1846); Brundage *v.* Monumental, etc. Min. Co., 12 Oreg. 322 (1885), holding also that a defendant stockholder desiring to bring in other stockholders must do that by an ap-

object being to enforce the statutory liability, but such bill must allege such liability.[1] A stockholder sued at law may institute an equitable proceeding to bring in all the parties.[2] Where many suits have been brought to enforce the statutory liability, the court may enjoin all of the suits excepting one, that one being for the benefit of all, and being in equity.[3] The corporation is a proper, but not a

propriate cross-proceeding. And an action to enforce the statutory liability may be joined with an action to collect unpaid subscriptions. Warner *v.* Callender, 20 Ohio St. 190 (1870); New York, etc. Co. *v.* Beard, 80 Fed. Rep. 66 (1897). But a claim against stockholders upon a liability imposed by statute cannot be joined in one bill in equity with a penal claim against the directors of the company. Cambridge Water-works *v.* Somerville Dyeing, etc. Co., 80 Mass. 193 (1859); Pope *v.* Leonard, 115 Mass. 286 (1874); Mappier *v.* Mortimer, 11 Abb. Pr. (N. S.) 455 (1871). *Cf.* Wiles *v.* Suydam, 64 N. Y. 173 (1876). The case of Mason *v.* Alexander, 44 Ohio St. 318 (1886), holds that the corporation is a necessary party to the creditor's suit in equity; that judgment against the stockholders is to be against them severally, and that interest is to be allowed from the commencement of the suit, "although the amount of recovery may thereby exceed the stockholder's original liability." A married woman in Arkansas may own stock and be liable thereon. Her liability may be enforced in equity. Bundy *v.* Cocke, 128 U. S. 185 (1888). Proceedings to enforce the statutory liability are made elastic, and applications of creditors who come in may cure defects in the original papers. Arthur *v.* Willius, 44 Minn. 409 (1890). A suit to enforce in the federal court in New York the statutory liability of New York stockholders in an Ohio corporation failed in Middletown, etc. Bank *v.* Toledo, etc. Ry., 113 Fed. Rep. 587 (1901), on the ground that all the stockholders were not made parties as required by the statutes of Ohio. A suit to enforce the statutory liability of stockholders in a New York state bank must be against all the stockholders who can be made parties. Hirshfeld *v.* Bopp, 39 N. Y. App. Div. 613 (1899). Where some of the stockholders are not made parties defendant in a suit in equity they may be brought in by the stockholders who are made defendants. Rehbein *v.* Rahr, 109 Wis. 136 (1901). In a creditor's suit to wind up a mutual insurance company the parties subject to assessment are proper parties defendant. Sugg *v.* Farmers', etc. Assoc., 63 S. W. Rep. 226 (Tenn. 1901). A receiver of a national bank may bring his suit in a court of equity, and may join various stockholders as defendants. Bailey *v.* Tillinghast, 99 Fed. Rep. 801 (1900). In Maine it is held that stockholders' ratable liability is not increased by reason of the fact that some of the stockholders are insolvent or beyond the reach of process. Maine, etc. Co. *v.* Southern, etc. Co., 92 Me. 444 (1899).

1 Clark *v.* Rhode Island, etc. Works, 24 R. I. 307 (1902); Post *v.* Toledo, etc. R. R., 144 Mass. 341 (1887). In a corporate creditor's action against a few stockholders, to enforce their liability and to obtain discovery of other stockholders, the discovery may be compelled. Hipple *v.* Five-Mile, etc. Co., 3 Atl. Rep. 682 (N. J. 1886). See also § 519, *infra*.

2 Pfohl *v.* Simpson, 74 N. Y. 137 (1878); Cochran *v.* Wiechers, 119 N. Y. 399 (1890); Garrison *v.* Howe, 17 N. Y. 458 (1858). *Semble*, Thebus *v.* Smiley, 110 Ill. 316 (1884); Eames *v.* Doris, 102 Ill. 350 (1882).

3 Bagley, etc. Co. *v.* Ehrlicher, 8

necessary party defendant.[1] A corporate creditor's suit in equity in behalf of himself and all others to enforce the stockholders' statutory liability does not, even though it goes to a decree, prevent other creditors filing a subsequent bill for the same purpose.[2] Where in a suit in equity to enforce the liability other creditors are not joined, the complainant may recover his full claim, even though, if other creditors had come in, the assets would have been insufficient to pay all claims in full.[3] The judgment against each stockholder is for the full amount of his liability, even though the aggregate of such judgments is more than the entire debts; but the execution should be by instalments, the first one being for a *pro rata* share of each stockholder's liability, and subsequent levies to make up that which cannot be collected from insolvent stockholders.[4] In a suit brought

N. Y. App. Div. 581 (1896). A suit by a creditor to enforce the statutory liability of directors for debts in excess of the capital stock should be for the benefit of all creditors, and where there are several suits all will be stayed excepting one. American Grocery Co. *v.* Flint, 5 N. Y. App. Div. 263 (1896). See also § 226, *infra*.

1 German Nat. Bank *v.* Farmers' & M. Bank, 54 Neb. 593 (1898). See s. c., 59 Neb. 229 (1899); Nolan *v.* Hazen, 44 Minn. 478 (1890); Bauer *v.* Platt, 72 Hun, 326 (1893); Third Nat. Bank *v.* Angell, 18 R. I. 1 (1894). *Contra*, Mason *v.* Alexander, 44 Ohio St. 318 (1886). The corporation is not a necessary party in a suit under the Massachusetts statute of 1906 to hold directors of street railways liable for debts to the amount of the capital stock before it is all paid in and a certificate thereof filed. American, etc. Co. *v.* Bearse, 80 N. E. Rep. 623 (Mass. 1907). Under the Wisconsin statute making stockholders liable for the debts where business is commenced before one-half the capital stock is subscribed and twenty per cent. paid in, the statute allows suit without joining the corporation as a defendant. Flour City Nat. Bank *v.* Wechselberg, 45 Fed. Rep. 547 (1891). In a suit to enforce the statutory liability of directors for debts in excess of the capital stock, the corporation is not a necessary party defendant. James, etc. Co. *v.* Libbey, 105 Fed. Rep. 825 (1901). The defense that the corporation and its assignee should be made parties defendant may be waived by answering over after a demurrer has been overruled on this ground. Zang *v.* Wyant, 25 Colo. 551 (1898). An Indiana creditor of an insolvent Minnesota corporation cannot enforce in equity in the federal court in Pennsylvania the statutory liability of Pennsylvania stockholders in such Minnesota corporation, unless the latter is made a party defendant, and voluntarily appears. Elkhart Nat. Bank *v.* Northwestern, etc. Co., 87 Fed. Rep. 252 (1898). The statutory liability of an Ohio stockholder in a Kansas corporation may be enforced in Ohio, and the corporation is not a necessary party defendant, and the suit may be in equity against one or more stockholders. Blair *v.* Newbegin, 65 Ohio St. 425 (1902).

2 Palmer *v.* Woods, 149 Ill. 146 (1894).

3 Rehbein *v.* Rahr, 109 Wis. 136 (1901). *Cf.* § 204, *supra*. All the other creditors need not be joined, the suit being in behalf of all creditors. Herrick *v.* Wardwell, 58 Ohio St. 294 (1898).

4 Harper *v.* Carroll, 66 Minn. 487 (1896), holding also that the court in

by a creditor of an insolvent bank to enforce the statutory liability of the stockholders of the bank, such creditor has the right to control the action, and may continue, compromise, abandon, or discontinue it at pleasure until a creditor similarly situated has procured an order to be made a party to the action or until interlocutory judgment is entered.[1] It is not necessary to allege the amount of stock which the defendant holds.[2] A demand on the stockholder need not be alleged.[3] In a suit by creditors to hold directors personally liable for violating the statutes in the conduct of the corporate business, the creditors must clearly set forth the character and existence of the amount they claim.[4] In a suit brought by a corporate creditor against many stockholders to collect unpaid subscriptions, the plaintiff is not entitled to an order allowing him to examine persons for the purpose of ascertaining the residence of the defendants in order that they may be served.[5]

§ 223. *Enforcement of the statutory liability in the courts of another state — Penal liabilities — Construction of liability created by another state.*—The stockholders of a corporation are generally

a suit in equity may cause the property of a non-resident stockholder to be attached. Stockholders sued under the Minnesota statute cannot question the amount of the assessment which has been levied by the court. A statute to that effect is not unconstitutional. Straw, etc. Co. *v.* Kilbourne, etc. Co., 80 Minn. 125 (1900). A judgment should be for the entire liability to be paid from time to time as found necessary. Man *v.* Boykin, 60 S. E. Rep. 17 (S. C. 1908).

1 Hirshfield *v.* Fitzgerald, 157 N. Y. 166 (1898); §§ 225, 748, *infra;* and p. 528, note 4, *supra.* After a receiver of an insolvent corporation has been appointed at the instance of a creditor, and under an order of the court other creditors have proved their claims in such suit, the court has power to refuse to discontinue the suit at the instance of the complainant of record. Johnson *v.* Miller, 96 Fed. Rep. 271 (1889). In a creditor's suit attacking a mortgage, the suit being for himself and other creditors, there being no funds to pay the expense of litigation, the court may require parties coming in to contribute towards such expense or else be excluded from the suit. Chick *v.* Northwestern, etc. Co., 118 Fed. Rep. 933 (1895). As to the form of a decree in a creditor's action, and as to the right of a creditor to discontinue a suit brought in behalf of himself and other creditors, see Salisbury *v.* Binghamton Pub. Co., 85 Hun, 99 (1895). As to the rules governing intervention by one creditor in a suit instituted by another creditor, see §§ 734, 735, 748, 848, *infra.*

2 Rowell *v.* Janvrin, 151 N. Y. 60 (1896). The complaint must definitely allege stockholdership. McVickar *v.* Jones, 70 Fed. Rep. 754 (1895). In a suit to enforce the statutory liability of stockholders in a California corporation, the plaintiff must set forth the amount of stock issued, the amount held by the defendant, and the amount of the debt. Roebling's Sons Co. *v.* Butler, 112 Cal. 677 (1896).

3 Newton, etc. Mills *v.* Springs, 56 S. C. 534 (1900).

4 Boston, etc. R. R. *v.* Parr, 104 Fed. Rep. 695 (1900).

5 Union Collection Co. *v.* Superior Court, 149 Cal. 790 (1906).

widely scattered, and reside in many states. Accordingly, when some or all of them are non-residents of the state in which the corporation exists, the important question arises whether the courts of one state will enforce a stockholder's statutory liability created by the statutes of another state. If not, then non-resident stockholders practically escape the liability which they assumed when they became members of the corporation.

The cases are uniform in holding that the extent of the stockholder's statutory liability and the character of that liability depend upon and are determined by the charter of the corporation or the statutes of the state which created it.[1]

In general, when the courts of one state are asked to enforce the statutory liability of stockholders in a corporation created by another state, two things are to be considered: First, is the statutory

1 Payson *v.* Withers, 5 Biss. 269 (1873); s. c., 19 Fed. Cas. 29; Seymour *v.* Sturgess, 26 N. Y. 134 (1862); McDonough *v.* Phelps, 15 How. Pr. 372 (1856); *Ex parte* Van Riper, 20 Wend. 614 (1839); Aultman's Appeal, 98 Pa. St. 505 (1881). When the suit is maintainable, the construction placed upon the statute of the state in which the corporation exists, by the courts of that state, is, as a general rule, controlling, and will be followed by the courts of the state where the suit to enforce is brought. Jessup *v.* Carnegie, 80 N. Y. 441 (1880); Chase *v.* Curtis, 113 U. S. 452 (1884); Savings Assoc. *v.* O'Brien, 51 Hun, 45 (1889). *Cf.* Hill *v.* Beach, 12 N. J. Eq. 31 (1858); Nabob of Carnatic *v.* East India Co., 1 Ves. Jr. 371 (1791); Dutch West India Co. *v.* Van Moses, 1 Strange, 612 (1725). In enforcing the statutory liability of stockholders in a foreign corporation, the decisions of the courts in the state where the company is incorporated will be followed. Fowler *v.* Lamson, 146 Ill. 472 (1893), holding also, however, that the remedies of the state where the company is incorporated will not be applied. This principle applies, of course, only to corporations which were legally incorporated. For the liability where the incorporation was not legal, see ch. XIII, *infra*. The United States courts take judicial notice of the statutes of the various states. Newberry *v.* Robinson, 36 Fed. Rep. 841 (1888). In Bateman *v.* Service, L. R. 6 App. Cas. 386 (1881), the ground is taken that a liability created by statute remains the same wherever the corporation may transact its business, or wherever the stockholders may happen to live, and that the fact of doing business in a foreign state does not subject the stockholders of the corporation to the operation of laws which create statutory liability in such foreign state. In accordance with this view it was very properly held in Ohio that where a foreign corporation, without statutory liability of its stockholders, did business in Ohio, where the statutes prescribe a personal liability for stockholders in domestic corporations of similar character, the stockholders of the foreign corporation are protected by the exemption they enjoy at home. Second Nat. Bank *v.* Hall, 35 Ohio St. 158 (1878). See also §§ 12, 199, *supra*, and § 243, *infra*. It is constitutional, however, for a state to prescribe that the stockholders of foreign corporations doing business in the state shall be personally liable the same as stockholders in domestic corporations. Pinney *v.* Nelson, 183 U. S. 144 (1901).

liability itself a contract liability or a mere penalty? Second, are the remedies provided by the laws of the state where suit is brought adequate to the just enforcement of the liability?

The answer to the first question depends on the words of the statute imposing the liability. The law is clear that the courts of one state will not enforce the penalties imposed by another state.[1] But the usual statutory liability of stockholders is not a penalty. The courts are nearly unanimous in holding that where by statute the stockholders in a corporation, instead of being relieved entirely from liability to corporate creditors, are only partially relieved therefrom, the additional liability is a contract liability, and will be enforced by the courts of any state. In other words, the ordinary statutory liability of stockholders is a contract liability, and is generally held to be such by the courts of all the states.[2] The question of

1 Story, Conf. L., §§ 620, 621; Wharton, Conf. L., §§ 4, 853 *et seq.*; Rorer, Interstate L. 148, 149. See also Lowry *v.* Inman, 46 N. Y. 119 (1871); Patterson *v.* Baker, 34 How. Pr. 180 (1867); Howell *v.* Manglesdorf, 33 Kan. 194 (1885). Penal laws are strictly local, and cannot have any operation beyond the jurisdiction of the country where they were enacted. Scoville *v.* Canfield, 14 Johns. 338 (1817).

2 Corning *v.* McCullough, 1 N. Y. 47 (1847); Freeland *v.* McCullough, 1 Denio, 414 (1845); Hanson *v.* Davison, 73 Minn. 454 (1898); Hodgson *v.* Cheever, 8 Mo. App. 318 (1880); Manville *v.* Edgar, 8 Mo. App. 324 (1880); Quecnan *v.* Palmer, 117 Ill. 619 (1886); Aultman's Appeal, 98 Pa. St. 505 (1881); Sackett's Harbor Bank *v.* Blake, 3 Rich. Eq. (S. C.) 225 (1851); Woods *v.* Wicks, 7 Lea (Tenn.), 40 (1881); *Ex parte* Van Riper, 20 Wend. 614 (1839); McDonough *v.* Phelps, 15 How. Pr. 372 (1856); Lowry *v.* Inman, 46 N. Y. 119 (1871). See also Paine *v.* Stewart, 33 Conn. 516 (1866); Bond *v.* Appleton, 8 Mass. 472 (1812); Hutchins *v.* New England Coal Min. Co., 86 Mass. 580 (1862); Grand Rapids Sav. Bank *v.* Warren, 52 Mich. 557 (1884). *Cf.* Bateman *v.* Service, L. R. 6 App. Cas. 386 (1881); Norris *v.* Wrenschall, 34 Md. 492 (1871); Terry *v.* Calnan, 13 S. C. 220 (1879); Tinker *v.* Van Dkye, 1 Flippin, 521, 532 (1876); s. c., 23 Fed. Cas. 1297, 1301; Brown *v.* Hitchcock, 36 Ohio St. 667, 678 (1881); Hatch *v.* Burroughs, 1 Woods, 439, 443 (1870); s. c., 11 Fed. Cas. 795, 796; Flash *v.* Conn, 109 U. S. 371 (1883); Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747 (1887); Cuykendall *v.* Miles, 10 Fed. Rep. 342 (1882); Nimick *v.* Mingo Iron Works, 25 W. Va. 184 (1884). *Cf.* Lawler *v.* Burt, 7 Ohio St. 340 (1857). The stockholder's liability under the New York statute of 1892 is a contractual liability. Close *v.* Potter, 155 N. Y. 145 (1898). In the case of New Haven, etc. Co. *v.* Linden Spring Co., 142 Mass. 349 (1886), the court, in refusing to enforce a subscription made to a foreign corporation, without an express promise to pay, said: "That the statutes of a state do not operate extraterritorially, *proprio vigore*, will be conceded. How far they should be enforced beyond the limits of the state which has enacted them must depend on several considerations—as, whether any wrong or injury will be done to the citizens of the state in which they are sought to be enforced; whether the policy of its own laws will be contravened or impaired; and whether its courts are capable of do-

what constitutes a penal liability and what constitutes a contractual liability of stockholders and directors in corporations has been carefully considered by the supreme court of the United States,[1] and by the privy council in England.[2] A statute rendering directors liable may be penal so far as they are concerned, and hence strictly construed, and yet be not "a penal law in the international sense."[3]

A different rule prevails as to the statutory liability of corporate officers for failure to file reports, or give certain notices, or make certain contracts. Such liability is generally construed to be penal, and will not be enforced by the courts of other states.[4] Sometimes

ing complete justice to those liable to be affected by their decrees." To same effect, Halsey *v.* McLean, 94 Mass. 438 (1866). The statutory liability of stockholders in California is a contract liability. Dennis *v.* Superior Court, 91 Cal. 548 (1891). The statutory liability of stockholders in New York business corporations to the extent of their stock until a certificate is filed that the whole capital stock is paid in is not a penal liability, and it survives the death of a stockholder. Cochran *v.* Wiechers, 119 N. Y. 399 (1890). A statute making the stockholders liable for all debts if certain steps in incorporating are not observed is penal. Kleckner *v.* Turk, 45 Neb. 176 (1895). As to what is a penal liability, see 28 Am. Law Rev. 518. The usual double liability of stockholders created by statute is *ex contractu*. Coulbourn *v.* Boulton, 100 Md. 350 (1905).

1 Huntington *v.* Attrill, 146 U. S. 657 (1892). The court reversed the decision in Attrill *v.* Huntington, 70 Md. 191 (1889), which refused to enforce in Maryland a judgment obtained in New York by a corporate creditor against an officer of the corporation, who, under the statutes of New York, was rendered liable to corporate creditors by reason of signing a false certificate as to the amount of the capital stock of the company. The supreme court of the United States held that such a liability was not penal in the international sense.

2 The New York statute making officers liable for corporate debts in case they file a false certificate as to the condition of the company is not penal. Hence a judgment in New York on such a liability may be enforced in Canada. Huntington *v.* Attrill, [1893] A. C. 150, reversing the Canadian court below. A constitutional provision making the directors liable for moneys misappropriated by officers during their term of office is self-executing, and they are liable for using the funds to purchase worthless paper from a bank which they wish to keep going. The liability is not penal, inasmuch as it is not a punishment, but a compensation for a loss. A creditor who became such after the misappropriation may maintain a suit as well as one before, and he need not bring a suit in behalf of all, nor first obtain a judgment against the corporation. Rice *v.* Howard, 69 Pac. Rep. 77 (Cal. 1902).

3 Park Bank *v.* Remsen, 158 U. S. 337 (1895).

4 Quoted and approved in Globe Pub. Co. *v.* State Bank, 41 Neb. 175 (1894); Derrickson *v.* Smith, 27 N. J. L. 166 (1858); First Nat. Bank *v.* Price, 33 Md. 487 (1870), where a statute of Pennsylvania imposing liability upon directors and officers contracting or assenting to an indebtedness in excess of the amount of capital was held to be penal. But see, *contra*, Field *v.* Haines, 28 Fed. Rep. 919 (1886); Halsey *v.* McLean, 94 Mass. 438 (1866); Bird *v.* Hayden, 1 Rob. 383 (1863); Union Iron Co. *v.*

a statute rendering directors personally liable applies to directors in foreign as well as domestic corporations.[1]

Pierce, 4 Biss. 327 (1869); s. c., 24 Fed. Cas. 583. A statutory liability of directors in a Montana corporation for failure to file reports is penal. Davis *v.* Mills, 113 Fed. Rep. 678 (1902). A statute rendering a director liable for corporate debts in excess of the capital stock is not penal and may be enforced in another state, inasmuch as the remedy is not to punish an offense, but is a private remedy to a person injured by the wrongful act. Farr *v.* Briggs' Estate, 72 Vt. 225 (1900). The twelfth section of the New York Manufacturing Companies Act (Laws of 1848, ch. 40), to the effect that the corporate officers should be liable for the debts of the corporation in case they failed to make an annual public report of the business of the corporation, was generally spoken of as being penal in its character. Chase *v.* Curtis, 113 U. S. 452 (1885); Stokes *v.* Stickney, 96 N. Y. 323 (1884); Pier *v.* Hanmore, 86 N. Y. 95 (1881); Pier *v.* George, 86 N. Y. 613 (1881); Veeder *v.* Baker, 83 N. Y. 156 (1880); Knox *v.* Baldwin, 80 N. Y. 610 (1880); Easterly *v.* Barber, 65 N. Y. 252 (1875); Wiles *v.* Suydam, 64 N. Y. 173 (1876); Jones *v.* Barlow, 62 N. Y. 202 (1875); Merchants' Bank *v.* Bliss, 35 N. Y. 412 (1866); Gadsden *v.* Woodward, 103 N. Y. 242 (1886). But Huntington *v.* Attrill, 146 U. S. 657 (1892) (rev'g Attrill *v.* Huntington, 70 Md. 191—1889), decided otherwise, and the decision of the House of Lords is to the same effect. Huntington *v.* Attrill, [1893] A. C. 150. As to the statutory liability of the stockholders if the capital stock was not fully paid up and a certificate filed, see Howell *v.* Roberts, 29 Neb. 483 (1890); Halsey *v.* McLean, 94 Mass. 438 (1866); Erickson *v.* Nesmith, 86 Mass. 233 (1862); Mitchell *v.* Hotchkiss, 48 Conn. 9 (1880); Steam Engine Co. *v.* Hubbard, 101 U. S. 188 (1879); Savings Assoc. *v.* O'Brien, 51 Hun, 45 (1889). A stockholder's liability for failure of the directors to file a certificate each year is a penal liability and cannot be enforced in a foreign jurisdiction, and foreign stockholders cannot be sued in their state for contributions towards a penal liability paid by domestic stockholders. Sayles *v.* Brown, 40 Fed. Rep. 8 (1899). But see Huntington *v.* Attrill, 146 U. S. 657 (1892), reversing Attrill *v.* Huntington, 70 Md. 191 (1889). The statutory liability of a director in a national bank is not a penal liability, and it survives the death of the director who is liable. Stevens *v.* Overstoltz, 43 Fed. Rep. 465 (1890). The statutory liability of trustees of clubs for all debts contracted during their term of office is a contract liability. Rogers *v.* Decker, 131 N. Y. 490 (1892). A liability of stockholders for failure to publish annually a statement of their indebtedness is penal. Globe

[1] A statute giving a remedy against directors of a corporation who are guilty of fraud applies to directors in foreign corporations, as well as those in domestic corporations, unless its language is clearly to the contrary. Miller *v.* Quincy, 179 N. Y. 294 (1904); rev'g Miller *v.* Barlow, 88 N. Y. App. Div. 529. Under the statutes of New York where a New Jersey corporation doing business in New York, pays dividends from the capital stock, a director participating in declaring the dividend is personally liable therefor, and if the corporation refuses to bring the action a stockholder may bring it in behalf of himself and other stockholders. Hutchinson *v.* Stadler, 85 N. Y. App. Div. 424 (1903). See also § 215, *supra*.

This question of whether the liability is a penalty arises often in ascertaining what particular statute of limitations applies.[1] There

Pub. Co. *v.* State Bank, 41 Neb. 175 (1894), overruling Howell *v.* Roberts, 29 Neb. 483 (1890), and Coy *v.* Jones, 30 Neb. 798 (1890). A director's liability for failure to make reports is penal. State Sav. Bank *v.* Johnson, 18 Mont. 440 (1896). A statute rendering the directors liable to corporate creditors in case of fraud or unfaithfulness is not a penal statute. Flowers *v.* Bartlett, 66 Minn. 213 (1896). A director's statutory liability for receiving deposits after the bank becomes insolvent is penal. Ashley *v.* Frame, 4 Kan. App. 265 (1896). The statutory liability in Oregon of directors for declaring dividends from the capital stock is penal. Patterson *v.* Thompson, 86 Fed. Rep. 85 (1898). In New York, if the suit is commenced by summons only, to recover a penalty, a reference must be made on the summons to the statute. Code Civ. Proc., § 1897. The statutory liability of directors in New York state, for failing to file a report, is a penalty, and the summons must state that fact on its face. Farmers', etc. Bank *v.* Stringer, 75 N. Y. App. Div. 127 (1902). The statutory liability of directors in an Oregon corporation for declaring dividends out of the capital stock is a penal liability. Patterson *v.* Wade, 115 Fed. Rep. 770 (1902).

[1] Gridley *v.* Barnes, 103 Ill. 211 (1882); Diversey *v.* Smith, 103 Ill. 378 (1882). See also Cable *v.* McCune, 26 Mo. 380 (1858); Lawler *v.* Burt, 7 Ohio St. 340 (1857); Cady *v.* Smith, 12 Neb. 628 (1882); Knox *v.* Baldwin, 80 N. Y. 610 (1880). *Cf.* Duckworth *v.* Roach, 81 N. Y. 49 (1880); Wiles *v.* Suydam, 64 N. Y. 173 (1876). The federal courts follow the state decisions. Price *v.* Yates, 19 Fed. Cas. 1322 (1879). The three years' statute of limitations relative to penalties applies to an action to hold directors liable under a statute making them liable for all debts if they commit *ultra vires* acts which result in insolvency. Merchants' Nat. Bank *v.* Northwestern Mfg. Co., 48 Minn. 349 (1892). A statutory liability of directors for failure to file reports is penal and subject to the statute of limitations on penalties. A judgment need not be obtained against the corporation first. Larsen *v.* James, 1 Colo. App. 313 (1892). A penal liability of a director ends in case of his death, unless it is already merged into a judgment, in which case it survives. Carr *v.* Rischer, 119 N. Y. 117 (1890). A statutory liability of directors for illegal payment of dividends is penal and does not survive the death of a director and is not assignable. Killen *v.* Barnes, 106 Wis. 546 (1900). The statutory provision in Illinois making officers liable for debts in excess of the capital stock is not a penal liability, and is not barred by the two-year statute of limitations. It may be enforced in equity. Woolverton *v.* Taylor, 132 Ill. 197 (1890). The liability of directors in an Indiana manufacturing corporation because the capital stock was not paid up within eighteen months is a penal liability and is barred in two years. Brown *v.* Clow, 158 Ind. 403 (1902). The statutory liability of directors for failure to make a report or for making a false report is not penal, and is not affected by the statute of limitations applicable to penalties. American, etc. Co. *v.* Ellis, 156 Ind. 212 (1901). As to the statute of limitations applicable to the liability of directors under the business corporation act of New York of 1875 (now repealed), see Chapman *v.* Lynch, 156 N. Y. 551 (1898). In a suit against a director for fraud in inducing subscription, the statute of limitations begins to run from the time of subscription, and the liability is not a

can never be such a thing as a vested right to enforce a penalty.[1] Until judgment is obtained the legislature may relieve the parties from this penalty.[2]

The second question is whether the courts of one state will enforce a statutory liability created by another state, when the legal procedure for enforcing that liability is prescribed by the latter state and is not feasible in the former state. As explained elsewhere, when the statute creating the liability prescribes a particular procedure for enforcing it, that procedure is exclusive of all other remedies.[3] Hence, instances have occurred in which the enforcement of this statutory liability in another state has failed, by reason of difficulties attending the legal procedure to be used in enforcing that liability.[4] The liability will be enforced only when it

penalty, even though the liability is made statutory. Thomson *v.* Lord Clanmorris, [1900] 1 Ch. 718. A statute making directors personally liable for failure to file reports is not penal, within the meaning of the statute of limitations. Nebraska, etc. Bk. *v.* Walsh, 68 Ark. 433 (1900). The liability of an officer for signing a false report under the New York statute is not a penalty. Hutchinson *v.* Young, 80 N. Y. App. Div. 246 (1903).

On this subject of the statute of limitations, see also § 225*f*, *infra*.

1 Yeaton *v.* U. S., 5 Cranch, 281 (1809); Norris *v.* Crocker, 13 How. 429 (1851). See also Huntington *v.* Attrill, 146 U. S. 657, 679 (1892), a *dictum*.

2 Cooley's Constitutional Limitations (5th ed.), p. 445, note. A penal liability of stockholders ceases by the passage of a statute repealing it, unless such liability has passed into a judgment. Globe Pub. Co. *v.* State Bank, 41 Neb. 175 (1894). A penal liability repealed is ended. Hogue *v.* Capital Nat. Bank, 47 Neb. 929 (1896). A repeal of the statute at any time prior to judgment in a case puts an end to liability in that case. Kleckner *v.* Turk, 45 Neb. 176 (1895). A statute rendering directors in a mining company liable for $1,000 for failing to post monthly balance sheets is penal, and upon the repeal thereof an existing judgment becomes null and void, there being a pending appeal from such judgment. Anderson *v.* Byrnes, 122 Cal. 272 (1898). A penal liability, even though already incurred, may be annulled by act of the legislature. Davidson *v.* Witthaus, 106 N. Y. App. Div. 182 (1905). The repeal of a statute which imposes a penalty destroys any action then pending to recover such penalty. Fisher *v.* New York Cent. etc. R. R., 46 N. Y. 644, 657 (1871); and see note in 4 Denio, 377, to case of Palmer *v.* Conly; Yeaton *v.* U. S., 5 Cranch, 281 (1809); Norris *v.* Crocker, 13 How. 429 (1851); also § 497, *infra*.

3 See § 220, *supra*.

4 Lowry *v.* Inman, 46 N. Y. 119 (1871), where the remedy prescribed by the Georgia corporation was an execution levied on stockholders' property, and based on the judgment against the corporation only. Nimick *v.* Mingo Iron Works, 25 W. Va. 184 (1884). See also Savings Assoc. *v.* O'Brien, 51 Hun, 45 (1889). Where the statute provides that the creditor's remedy shall be by bill in equity, and that all stockholders shall be joined, the liability cannot be enforced in a state where this remedy is not possible. Erickson *v.* Nesmith, 86 Mass. 233 (1862); s. c.,

may be enforced by the procedure of the state wherein the enforcement is sought.[1]

During the past few years this question of enforcing a statutory liability created by the laws of another state has come prominently before the courts. Especially has this been the case with stockholders in insolvent Kansas corporations. At first the state courts refused to enforce the liability, and, following the old Massachusetts decisions, declined to aid the corporate creditors as against resident stockholders. The New York court of appeals especially decided that on general grounds of public policy it would not enforce the statutory liability of New York stockholders in Kansas corporations.[2] There have been many other decisions to practically the same effect, not only as to the Kansas liability, but as to the liability in Ohio and Illinois.[3]

81 Mass. 221 (1860). *Cf.* s. c., 46 N. H. 371 (1866).

1 Lowry *v.* Inman, 46 N. Y. 119 (1871); Drinkwater *v.* Portland Marine R. R., 18 Me. 35 (1841); Nimick *v.* Mingo Iron Works, 25 W. Va. 184 (1884); Christensen *v.* Eno, 106 N. Y. 97 (1887); Erickson *v.* Nesmith, 81 Mass. 221 (1860). *Cf.* Taft *v.* Ward, 106 Mass. 518 (1871). Where a statutory liability cannot be enforced at law, and can only be enforced in equity where all the stockholders and creditors are brought in, the remedy is exclusive, and a nonresident stockholder cannot be sued in the state where he resides. Eau Claire, etc. Bank *v.* Benson, 106 Wis. 624 (1900); Finney *v.* Guy, 106 Wis. 256 (1900).

2 In the important case of Marshall *v.* Sherman, 148 N. Y. 9 (1895), rev'g 84 Hun, 186, the New York court of appeals held that the public liability of stockholders in Kansas corporations would not be enforced by the New York courts. The court said that such enforcement would be inequitable, inasmuch as all the stockholders and creditors could not be brought into the action; also that the liability, while arising on contract, was somewhat penal in its nature; also that the Kansas statute prescribed the mode of enforcing the liability, and hence the enforcement must be local; and also that to enforce such a liability would encourage parties to buy up claims for the purpose of instituting suits of this character. The court said: "It is to be noticed that the party seeking to enforce such a statute in a foreign jurisdiction has been quite uniformly defeated." A suit cannot be maintained in New York to enforce a stockholder's liability under the Ohio statutes, because the Ohio statutes prescribe a remedy, and this remedy is not available in New York. Barnes *v.* Wheaton, 80 Hun, 8 (1894). The New York courts will refuse to entertain a suit in equity brought to enforce the statutory liability of stockholders in an Ohio corporation. Not only does the Ohio statute give a local remedy, but it is impracticable to adjust all the liabilities and rights in New York with only a few of the parties before the court. In a suit at law it may be different. Cleveland, etc. Ry. *v.* Kent, 87 Hun, 329 (1895), with a remarkably well-reasoned opinion by O'Brien, J.

3 In Coffing *v.* Dodge, 167 Mass. 231 (1897), the court refused to enforce the Kansas statutory liability because the complaint did not allege that the liability was on contract arising from subscription for stock, and did not al-

There have also been decisions in the lower federal courts to the same effect.[1]

lege that such liability had been so construed in Kansas, and did not make other allegations to show that no injustice could be done to any one by the court entertaining the suit. In Massachusetts it is held that a receiver of a Kansas corporation cannot enforce the statutory liability of stockholders. Hancock Nat. Bank *v.* Ellis, 172 Mass. 39 (1898). A resident of New York cannot bring suit in Massachusetts against a resident of California to hold him liable as a stockholder in a Kansas corporation, under a statute making him liable when the remedy against the corporation has been exhausted, even though judgment against the latter was obtained in Kansas. The courts of Massachusetts have uniformly refused to enforce the statutory liability in corporations organized in other states. Bank of N. America *v.* Rindge, 154 Mass. 203 (1891). See also the decisions in the preceding three notes. The supreme court of Illinois refused to enforce the statutory liability of stockholders in a Kansas corporation on the ground that the special remedy provided by the Kansas statute could be enforced only in the state of Kansas. Tuttle *v.* National Bank, 161 Ill. 497 (1896). The Illinois courts will not enforce the statutory liability of Illinois stockholders in a Michigan corporation where the Michigan courts have never construed the statute and no bill has been filed there to determine the debts, assets, and various liabilities. Young *v.* Farwell, 139 Ill. 326 (1891). Where a special remedy is given for the enforcement of a stockholder's statutory liability, that liability cannot be enforced in another state. Fowler *v.* Lamson, 146 Ill. 472 (1893), refusing to enforce the liability of stockholders in a Kansas corporation. The California courts will not enforce the subscription liability of stockholders in an Illinois corporation where the Illinois statutes prescribe that the remedy may be by garnishment. Russell *v.* Pacific Ry., 113 Cal. 258 (1896). The supreme court of New Hampshire refused to enforce the statutory liability of a citizen of New Hampshire in a Kansas corporation, in the case of Crippen *v.* Laighton, 69 N. H. 540 (1899). Creditors of an insolvent Colorado corporation cannot maintain a suit in equity in Pennsylvania against a single stockholder to enforce his statutory liability. The suit must be in behalf of the creditors, and the corporation and other stockholders must be made parties defendant, especially where a suit is still pending in Colorado to collect and distribute the assets. Bates *v.* Day, 198 Pa. St. 513 (1901). Even though under the laws of Nebraska a receiver may enforce the statutory liability of stockholders, yet such receiver cannot enforce that liability in the Vermont courts. Murtey *v.* Allen, 71 Vt. 377 (1899). A Wisconsin court will not enforce the statutory liability of a resident stockholder in a Michigan mining company for debts due to laborers where the Michigan statute gives, as a remedy for enforcing such liability, a joint action at law against both the corporation and the stockholder. May *v.* Black, 77 Wis. 101 (1890). A judgment in Minnesota fixing the statutory liability of the various stockholders in a Minnesota corporation is not enforceable in Wisconsin against a Wisconsin stockholder, inasmuch as such stockholder is entitled to his day in court. Finney *v.* Guy, 106 Wis. 256 (1900). A person residing in Wyoming cannot be held liable in Wyoming as a stockholder in a Utah corporation until after a suit in equity has determined the amount of deficit. McLaughlin *v.* O'Neill, 7 Wyo. 187, 215 (1897).

[1] In a bill in equity in the federal

The supreme court of the United States, however, in a decision rendered in 1900, reversed the supreme court of Rhode Island, and held that a creditor of a Kansas corporation had a right to hold a Rhode Island stockholder in such corporation liable on the statutory liability created by the statutes of Kansas, and that such liability could be enforced in the state courts of Rhode Island.[1] The same question arose often in the lower federal courts and the right to maintain such an action sustained,[2] and, notwithstanding the

court in Pennsylvania, brought by a citizen of Indiana to enforce the liability of residents of Pennsylvania as stockholders in a Minnesota corporation, also asking for a receiver and an accounting, the corporation is a necessary party defendant, and if not served the suit fails, inasmuch as an accounting may show that the company has means to pay the debt. The complainant had already obtained a judgment. Elkhart Nat. Bank *v.* Northwestern, etc. Co., 84 Fed. Rep. 76 (1897). The United States court sitting in Massachusetts will not enforce the statutory liability of Massachusetts stockholders in an Ohio corporation. State Nat. Bank *v.* Sayward, 86 Fed. Rep. 45 (1898). In the case of State Nat. Bank *v.* Sayward, 91 Fed. Rep. 443 (1899), the federal court in Massachusetts refused to enforce the statutory liability of Massachusetts stockholders in an Ohio corporation. A receiver appointed by a court in Iowa of the assets of an insolvent Iowa corporation cannot maintain a suit in the federal court in Pennsylvania to enforce the liability of a Pennsylvania stockholder in such Iowa corporation, especially where the assessment was fixed by an Iowa court in a suit in which the Pennsylvania stockholder was not a party and did not appear and could not have been made to appear. Wigton *v.* Bosler, 102 Fed. Rep. 70 (1900). A suit to enforce in the federal court in New York the statutory liability of New York stockholders in an Ohio corporation failed in Middletown, etc. Bank *v.* Toledo, etc. Ry., 113 Fed. Rep. 587 (1901), on the ground that all the stockholders were not made parties as required by the statutes of Ohio. The statutory liability of a Maine stockholder in a Minnesota corporation cannot be enforced in Maine, where the stockholder has died and his estate been distributed and the suit was not instituted until three years after the decree of insolvency in Minnesota and the one-year statute of limitations in Maine in suits against estates had run. Hale *v.* Coffin, 114 Fed. Rep. 567 (1902); aff'd, 120 Fed. Rep. 470. See also James H. Rice Co. *v.* Libbey, 85 Fed. Rep. 821 (1898); Schiffer *v.* Trustees, 87 id. 166 (1898); Elkhart Nat. Bank *v.* Northwestern, etc. Co., 87 id. 252 (1898).

1 Hancock, etc. Bank *v.* Farnum, 176 U. S. 640 (1900), reversing 20 R. I. 466. The supreme court of the United States in the case of Whitman *v.* Oxford, etc. Bank, 176 U. S. 559 (1900), held that the Kansas liability is a contractual liability and can be enforced in any court, federal or state, and that a Pensylvania bank, as a judgment creditor of a Kansas corporation, could enforce in the United States court in New York the statutory liability of a New York stockholder in such Kansas corporation. The action was at law.

2 The liability of an Illinois stockholder in a Kansas corporation for the debts of the corporation begins to run from the time he became a stockholder and expires in five years. Hutchings *v.* Lampson, 82 Fed. Rep. 960 (1897). In Rhodes *v.* U. S. Nat.

former reluctance of the state courts to enforce these statutory liabilities, incurred in other states, and complicated in their nature,

Bank, 66 Fed. Rep. 512 (1895), the federal court in Illinois enforced the statutory liability in a Kansas corporation and followed the Kansas decisions as to the nature of and remedy for the liability.

The fact that a Kansas corporation is in the hands of a receiver does not prevent a judgment creditor enforcing in New York the stockholders' statutory liability. American, etc. Co. *v.* Woodworth, 82 Fed. Rep. 269 (1897).

The federal court in New Hampshire sustained an action of debt at law to enforce the statutory liability of a stockholder in a Kansas corporation, in the case of McVickar *v.* Jones, 70 Fed. Rep. 754 (1895), the court following the Kansas decisions as to the remedy at law.

The statutory liability of directors in New York corporations may be enforced in the federal courts. International Bank *v.* Faber, 79 Fed. Rep. 919 (1897). In the case of Howarth *v.* Ellwanger, 86 Fed. Rep. 54 (1898), the United States court in New York enforced the statutory liability of a stockholder in a Washington bank, such liability having been fixed by a decree of a court in Washington. An action at law, at the instance of a judgment creditor of the corporation, lies against a Pennsylvania stockholder in a Kansas corporation to enforce the statutory liability of such stockholder. Mechanics' Sav. Bank *v.* Fidelity, etc. Co., 87 Fed. Rep. 113 (1898). A creditor of a Kansas corporation may enforce in the United States court in Pennsylvania the statutory liability of a Pennsylvania stockholder therein, and the remedy may be at law. Fidelity, etc. Co. *v.* Mechanics' Sav. Bank, 97 Fed. Rep. 297 (1899). In the case of Kisseberth *v.* Prescott, 91 Fed. Rep. 611 (1899), the court held that a Massachusetts stockholder in a Kansas corporation might be held liable in a suit instituted in Massachusetts. In the enforcement of a Kansas liability against a New York stockholder, the New York statute of limitations of two years, applicable to stockholders' liability in New York corporations, does not apply. Platt *v.* Larter, 94 Fed. Rep. 610 (1899). The statutory liability of Massachusetts stockholders in a Minnesota corporation was enforced in Hale *v.* Hardon, 95 Fed. Rep. 747 (1899). The statutory liability of a New Jersey stockholder in a Kansas corporation may be enforced by a suit at law in a federal court sitting in New Jersey. Western, etc. Bank *v.* Reckless, 96 Fed. Rep. 70 (1899). The New York three-years' statute of limitations relative to the statutory liability of stockholders in certain corporations applies to a suit brought in the United States circuit court, in the New York district, to enforce the statutory liability of a citizen of New York in a Kansas mortgage company. Hobbs *v.* National Bank, etc., 96 Fed. Rep. 396 (1899). The United States court in Minnesota will enforce the statutory liability of a director in a Montana corporation for failure to file annual reports. First Nat. Bank, etc. *v.* Weidenbeck, 97 Fed. Rep. 896 (1899). The owner of a claim against a Montana corporation may enforce in Connecticut the liability of directors for failure to file annual reports. Davis *v.* Mills, 99 Fed. Rep. 39 (1900). Even though in a suit to enforce the liability of a stockholder in a Kansas corporation it is proved that the stockholder was liable only for 1,500, yet, if the complaint claimed $2,200, the court had jurisdiction. Kunkel *v.* Brown, 99 Fed. Rep. 593 (1900). A Minnesota receiver may sue in the federal court in Massachusetts to enforce a stock-

the decisions in New York,[1] Massachusetts,[2] Ohio,[3] Michigan,[4] New

holder's statutory liability in a Minnesota corporation. Hale *v.* Tyler, 104 Fed Rep. 757 (1900). The Ohio statutory liability may be enforced in the United States court in Kentucky against a Kentucky stockholder, where it is shown that the Ohio stockholders have been assessed to the full amount of their liability, and that the corporation is insolvent and that the liabilities of the corporation exceed its assets, together with the stockholders' liability; and where, under the statutes of Ohio, a receiver may enforce the liability, such receiver may maintain such suits in the United States courts in other states for that purpose. Kirtley *v.* Holmes, 107 Fed. Rep. 1 (1901). Where, by statute in Minnesota, a receiver of an insolvent Minnesota corporation may maintain a suit at law to enforce the statutory liability of stockholders, he may maintain such a suit in the circuit court of the United States in another district. Hale *v.* Hilliker, 109 Fed. Rep. 273 (1901). The statutory liability of a stockholder of a Kansas corporation may be enforced in any court of competent jurisdiction, either state or federal, in or outside of Kansas. Whitman *v.* Citizens' Bank, 110 Fed. Rep. 503 (1901). An Ohio receiver of an insolvent Ohio corporation may bring suit in Indiana to enforce a stockholder's statutory liability, where the Ohio statutes authorize a receiver so to do. Burr *v.* Smith, 113 Fed. Rep. 858 (1902).

1 A Washington receiver of an insolvent Washington bank, who, by the statutes of Washington, has power to enforce the statutory liability of stockholders, may bring suit in the New York courts to enforce the liability of a citizen of New York as a stockholder in such bank, it being shown that the liability has been fixed by the decree of the court in Washington and that the citizen of New York had had full opportunity to contest all the essential facts, and it being shown further that no injustice will result from sustaining the suit. Howarth *v.* Angle, 162 N. Y. 179 (1900). In the case of Brookman *v.* Merchants', etc. Bank, 31 N. Y. Misc. Rep. 191 (1900), the court refused to enforce the statutory liability of a stockholder in a Kansas corporation where the plaintiff had not taken any proceedings in Kansas to enforce the liability of stockholders, and the receiver in Kansas had not established in that state the amount of such liability, and only one stockholder was sued in the New York court.

2 A judgment creditor of a Kansas corporation may enforce in Massachusetts the statutory liability of a Massachusetts stockholder in such corporation. Hancock Nat. Bank *v.* Ellis, 172 Mass. 39 (1898). Inasmuch as the statutes of the state of Washington authorize a receiver of an insolvent bank to enforce a stockholder's statutory liability, such receiver may maintain such a suit in Massachusetts against a Massachusetts stockholder in such bank. Howarth *v.* Lombard, 175 Mass. 570 (1900). The Kansas statute of limitations against stockholders' statutory liability does not apply to a suit in Massachusetts against a Massachusetts stockholder in a Kansas corporation, where it is shown that he has not been in the state of Kansas. Broadway, etc. Bank *v.* Baker, 176 Mass. 294 (1900).

3 The statutory liability of an Ohio stockholder in a Kansas corporation may be enforced in the courts of Ohio. Kulp *v.* Fleming, 65 Ohio St. 321 (1901).

4 The Kansas liability was enforced in the case of Western Nat. Bank *v.* Lawrence, 117 Mich. 669 (1898).

Hampshire,[1] and other states were to the same effect.[2] During the past five years, however, the pendulum seems to have swung the other way, and such a liability has been held, for various reasons, particularly when the remedy was statutory, not to be enforcible in other states. There have been decisions to that effect in the federal courts,[3]

[1] An assessment in Iowa on stockholders in an insolvent Iowa bank may be enforced in New Hampshire against a New Hampshire stockholder in such bank. Tompkins *v.* Blakey, 70 N. H. 584 (1901).

[2] A Minnesota receiver of a Minnesota corporation enforced the statutory liability of a Maine stockholder in such corporation in Childs *v.* Cleaves, 95 Me. 498 (1901), the Minnesota statutes providing for such suits by the receiver and the proceeds of the suit to be applied for the benefit of all the creditors. The court held that the adjudication of the Minnesota courts was conclusive except as to the question of the defendant's individual liability and the measure of such liability. The statutory liability of an Arizona stockholder in a California corporation may be enforced in Kansas. Lanigan *v.* North, 69 Ark. 62 (1901). In Guerney *v.* Moore, 131 Mo. 650 (1895), the supreme court of Missouri held that a Kansas statutory liability could be enforced in Missouri. The Kansas statutory liability is enforceable in California. Ferguson *v.* Sherman, 116 Cal. 169 (1897). The statutory liability of stockholders in a California corporation may be enforced by an action at law in Oregon, although the liability of stockholders in an Oregon corporation may be enforced only by a suit in equity. Aldrich *v.* Anchor Coal, etc. Co., 24 Oreg. 32 (1893). The liability of an Illinois stockholder in a Kansas corporation may be enforced by an action at law in Illinois, inasmuch as the supreme court of Kansas has decided that an action at law will lie, even though the statutory liability of stockholders in an Illinois corporation will be enforced in Illinois by a suit in equity only. Bell *v.* Farwell, 176 Ill. 489 (1898). The liability of a Delaware stockholder in a Kansas corporation may be enforced by an action of debt. Love *v.* Pusey & Jones Co., 3 Pen. (Del.) 577 (1902). The Kansas statutory liability is contractual, and hence may be enforced in Maine against a Maine stockholder without joining other stockholders as parties defendant in the suit. If the Kansas statute creating the liability prescribes a special limitation as an enforcement, such limitation applies in Maine, but the general statute of limitations of Kansas is not applicable. Pulsifer *v.* Greene, 96 Me. 438 (1902). The statutory liability of various Missouri stockholders in an Ohio corporation may be enforced in Missouri by a suit in equity. Pfaff *v.* Gruen, 69 S. W. Rep. 405 (Mo. 1902).

[3] The Ohio statutory liability cannot be enforced in other states until after the remedy prescribed by the Ohio statutes has been pursued in that state. Middletown Bank *v.* Railway Co., 197 U. S. 394 (1904). Where a statutory liability is by the statute to be enforced by a suit in equity in the state by a creditor in behalf of himself and others, such liability cannot be enforced in the courts of another state. Finney *v.* Guy, 189 U. S. 335 (1903). Where a state court has refused to enforce the statutory liability of stockholders in a foreign corporation, on the ground that the suit must be by the creditors as a whole against the stockholders as a whole, the same plaintiff cannot maintain a similar suit in the federal court. Eau Claire Nat. Bank *v.* Benson, 128 Fed. Rep. 277 (1904). A court of equity in one state has no

Maine,[1] Massachusetts,[2] New Jersey,[3] New York,[4] Rhode

jurisdiction to enforce the statutory liability of stockholders in a corporation organized in another state on the ground of preventing a multiplicity of suits nor on the ground that it is an ancillary or auxiliary proceeding to enforce the equitable decree of another court where the stockholder sued was not served in the other state in such last mentioned suit and the full statutory limit of liability is sought to be enforced. Hale *v.* Allison, 188 U. S. 56 (1903); aff'g 106 Fed. Rep. 258. Where several Massachusetts stockholders in an insolvent Colorado bank are joined as parties defendant in a suit in equity in the state court to enforce their statutory liability, one of them cannot remove the case to the United States court on the ground of a separable controversy. Miller *v.* Clifford, 133 Fed. Rep. 880 (1904). The statutory liability of Pennsylvania stockholders in a Kansas corporation was enforced in Anglo-American, etc. Co. *v.* Wood, 143 Fed. Rep. 683 (1906).

1 Creditors of a Colorado corporation cannot maintain a bill in equity in Maine against stockholders in such corporation to hold them liable on their statutory liability. The remedy is a bill in equity in Colorado, with the corporation as a party, brought for the benefit of all creditors and against all stockholders, so that the stockholders living in one state may be treated the same as stockholders living in another state. Abbott *v.* Goodall, 100 Me. 231 (1905).

2 The creditors of a Colorado corporation cannot maintain a bill in equity in Massachusetts against a single stockholder to enforce his double liability, where the Colorado statute contemplated only a pro rata contribution sufficient to pay the debts. The suit should have made the corporation a party and should have been against all the stockholders. The decisions of the state of Colorado relative to stockholders' liability in a Colorado corporation will be followed by the Massachusetts courts as to the extent of the liability, but will not be followed as to the mode of procedure and practice. Clark *v.* Knowles, 187 Mass. 35 (1904). Massachusetts stockholders in a Nebraska state bank, being liable on their stock by statute, are bound by a final decree of the Nebraska court that the corporation has been wound up and has no more property and has unpaid judgments against it, and that the receiver will bring suit against the stockholders. Such a receiver may on such decree bring suits at law in the Massachusetts courts against Massachusetts stockholders, even though they were not parties to the Nebraska suit, and they cannot maintain a bill in equity to enjoin such suits at law. Francis *v.* Hazlett, 192 Mass 137 (1906). See 84 N.E. Rep.1015.

3 A bill in equity does not lie in New Jersey to enforce the statutory liability of New Jersey stockholders in a Colorado bank, inasmuch as the different defendants may have different defenses, and there being no case made out for accounting or discovery or joint liability or breach of trust, and it appearing that the liability exceeds the debts. Miller *v.* Willett, 70 N. J. Eq. 396 (1905).

4 The statutory liability of a New York stockholder in a Maryland corporation cannot be enforced in an action at law in New York by one creditor, where the Maryland statute provides for a suit in equity. Knickerbocker T. Co. *v.* Iselin, 185 N. Y. 54 (1906). A decree of a Minnesota court making a statutory assessment on stockholders, the amount being based on the assumption that some of the stockholders were insolvent, and the amount including debts, general expenses, and cost of collection, is not conclusive on a non-resident

Island,[1] Wisconsin [2] and England.[3] Sometimes this difficult question is complicated still further by the question of whether a foreign receiver may institute the suit.[4]

The supreme court of the United States has recently held that the

stockholder, who is sued in another jurisdiction. Converse *v.* Stewart, 105 N. Y. App. Div. 478 (1905). A Minnesota receiver of an insolvent Minnesota corporation in which by statute the stockholders are liable for the debts to the amount of their stock, may maintain a suit in the courts of Massachusetts to enforce such liability against a Massachusetts stockholder, and the judgment rendered against him in a Minnesota court in accordance with a statute is conclusive, even though he was not personally heard. Converse *v.* Ayer, 84 N. E. Rep. 98 (Mass. 1908). A demurrer does not lie to a complaint alleging that the plaintiff sold goods to defendants who pretended to be officers of a pretended corporation organized in Illinois. Such a suit may be maintained, irrespective of the Illinois statute on that subject, if the proof sustains the allegations. Worthington *v.* Griesser, 77 N. Y. App. Div. 203 (1902).

[1] The Nebraska constitutional liability of stockholders in banks is enforceable only in equity in which every stockholder is made a defendant, and hence a suit does not lie in Rhode Island against a stockholder who was not made a party defendant in the suit in Nebraska. Hazlett *v.* Woodhead, 27 R. I. 506 (1906).

[2] An order of a Minnesota court assessing stockholders in a Minnesota bank on their statutory liability is not a judgment which can be enforced as such in Wisconsin. Hunt *v.* Whewell, 99 N. W. Rep. 599 (Wis. 1904).

[3] The California statutory liability applicable to stockholders in a foreign corporation doing business in California will not be enforced by the English courts as against an English stockholder in an English corporation doing business in California. Risdon, etc. Works *v.* Furness, 93 L. T. Rep. 687 (1905), the court distinguishing Pinney *v.* Nelson, 183 U. S. 144 on the ground that in the latter case a California stockholder in a Colorado corporation was sued.

[4] See § 218, *supra*. Where a citizen of Connecticut purchases stock in a Minnesota corporation, after Minnesota has passed a statute authorizing a receiver to enforce the statutory liability, and after the Minnesota courts have decided that the expense of the receivership might be enforced against the stockholders, the liability of such Connecticut stockholder may be enforced in the Connecticut courts, but not to cover the expense of enforcing such liability of other stockholders. Converse *v.* Ætna Nat. Bank, 64 Atl. Rep. 341 (Conn. 1906). Where a Minnesota court has entered judgment, in behalf of its receiver and of the creditors of an insolvent Minnesota corporation, fixing the statutory liability of a stockholder who then was a resident of Minnesota and who was personally served, such judgment will be enforced by the courts in the state of Washington. Childs *v.* Blethen, 82 Pac. Rep. 405 (Wash. 1905). A Nebraska receiver of an insolvent Nebraska bank cannot enforce in Rhode Island the statutory liability of a Rhode Island stockholder in such bank, unless the court allows such suit to be maintained. Hazlett *v.* Woodhead, 67 Atl. Rep. 736 (R. I. 1907). A receiver of a Nebraska bank may under the Nebraska law enforce in another state a stockholder's statutory liability. Goss *v.* Carter, 156 Fed. Rep. 746 (1907).

Minnesota statute authorizing a receiver appointed in that state of a Minnesota corporation to collect the stockholders' statutory liability and to maintain actions within and without the state for that purpose is constitutional, and such a suit may be maintained by him in another state.[1]

Where a suit is brought in one state on a statutory liability incurred in another state, it is a good defense that enough of the defendant's property in such latter state has been levied upon to satisfy the claim.[2]

Generally, the statute creating the liability must be pleaded and proved where the action is in another state.[3] The United States courts, however, take judicial notice of the statutes of all the states, and in those courts this part of the pleading may be omitted.[4] The courts of one state will entertain a bill of discovery filed by corporate creditors to obtain the names of stockholders in a corporation in another state, with a view to enforcing their statutory liability in the latter state.[5]

It is also a general rule that while, before suit can be brought against a stockholder, a judgment must be obtained and execution returned unsatisfied in the state where the corporation was organized, yet that such judgment and execution need not be repeated in the state where suit is brought.[6]

[1] Bernheimer *v.* Converse, 206 U. S. 516 (1907).

[2] Cushing *v.* Perot, 175 Pa. St. 66 (1896).

[3] Salt Lake, etc. Bank *v.* Hendrickson, 40 N. J. L. 52 (1878), holding that the foreign statute, when pleaded, must be set forth in substance; and an averment "pursuant to the statute" is insufficient. In a suit by an alien corporation to collect unpaid calls the statutes under which the corporation is formed may be proved by the testimony of an English solicitor who produces copies of such statutes. Nashua, etc. Bank *v.* Anglo-American, etc. Co., 189 U. S. 221 (1903).

[4] Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747 (1887); Newberry *v.* Robinson, 36 Fed. Rep. 841 (1888). In New Hampshire it is held to be necessary to set out in the pleading the remedy provided by the laws of the state creating the corporation, and the liability, and to show that this remedy can be employed in the court where suit is brought. Rice *v.* Merrimack Hosiery Co., 56 N. H. 114 (1875). As to the advantages of a suit in the federal courts, see 28 Am. L. Rev. 518.

[5] Post *v.* Toledo, etc. R. R., 144 Mass. 341 (1887). See also § 222, *supra*.

[6] Hancock, etc. Bank *v.* Farnum, 176 U. S. 640 (1900). In a suit in Massachusetts to enforce the statutory liability of a Massachusetts stockholder in a Kansas corporation, no execution need be returned unsatisfied in Massachusetts, it being proved that execution was unsatisfied in Kansas. Broadway, etc. Bank *v.* Baker, 176 Mass. 294 (1900). In the case of Dexter *v.* Edmands, 89 Fed. Rep. 467 (1898), the court enforced in Massachusetts the Kansas liability, and held that the judgment returned unsatisfied in Kansas was sufficient in

Where the stockholders in an insolvent California corporation formed an Illinois corporation and exchanged their stock for stock in the latter, in order to avoid the California subscription and statutory liability, and then transferred the property of the California corporation to the Illinois corporation, the Illinois court held them liable on the new stock to the extent that the actual value of the property was less than the par value of the stock.[1]

§ 224. *How far the judgment against the corporation is conclusive of the creditor's claim.*—In general, the judgment in these cases against the corporation is conclusive as to the amount and validity of the creditor's claim. Consequently, in most of the states, when suit is brought to enforce the stockholder's statutory liability, that judgment can be impeached by him only for fraud or want of jurisdiction.[2]

Massachusetts, and held also that the statute of limitations in Massachusetts and not the statute of limitations in Kansas applied to such a suit in Massachusetts. It is no defense that the receiver of the Kansas corporation has some assets in his hands, if execution has been returned unsatisfied in Kansas, where the corporation existed. Platt *v.* Larter, 94 Fed. Rep. 610 (1899). In McVickar *v.* Jones, 70 Fed. Rep. 754 (1895), no judgment against the corporation had been recovered in New Hampshire, the place of suit. In enforcing in the federal court in New York a stockholder's statutory liability in a Kansas corporation, the suit may be based upon a judgment against the corporation obtained in Kansas. American, etc. Co. *v.* Woodworth, 79 Fed. Rep. 951 (1897). If the execution is issued in the county of the chief place of business as required by statute, it need not be issued in other counties to enforce stockholders' liability for labor debts. Ripley *v.* Evans, 87 Mich. 217 (1891). An action in New York, to enforce the statutory liability of a stockholder in a New York corporation, does not lie where the only execution issued was in Colorado. Rocky Mountain Bank *v.* Bliss, 89 N. Y. 338 (1882); Dean *v.* Mace, 19 Hun, 391 (1879); Sumner *v.* Marcy, 3 Woodb. & M. 105; s. c., 23 Fed. Cas. 384 (1847). See also § 200, *supra*. The case of Patterson *v.* Lynde, 112 Ill. 196 (1884), holds that the judgment must be obtained in the state where enforcement is sought, and that not even a judgment in the federal circuit court for that district will suffice.

1 Sprague *v.* Nat. Bank of America, 172 Ill. 149 (1898). It appears in this case that the California stock was not paid up at the time of the transfer.

2 Thayer *v.* New England Lithog. Co., 108 Mass. 523 (1871); Borland *v.* Haven, 37 Fed. Rep. 394 (1888); Hanson *v.* Davison, 73 Minn. 454 (1898); Steffins *v.* Gurney, 61 Kan. 292 (1900); Came *v.* Brigham, 39 Me. 35 (1854); Milliken *v.* Whitehouse, 49 Me. 527 (1860); Wilson *v.* Pittsburgh, etc. Coal Co., 43 Pa. St. 424 (1862); Donworth *v.* Coolbaugh, 5 Iowa, 300 (1857); State *v.* Union, etc. Bank, 103 Iowa, 549 (1897); Oswald *v.* Minneapolis Times Co., 65 Minn. 249 (1896); Holland *v.* Duluth, etc. Co., 65 Minn. 324 (1896); Farnum *v.* Ballard Vale Machine Shop, 66 Mass. 507 (1853); Handrahan *v.* Cheshire Iron Works, 86 Mass. 396 (1862); Gaskill *v.* Dudley, 47 Mass. 546 (1843); Hampson *v.* Weare, 4 Iowa, 13 (1856); Bullock *v.* Kilgour, 39

In some jurisdictions, however, this judgment against the corporation is only *prima facie* evidence of the validity and amount

Ohio St. 543 (1883). *Cf.* Merrill *v.* Suffolk Bank, 31 Me. 57 (1849); Holyoke Bank *v.* Goodman Paper Mfg. Co., 63 Mass. 576 (1852); Bank of Australasia *v.* Nias, 16 Q. B. 717; s. c., 20 L. J. (Q. B.) 284 (1851), and § 209, *supra*. Judgment against the corporation is conclusive as regards the affairs and liability of the corporation, but not as to questions respecting the personal liability of the stockholder. *In re* Receivership, etc., 91 Minn. 494 (1904). The judgment against a corporation is conclusive. Old Colony, etc. Co. *v.* Parker, etc. Co., 183 Mass. 557 (1903). A stockholder cannot defend against the statutory liability on the ground that it is being enforced to pay a debt for which he is not liable, his liability having been fixed in a receivership litigation, even though he was not a party, the statute providing for collection by the receiver. Elson *v.* Wright, 112 N. W. Rep. 105 (Iowa 1907). Where by the decisions of a state court a statutory liability cannot be enforced until such liability has been fixed by a suit in equity adjusting all rights, the decree therein is conclusive, except for fraud or want of jurisdiction, even as against a non-resident stockholder who was not personally served. Goss *v.* Carter, 156 Fed. Rep. 746 (1907). A stockholder cannot attack the debt on the ground of fraud where the debt was incurred in the adjustment of claims, and the statute of limitations is a bar to any fraud in the settlement. Railroad Co. *v.* Smith, 48 Ohio St. 219 (1891). In Schrader *v.* Manufacturers' Nat. Bank, 133 U. S. 67 (1890), the supreme court allowed stockholders, who had been sued on their statutory liability on national bank stock, to go back of the judgment against the bank, such judgment having been rendered after the bank had gone into liquidation. A stockholder in a national bank may impeach a judgment against the bank on the ground that it was for an obligation incurred after the bank had gone into liquidation and that it was obtained by collusion, and the court intimated that the proper remedy was to file a bill in equity to enjoin collection of the assessment. Moss *v.* Whitzel, 108 Fed. Rep. 579 (1901). A judgment against the corporation may be impeached by the stockholder for fraud. Ball *v.* Warrington, 108 Fed. Rep. 472 (1901). In a suit in the United States court in Pennsylvania to enforce the Kansas statutory liability of stockholders, a stockholder may set up that the judgment against the corporation was fraudulent and collusive. Warrington *v.* Ball, 90 Fed. Rep. 464 (1898). Where a comprehensive accounting is had in the courts of the state which created the corporation and the amount of liability is determined, this is binding in a suit brought in another state to enforce a stockholder's statutory liability, but the decision of the former court as to the liability of a particular stockholder living in another state, who was not personally a party to the suit, is not binding on him in a suit brought against him to enforce his liability. Hale *v.* Hardon, 95 Fed. Rep. 747 (1899). In enforcing the statutory liability the effect of a judgment against the corporation is to be determined by the laws of the state which created the corporation. Dexter *v.* Edmands, 89 Fed. Rep. 467 (1898). Stockholders will not be allowed to intervene in a suit brought by a creditor against the corporation itself, even though they wish to set up the statute of limitations, and even though the directors had directed the company's lawyer to admit the allegations of the complaint,

of the creditor's claim.[1] And in New York judgment against the corporation and the execution returned wholly or partially unsatisfied are evidence only that the corporation cannot pay its debts. They only serve to show that the creditor has taken the necessary precedent steps to collect his claim from the corporate assets. But he cannot rely upon the judgment obtained against the corporation to establish his right to recover against the stockholder. It is not even *prima facie* evidence either of the amount or validity of his claim. Moreover the stockholder may set up any defense that

and even though the company is insolvent, and the stockholders are liable on the stock, no fraud being shown. Meyer *v.* Bristol, etc. Co., 163 Mo. 59 (1901). In enforcing a director's statutory liability in Colorado for failure to file reports, the judgment creditor of the corporation may sue on his judgment, and need not sue on his original claim. Tabor *v.* Commercial Nat. Bank, 62 Fed. Rep. 383 (1894). The complaint need not set out the original cause of action. It is sufficient if it sets out the judgment against the corporation. McVickar *v.* Jones, 70 Fed. Rep. 754 (1895). In Whitman *v.* National Bank, 83 Fed. Rep. 288 (1897), the creditor, in a suit to enforce the statutory liability of stockholders, put in evidence not only the judgment against the corporation, but proved the original cause of action against the corporation. The judgment against a corporation is conclusive as to the amount of the debt and the liability of the corporation. Ball *v.* Reese, 58 Kan. 614 (1897). *Cf.* Grund *v.* Tucker, 5 Kan. 70 (1869).

[1] A judgment is not conclusive in a suit to enforce a director's statutory liability for illegal dividends, especially if it was obtained in another state. Audenreid *v.* East, etc. Co., 68 N. J. Eq. 450 (1904). A judgment in a suit between the corporation and the president which fixes his liability, is not binding on stockholders in a suit to adjust equities among the stockholders on winding up. Gund *v.* Ballard, 73 Neb. 547 (1905). A judgment against a corporation is conclusive of the right of a creditor to have his debt satisfied out of the corporate assets. It is not conclusive against the stockholder when he had no notice of the suit nor opportunity to defend, although it is *prima facie* evidence as to the amount or validity of the debt, and he may defend on the ground that it was not a valid debt against the company. Wheatley *v.* Glover, 125 Ga. 710 (1906). The court may investigate whether the judgment of the creditor is such as to bind the stockholders in a proceeding to enforce their subscription and statutory liability. Covell *v.* Fowler, 144 Fed. Rep. 535 (1906). See also Hawes *v.* Anglo-Saxon Petroleum Co., 101 Mass. 385 (1869); Grand Rapids Sav. Bank *v.* Warren, 52 Mich. 557 (1884); Merchants' Bank *v.* Chandler, 19 Wis. 435 (1865). And see Neilson *v.* Crawford, 52 Cal. 248 (1877), passing also on the admissibility of the books of the corporation to prove its indebtedness to a creditor in an action against a stockholder. Stockholders may interpose any defense which the corporation might interpose. Zang *v.* Wyant, 25 Colo. 551 (1898). A stockholder when sued may attack the judgment on the ground that it was taken by default by collusion. Town of Hinckley *v.* Kettle River R. R., 80 Minn. 32 (1900). Stockholders sued on their liability may show that the judgment was obtained by default and that a valid defense exists to the original

the corporation might have set up.[1] This means that the corporate creditor is obliged to prove his cause of action over again, and repeat what he has already proved in his action against the corporation. Such, also, seems to be the rule in Illinois.[2] In New York a stockholder may attack the validity of a corporate note, even in

claim. Irons *v.* Manufacturers' Nat. Bank, 36 Fed. Rep. 843 (1888); aff'd, 133 U. S. 67.

1 Moss *v.* McCullough, 5 Hill, 131 (1843). [This case was reversed upon another point in McCullough *v.* Moss, 5 Denio, 567 (1846).] McMahon *v.* Macy, 51 N. Y. 155 (1872); Miller *v.* White, 50 N. Y. 137 (1872); Chase *v.* Curtis, 113 U. S. 452 (1884); Esmond *v.* Bullard, 16 Hun, 65 (1878); aff'd, 79 N. Y. 404; Conant *v.* Van Schaick, 24 Barb. 87 (1857); Truesdell *v.* Chumar, 75 Hun, 416 (1894). But see Slee *v.* Bloom, 20 Johns. 669 (1822); Belmont *v.* Coleman, 21 N. Y. 96 (1860); Hastings *v.* Drew, 76 N. Y. 9 (1879); Lawyer *v.* Rosebrook, 48 Hun, 453 (1888); Moss *v.* Oakley, 2 Hill, 265 (1842); Berridge *v.* Abernethy, 24 N. Y. Week. Dig. 513 (1886). *Cf.* § 209, *supra;* also Stephens *v.* Fox, 83 N. Y. 313 (1881), in which the ground is taken that the judgment in these cases is *prima facie* evidence or more, without, however, overruling the earlier cases. See also Whitney Arms Co. *v.* Barlow, 63 N. Y. 62 (1875). Practically the corporate creditor must bring his action anew against the stockholder upon his original demand. Bailey *v.* Bancker, 3 Hill, 188 (1842); Kincaid *v.* Dwinelle, 59 N. Y. 548 (1875); Moss *v.* Averell, 10 N. Y. 449 (1853); Witherhead *v.* Allen, 4 Abb. App. Dec. 628 (1867). This judgment against the corporation is admissible only as evidence that the condition precedent to his right to recover from the stockholder has been complied with. Wheeler *v.* Miller, 24 Hun, 541 (1881); aff'd, 90 N. Y. 353 (1882). But *cf.* Tyng *v.* Clarke, 9 Hun, 269 (1876). The judgment may avail, however, in these cases to prevent the statute of limitations from barring the action. Van Cott *v.* Van Brunt, 2 Abb. N. Cas. 283, 297 (1877); reversed on other points, 82 N. Y. 535 (1880). A decree of a Minnesota court making a statutory assessment on stockholders, the amount being based on the assumption that some of the stockholders were insolvent, and the amount, including debts, general expenses, and cost of collection, is not conclusive on a non-resident stockholder who is sued in another jurisdiction. Converse *v.* Stewart, 105 N. Y. App. Div. 478 (1905).

2 Chestnut *v.* Pennell, 92 Ill. 55 (1879), passing also on the effect of recitals in a decree against the corporation. In Quick *v.* Lemon, 105 Ill. 578 (1883), where the corporation had not pleaded a counter-claim against a creditor in a suit at law, a stockholder was permitted to file a cross-bill in a chancery suit brought by judgment creditors against the corporation and certain stockholders. Evidence competent and sufficient to establish a liability as against the corporation is sufficient as against the stockholder. McGowan *v.* McDonald, 111 Cal. 57 (1896). In Trippe *v.* Huncheon, 82 Ind. 307 (1882), a complaint founded on the judgment was held bad on demurrer because the liability of the stockholder was looked upon as being upon the original debt and not upon the judgment. See also Southmayd *v.* Russ, 3 Conn. 52 (1819), where, for the same reason, a proceeding by *scire facias* was not allowed to be maintained. See also Bissit *v.* Kentucky River Nav. Co., 15 Fed. Rep. 353 (1882), and the annotation; Union Bank *v.* Wando Min. etc. Co., 17 S. C. 339 (1881).

bona fide hands, in a suit brought to enforce the statutory liability.[1] The supreme court of the United States has recently decided that a New Hampshire stockholder in a Kansas corporation may defend against a statutory liability on the stock on the ground that the plaintiff's claim against the corporation is an *ultra vires* guarantee, even though the state court may have decided such guarantee to be valid.[2] A judgment obtained in England against an American stockholder in an English corporation for an unpaid call, the stockholder not having been served in England, is not enforcible in the United States.[3] Where the stockholders have not authorized the issue of bonds as required by statute, the statutory liability of the stockholders cannot be enforced to pay such bonds.[4]

In any jurisdiction where the stockholders are, by statute, made liable for only a certain class of the corporate indebtedness, it is plain that they cannot be charged upon a judgment recovered against the corporation, unless it be shown that the claim in controversy comes within the class upon which they are liable.[5]

§ 225. *Stockholder's miscellaneous defenses against his statutory liability.*—There are two classes of defenses that may occur to a stockholder to defeat his statutory liability. One class is of defenses

1 Close *v.* Potter, 155 N. Y. 145 (1898).

2 Ward *v.* Joslin, 186 U. S. 142 (1902), aff'g 100 Fed. Rep. 676. A judgment rendered against a corporation in the state where it is organized, even though taken by default, cannot be impeached except for fraud or want of jurisdiction, and the stockholder cannot set up the defense that the debt was really the debt of another corporation. Am. Nat. Bank *v.* Supplee, 115 Fed. Rep. 657 (1902). The stockholder may set up that the plaintiff's claim grew out of business transacted by the corporation after it had been put into liquidation by the court. Richmond *v.* Irons, 121 U. S. 27 (1887).

3 Bank of China *v.* Morse, 168 N. Y. 458 (1901). A judgment obtained in England by the liquidators of an English corporation against a New York subscriber to the stock, no personal service having been made upon such subscriber, is not enforcible as a judgment in New York, although such judgment may be legal in England under the statutes in force at the time the subscription was made. Anderson *v.* Haddon, 33 Hun, 435 (1884).

4 Boyd *v.* Heron, 125 Cal. 453 (1899).

5 Bohn *v.* Brown, 33 Mich. 257 (1876); Wilson *v.* Pittsburgh, etc. Coal Co., 43 Pa. St. 424 (1862); Conant *v.* Van Schaick, 24 Barb. 87 (1857). *Cf.* Larrabee *v.* Baldwin, 35 Cal. 155 (1868); Farnsworth *v.* Wood, 91 N. Y. 308 (1883). Where stockholders are liable for corporate debts existing on a certain date, the existence of a corporate creditor's debt on that date may be found by evidence other than his judgment against the corporation. Congdon *v.* Winsor, 17 R. I. 236 (1891). A statutory liability of directors for debts of the corporation does not render them liable on an accommodation indorsement by the corporation—the indorsement being non-enforceable. National Park Bank *v.* Remsen, 43 Fed.

that the corporation itself might have set up, or did set up, against the plaintiff when he sought to collect his debt from the corporation. As already explained herein, in some jurisdictions particularly New York, the stockholder may set up these defenses, although the corporation has failed to establish them. In other and most jurisdictions he cannot.

A second class of defenses includes those which are personal to the particular stockholder, and not such as the corporation might have set up. They are largely such defenses as the stockholder might set up against the corporation to defeat his subscription. They do not refer to the validity of the creditor's debt, but they deny that that particular defendant is one of those who are liable for the corporate debts. There are, in addition to the defenses specified in a previous chapter,[1] several defenses which are peculiar to this statutory liability.

(*a*) *Release, extension, and renewal.*—A release by the corporate creditor of one stockholder from his proportion of the corporate indebtedness will not operate to release the other stockholders.[2] Thus, where the stockholders are held to be severally and not jointly liable under the statute, one may be released without releasing the others.[3] Even though a reorganization under a statute which releases the stockholders from a part of their liability may be of doubtful legality, yet creditors who accept the benefits thereof cannot afterwards complain.[4] Although a corporation goes through bankruptcy and is discharged, this does not release stockholders from their statutory liability.[5] Whether an extension of time by renewal of note or otherwise, given to the corporation by a creditor, will not discharge a stockholder as to his liability by statute seems uncertain.[6] In

Rep. 226 (1890); aff'd, 158 U. S. 337. Where those stockholders are liable who were such when the debt was incurred, a note given for an old debt cannot be the basis of liability. Winona Wagon Co. *v.* Bull, 108 Cal. 1 (1895).

1 Ch. X, *supra*.

2 Herries *v.* Platt, 21 Hun, 132 (1880). See also Prince *v.* Lynch, 38 Cal. 528 (1869), holding that the other stockholders liable only proportionately are released only proportionately. It has been held that a release by the creditor to the corporation, under a statute requiring such release, in order to share in the assets, does not release a constitutional liability of stockholders. Willis *v.* Mabon, 48 Minn. 140 (1892). The assumption of the corporate debt by a third party may be rescinded. Borland *v.* Haven, 37 Fed. Rep. 394 (1888). A release by a creditor to the corporation does not necessarily cancel the statutory liability of a director. Old Colony, etc. Co. *v.* Parker, etc. Co., 183 Mass. 557 (1903).

3 Bank of Poughkeepsie *v.* Ibbotson, 5 Hill, 461 (1843). *Cf.* Herries *v.* Platt, 21 Hun, 132 (1880).

4 Hunt *v.* Roosen, 87 Minn. 68 (1902).

5 Elsbree *v.* Burt, 24 R. I. 322 (1902).

6 In Harger *v.* McCullough, 2 Denio,

New York a renewal note does not stop the prior running of the statute of limitations; and this is the rule where the facts are prac-

119 (1846), it was held that it would not; while in the later case of Parrott *v.* Colby, 6 Hun, 55 (1875); s. c. aff'd, 71 N. Y. 597 (1877), without expressly overruling Harger *v.* McCullough, it is plainly declared, in making an application of the short statute of limitations provided by the General Manufacturing Act of New York (N. Y. Laws, 1848, ch. 40, § 24), that the liability of stockholders in these cases cannot be revived or extended by any renewal or extension of the indebtedness which the creditors may make with the corporation. See also Jagger Iron Co. *v.* Walker, 76 N. Y. 521 (1879); Hardman *v.* Sage, 124 N. Y. 25 (1891); Stilphen *v.* Ware, 45 Cal. 110 (1872); Jones *v.* Barlow, 62 N. Y. 202 (1875); Bolen *v.* Crosby, 49 N. Y. 183 (1872). In Aultman's Appeal, 98 Pa. St. 505 (1881), it was held that, where the extension was granted at the request of the directors, the stockholders had assented, and there was no release. A release of the corporation under an insolvency statute was held to be a release of the stockholder's statutory liability in Mohr *v.* Minnesota Elev. Co., 40 Minn. 343 (1889). But under a later statute the contrary was held. Willis *v.* Mabon, 48 Minn. 140 (1892). In Hanson *v.* Donkersley, 37 Mich. 184 (1877), it was held that the Michigan statute does not make stockholders primarily liable, and that the individual liability for corporate debts is discharged by an extension of time and the acceptance of a corporate note. A laborer's statutory right to collect from the stockholders is not waived by taking the corporate note. Jackson *v.* Meek, 87 Tenn. 69 (1888). A partial payment of a creditor's claim by the corporation does not release the directors from their statutory liability. Fairbanks, etc. Co. *v.* Macleod, 8 Colo. App. 190 (1896). A new note for an old debt does not affect an officer's statutory liability for the old debt, unless, of course, the note is paid. Novelty Mfg. Co. *v.* Connell, 88 Hun, 254 (1895). An extension of a note does not release a director from his statutory liability in New York. It merely delays his remedy. Providence Steam, etc. Co. *v.* Connell, 86 Hun, 319 (1895). The fact that a new note is given for a debt does not affect the statutory liability of a stockholder therefor under the Kentucky statutes. Hyatt *v.* Anderson's Trustee, 74 S. W. Rep. 1094 (Ky. 1903). An extension of the time of payment by a creditor does not necessarily stop the running of the statute of limitations as against the stockholder's liability. Brigham *v.* Nathan, 62 Kan. 243 (1900). A renewal of a note does not extend the duration of the liability of officers under the Arkansas statute. Continental, etc. Bank *v.* Buford, 107 Fed. Rep. 188 (1901). The statutory liability of the president of a corporation in Arkansas for not making any report commences on the maturity of the note and is not extended by a renewal of the note. Continental Nat. Bank *v.* Buford, 114 Fed. Rep. 290 (1902). The liability in California of stockholders by statute for corporate debts begins when the debt is contracted, and cannot be extended by the corporation so as to extend this stockholder's liability. Redington *v.* Cornwell, 90 Cal. 49 (1891). The stockholder's liability under the California statute being a liability as a principal debtor, the statute of limitations begins to run as soon as the creditor's right of action against the corporation commences. An extension of the time as to the corporation by renewal notes does not stop the statute of limitations as regards the

tically a renewal, even though by a device the new notes run to another person for the secret benefit of the old holder.[1] A stockholder may defend against a statutory liability on the ground that the debt has been taken over by a trust company by the manager of the latter and that his acts have not been repudiated.[2]

(*b*) *Liability already paid.*—It is a defense to the stockholder to prove that his full statutory liability has already been paid by him. A stockholder who has voluntarily paid corporate debts to the full extent of his corporate liability is entitled to set up that fact. And when such a payment was *bona fide* it is a bar to an action to collect any further amount.[3]

stockholder's liability. Hyman *v.* Coleman, 82 Cal. 650 (1890). The seven-years statute of limitations in California applies to a claim on notes from the date of the original notes and not from the date of renewals. Goodall *v.* Jack, 127 Cal. 258 (1899). The California statute of limitations against a stockholder's liability begins to run when the debt is contracted and is not extended by the giving of a corporate note subsequently. O'Neill *v.* Quarnstrom, 92 Pac. Rep. 391 (Cal. 1907). As to renewal notes affecting a transferrer's liability, see also §§ 225 (*f*), 259, *infra*.

[1] Close *v.* Potter, 155 N. Y. 145 (1898). The extension of a debt by taking a note does not delay the application of the statute of limitations so far as a stockholder's liability is concerned. Hardman *v.* Sage, 124 N. Y. 25 (1890); Blake *v.* Clausen, 10 N. Y. App. Div. 223 (1896); aff'd, 158 N. Y. 727.

[2] First Nat. Bank *v.* Littlefield, 67 Atl. Rep. 594 (R. I. 1907).

[3] Quoted and approved in Hood *v.* French, 37 Fla. 117 (1896); Garrison *v.* Howe, 17 N. Y. 458 (1858); Mathez *v.* Neidig, 72 N. Y. 100 (1878); Lane *v.* Harris, 16 Ga. 217 (1854); Belcher *v.* Willcox, 40 Ga. 391 (1869); Robinson *v.* Bank of Darien, 18 Ga. 65, 109 (1855); Woodruff, etc. Iron Works *v.* Chittenden, 4 Bosw. (N. Y.) 406 (1859); Boyd *v.* Hall, 56 Ga. 563 (1876); San José Sav. Bank *v.* Pharis, 58 Cal. 380 (1881). *Cf.* Thebus *v.* Smiley, 110 Ill. 316 (1884), where fraud was involved. As to national banks, see Delano *v.* Butler, 118 U. S. 634 (1886). *Contra*, Fowler *v.* Robinson, 31 Me. 189 (1850); Grose *v.* Hilt, 36 Me. 22 (1853). But when a creditor has actually commenced a suit to enforce the statutory liability of any individual stockholder, it is then too late for that stockholder to defeat the action by paying some other corporate creditor's claim. Jones *v.* Wiltberger, 42 Ga. 575 (1871). See also Lane *v.* Harris, 16 Ga. 217 (1854); Thebus *v.* Smiley, 110 Ill. 316 (1884); Thompson *v.* Meisser, 108 Ill. 359 (1884). A contrary conclusion was reached in Richards *v.* Brice, 3 N. Y. Supp. 941 (Com. Pl. 1889) (see also Chicago *v.* Hall, 103 Ill. 342—1882; State Sav. Assoc. *v.* Kellogg, 63 Mo. 540—1876; Manville *v.* Roever, 11 Mo. App. 317—1881); but the plain injustice of allowing the stockholder to defeat an action by such a device will not commend such a conclusion. A stockholder who employs an agent to buy up claims at a discount and then confesses judgment in favor of that agent will not be permitted to plead such a judgment in bar of an action by other creditors. Manville *v.* Karst, 16 Fed. Rep. 173 (1883). A mortgage by an insolvent stockholder in an insolvent corporation to one

(*c*) *Set-off.*—Closely related to the defense of payment already made is the defense that the defendant stockholder has claims against

of the corporate creditors is a preference to the extent of the stockholder's liability for corporate debts. Gatch *v.* Fitch, 34 Fed. Rep. 566 (1888). Ingalls *v.* Cole, 47 Me. 530, 541 (1860), holds that the mere pendency of suits is not a defense for a stockholder in a later action, unless the prior claims have been legally established and his liability exhausted. A stockholder who has paid his statutory liability is not subrogated to the claims so paid and hence cannot participate in any dividends from the corporate assets. Sacramento Bank *v.* Pacific Bank, 124 Cal. 147 (1899). Even though a corporate creditor has realized a part of his debt under the stockholder's statutory liability, yet he may participate in the assets of the corporation as though no part of his debt had been paid. Sacramento Bank *v.* Pacific Bank, 124 Cal. 147 (1899). Even a *bona fide* purchaser of what purports to be full-paid stock in a corporation is liable on the double liability attached to the stock, under the New York statute, where the stock was issued for property taken at an overvaluation and no certificate of payment has been filed, as required by the statute. If, however, after the issue of the stock further sums of money were paid in by the stockholders equal to the difference between the par value of the stock and the value of the property, the liability ceases as to subsequent creditors. White, Corbin & Co. *v.* Jones, 167 N. Y. 158 (1901). If the stockholders of an insolvent bank voluntarily pay in to the assignees of the bank, for the benefit of its creditors, the amounts of their statutory liability, their liability is thereby discharged. Killen *v.* Barnes, 106 Wis. 546 (1900). Before he is actually brought into the suit a stockholder may discharge his liability by paying a creditor to the amount of his liability. Munson *v.* Warren, 63 Kan. 162 (1901). A stockholder may discharge his liability by paying one of the debts to an amount equal to his liability. Sedgwick City Bank *v.* Sedgwick Milling, etc. Co., 59 Kan. 654 (1898). A *bona fide* payment by a stockholder to a corporate creditor of an amount equal to his statutory liability is a defense to such liability, the payment having been made in good faith before process was served upon him. Campbell *v.* Reese, 8 Kan. App. 518 (1899). This is the rule even though payment was made by turning over property. Kendall *v.* Underhill, 8 Kan. App. 521 (1899). The defendant is entitled to credit for the amount of corporate debts voluntarily paid by him in good faith or paid by him on execution. Musgrave *v.* Glen Elder, etc. Assoc., 5 Kan. App. 393 (1897). As against the statutory liability the stockholder may set up that he has paid a note for which the company was liable and ask to have it deducted. Sargent *v.* Stetson, 181 Mass. 371 (1902). Even though the president has personally given security for a loan to a corporation the lender may obtain a judgment against the corporation, and even though by agreement the security is sold and the money deposited as security for the judgment, this does not constitute payment so far as the statutory liability of stockholders is concerned. Lancaster *v.* Knight, 74 App. Div. 255 (1902). A stockholder may discharge his liability by payment to the receiver. Strauss *v.* Denny, 95 Md. 690 (1902), holding also that payment as an indorser of the company's note is a good defense. Claims purchased by stockholders should be allowed to participate ratably in the proceeds collected on a statutory liability, but

the corporation, and that he is to be credited to that amount as a set-off.

It has been held that, where the statute creates a fund out of which the creditors are to be paid ratably, then the stockholder cannot set off an indebtedness of the corporation to him. He must pay in what the statute requires, and then prove his claim against the corporation like any other creditor.[1] But where the stockholder's liability by statute is immediate and personal and several, and any creditor may sue any stockholder, then the stockholder may set off a debt, owing to him from the corporation, when he is sued by a corporate creditor.[2] In a suit at law in the United States

not where the affairs of the corporation were fraudulently conducted. Covington, etc. Co. *v.* Rosedale, etc., 76 S. W. Rep. 506 (Ky. 1903).

1 Quoted and approved in Cahill *v.* Original, etc. Assoc., 94 Md. 353 (1902); *Re* Empire City Bank, 18 N. Y. 199, 227 (1858); Matthews *v.* Albert, 24 Md. 527 (1866); Briggs *v.* Cornwell, 9 Daly (N. Y.), 436 (1881); Hobart *v.* Gould, 8 Fed. Rep. 57 (1881); Hillier *v.* Allegheny Mut. Ins. Co., 3 Pa. St. 470 (1846); Lawrence *v.* Nelson, 21 N. Y. 158 (1860); Thebus *v.* Smiley, 110 Ill. 316 (1884); Witters *v.* Sowles, 32 Fed. Rep. 130 (1887); Ball Elect. Light Co. *v.* Child, 68 Conn. 522 (1897); Burget *v.* Robinson, 113 Fed. Rep. 669 (1902); Hale *v.* Calder, 113 Fed. Rep. 670 (1902); Parker *v.* Carolina Sav. Bank, 53 S. C. 583 (1898). No set-off is allowed against the statutory liability where such liability is enforced by an action at law. Lauraglenn Mills *v.* Ruff, 57 S. C. 53 (1900). See also Clapp *v.* Wright, 21 Hun, 240 (1880); Buchanan *v.* Meisser, 105 Ill. 638 (1883). A holder of stock in a national bank is not entitled to offset against an assessment ordered by the comptroller upon his stock the amount of his deposits at the time the bank became insolvent. Wingate *v.* Orchard, 75 Fed. Rep. 241 (1896); First Nat. Bank *v.* Riggins, 124 N. C. 534 (1899). Set-off is not allowed in a suit by a receiver under the Minnesota statute, where it would result in giving a preference contrary to the purpose of the statute. Robinson *v.* Brown, 126 Fed. Rep. 429 (1903).

2 Quoted and approved in Fidelity, etc. Co. *v.* Mechanics' Sav. Bank, 97 Fed. Rep. 297 (1899); Mathez *v.* Neidig, 72 N. Y. 100 (1878); Agate *v.* Sands, 73 N. Y. 620 (1878); Christensen *v.* Colby, 43 Hun, 362 (1887); Tallmadge *v.* Fishkill Iron Co., 4 Barb. 382 (1848); Boyd *v.* Hall, 56 Ga. 563 (1876); Hood *v.* French, 37 Fla. 117 (1896); Remington *v.* King, 11 Abb. Pr. 278 (1858); Pierce *v.* Topeka, etc. Co., 60 Kan. 164 (1899); Kendall *v.* Underhill, 8 Kan. App. 521 (1899). Where the stockholder offsets a debt due from him to the corporation he may be compelled to assign to the judgment creditor who has brought suit against him the debt so offset against the statutory liability. Van Pelt *v.* Strickland, 60 Kan. 584 (1899). A stockholder may offset a debt due to him from the corporation, and may also show that the plaintiff has collected his claim in whole or in part from other stockholders. Ball *v.* Anderson, 196 Pa. St. 86 (1900). Where the supreme court of the state in which the company is incorporated holds that a stockholder may set off against his statutory liability a debt due to him from the corporation, the courts of other states will follow this decision

court to enforce the statutory liability of New York stockholders in a Kansas corporation, an equitable set-off is not allowed under the practice of that court.[1] A stockholder sued on his statutory liability cannot offset judgments which he has purchased against the corporation, except to the extent of the amount that he paid for them.[2]

in enforcing a statutory liability arising in that state. Fidelity, etc. Co. *v.* Mechanics' Sav. Bank, 97 Fed. Rep. 297 (1899). "The courts of New York, Pennsylvania, Georgia, Missouri, Florida and Kansas hold the doctrine that the stockholder is entitled to the equitable set-off, while, on the other hand, the courts of Virginia, West Virginia, Illinois and some other states assert the very opposite doctrine." Cahill *v.* Original, etc. Assoc., 94 Md. 353 (1902), allowing set-off. *Cf.* Wheeler *v.* Millar, 90 N. Y. 353, 362 (1882). Where a stockholder is liable by statute and is also a creditor of the insolvent corporation, the court will order a set-off. Sowles *v.* Witters, 40 Fed. Rep. 413 (1889). *Cf.* s. c., 39 Fed. Rep. 403. See also Boulton Carbon Co. *v.* Mills, 78 Iowa, 460 (1889), and a criticism on this case in § 193, n., *supra*. The defendant may set off a corporate indebtedness due to himself. Musgrave *v.* Glen Elder, etc. Assoc., 5 Kan. App. 393 (1897).

1 Platt *v.* Larter, 94 Fed. Rep. 610 (1899). In the United States court a set-off in equity cannot be made a defense to a legal action. Crissey *v.* Morrill, 125 Fed. Rep. 878 (1903). A stockholder cannot as against a suit at law in the federal court set off a debt from the corporation to him. Anglo-American, etc. Co. *v.* Lombard, 132 Fed. Rep. 721 (1904). A stockholder's claim against the corporation should not be set up as a counter-claim, but should be filed in response to the notice to file claims. A guaranty for the corporation which has been liquidated by the stockholder giving his own note is not a good claim against the corporation on his part, unless he has paid such note. Helm *v.* Smith-Fee Co., 76 Minn. 328 (1899).

2 A stockholder cannot himself buy in claims at a discount, and then set them off at their face value in an action to enforce his statutory liability to creditors. Gauch *v.* Harrison, 12 Ill. App. 457 (1883). See also Thompson *v.* Meisser, 108 Ill. 359 (1884); Diven *v.* Phelps, 34 Barb. 224 (1861). Set-off by a purchased judgment was allowed in American, etc. Co. *v.* Brower, 32 S. Rep. 906 (Miss. 1902). A stockholder can defeat his statutory liability by offsetting judgments against the corporation, purchased by himself, but only to the extent that he paid for the judgments. Lingle *v.* National Ins. Co., 45 Mo. 109 (1869); Holland *v.* Heyman, 60 Ga. 174 (1878). Payment of judgments at a discount is no exhaustion of the liability, though the judgments at full value would have exhausted it. Kunkelman *v.* Rentchler, 15 Ill. App. 271 (1884). The stockholder cannot purchase claims against the corporation at a discount and set them off, but can set them off for the amount paid by him for them, even though they are purchased in an agent's name. Abbey *v.* Long, 44 Kan. 688 (1890). A stockholder who is also a director and is sued on his statutory liability as a stockholder cannot set off a judgment against the insolvent company, which judgment he purchased for a nominal sum. Bulkley *v.* Whitcomb, 121 N. Y. 107 (1890). The stockholder's right to set off his claim against the corporation in defense to an action against him to enforce his statutory liability may sometimes be a matter of *bona fides*. Boyd *v.* Hall, 56 Ga. 563 (1876); Belcher *v.* Wilcox, 40

(*d*) *Interest.*—A stockholder is not liable for interest on the amount for which the statute makes him answerable, and when he pays the par of his liability the whole liability is discharged;[1] but where he contests the liability and suit is brought, interest on the amount of his liability is collectible from the time the suit to enforce is commenced.[2]

Ga. 391 (1869); Thompson *v.* Meisser, 108 Ill. 359 (1884); Buchanan *v.* Meisser, 105 Ill. 638 (1883); Welles *v.* Stout, 38 Fed. Rep. 807 (1889). A stockholder may set off obligations of the corporation which he purchased before it became insolvent, but not after it became insolvent. Broadway, etc. Bank *v.* Baker, 176 Mass. 294 (1900). A set-off is good only in case a stockholder owned the set-off at the time of the commencement of the suit. In case the stockholder purchased a claim after the insolvency of the corporation he may set off only the amount he paid for the claim. Brown *v.* Traill, 89 Fed. Rep. 641 (1898). While an ordinary corporate debtor may offset claims against the corporation which he has purchased, yet officers, stockholders, or persons occupying a trust relationship cannot do so. Nix *v.* Ellis, 118 Ga. 345 (1903). For cases where the stockholder brings action as a corporate creditor, see §§ 193, 198, 218, *supra*.

[1] Munger *v.* Jacobson, 99 Ill. 349 (1881); Sackett's Harbor Bank *v.* Blake, 3 Rich. Eq. (S. C.) 225 (1849); Cole *v.* Butler, 43 Me. 401 (1857). There can be no interest in addition to the full liability where the statute does not speak of interest. Adams *v.* Clark, 36 Colo. 65 (1906). See Grand Rapids Sav. Bank *v.* Warren, 52 Mich. 557 (1884); Cleveland *v.* Burnham, 64 Wis. 347 (1885); Mathis *v.* Pridham, 1 Tex. Civ. App. 58 (1892). Interest on the judgment against the corporation may be recovered from the stockholders. Whitman *v.* Citizens' Bank, 110 Fed. Rep. 503 (1901). Interest on the debt may be recovered. Zang *v.* Wyant, 25 Colo. 551 (1898). Interest on the corporate debts should be included in an assessment against the stockholders. Cumberland, etc. Co. *v.* Clinton Hill, etc. Co., 64 N. J. Eq. 521 (1903).

[2] Handy *v.* Draper, 89 N. Y. 334 (1882); Burr *v.* Wilcox, 22 N. Y. 551 (1860). To same effect, Mason *v.* Alexander, 44 Ohio St. 318 (1886). *Cf.* Casey *v.* Galli, 94 U. S. 673 (1876); Richmond *v.* Irons, 121 U. S. 27 (1887). Where a referee computed the interest on the plaintiff's claim from the date on which it became due from the company instead of from the day the suit against the stockholder was commenced, it appearing that the indebtedness was less than the amount of the stockholder's liability, and that the allowance of interest did not swell it beyond that limit, the court of appeals held such a computation no error. Wheeler *v.* Millar, 90 N. Y. 353, 362 (1882). Interest on the judgment is allowed in a suit to enforce a stockholder's liability. Shickle *v.* Watts, 94 Mo. 410 (1888). Interest may be recovered from the date of the filing of the suit. Wheatley *v.* Glover, 125 Ga. 710 (1906). Interest is allowed from the day when the referee ascertains and reports the debts of the corporation. National Com. Bank *v.* McDonnell, 92 Ala. 387 (1891). Interest on a stockholder's liability will be allowed from the commencement of the action. Pine *v.* Western, etc. Bank, 63 Kan. 462 (1901). Interest should be allowed from the date of the commencement of suit against the stockholder. Senn *v.* Levy, 111 Ky. 318 (1901). Interest is allowed on the stockholder's liability from the time that judgment is rendered

(*e*) *Costs.*—Where it is a condition precedent to the action against the stockholder that a judgment be recovered against the corporation, it would seem proper that the stockholder's statutory liability should apply to the entire judgment, including the costs of obtaining that judgment, provided, of course, the limit of his liability is not passed. There are decisions to the effect that a judgment against the stockholder does not include any part of the costs of the proceeding against the corporation,[1] but the weight of authority and argument is to the contrary.[2]

(*f*) *Statute of limitations.*—Where the liability of the stockholder is immediate and primary, and not contingent on the ob-

against him. Palmer *v.* Bank, etc., 72 Minn. 266 (1898). Interest is not allowed on the par value of the stock. Mahoney *v.* Bernhard, 45 N. Y. App. Div. 499 (1899); aff'd, 169 N. Y. 589. The statutory liability on national bank stock bears interest from the date of the assessment by the comptroller. Davis' Estate *v.* Watkins, 56 Neb. 288 (1898).

1 Bailey *v.* Bancker, 3 Hill, 188 (1842); Richmond *v.* Irons, 121 U. S. 27 (1887); Rorke *v.* Thomas, 56 N. Y. 559, 565 (1874); Miller *v.* White, 50 N. Y. 137 (1872). *Cf.* Veeder *v.* Mudgett, 27 Hun, 519 (1882); aff'd, 91 N. Y. 374.

2 Grand Rapids Sav. Bank *v.* Warren, 52 Mich. 557 (1884), a case where the judgment is held to be conclusive as against the stockholder. A judgment for costs against a corporation may be enforced against the director's statutory liability. Allen *v.* Clark, 108 N. Y. 269 (1888). Costs may be collected against stockholders in suits to enforce this liability. Irons *v.* Manufacturers' Nat. Bank, 36 Fed. Rep. 843 (1888); aff'd, 133 U. S. 67, holding that a creditor enforcing the stockholders' liability in behalf of himself and other creditors may have his costs. The receiver's expenses may also be recovered, except that the statutory liability shall not be exceeded. Harper *v.* Carroll, 66 Minn. 487 (1896). Where the creditor sues the corporation first without being obliged so to do, and then sues the director on his statutory liability, the director cannot be held for the costs included in the judgment against the corporation, the suit against the corporation being unnecessary. Green *v.* Easton, 74 Hun, 329 (1893). The attorney of a creditor who intervenes in order to enforce a stockholder's liability and then settles is not entitled to payment of his fees out of the funds in the hands of the receiver. Dwinell *v.* Badger, 74 Minn. 405 (1898). A creditor who prosecutes a suit to enforce the liability is entitled to reimbursement for his reasonable expenses out of the sum realized. Helm *v.* Smith-Fee Co., 79 Minn. 297 (1900). The costs of the judgment against the corporation may be included in the amount collected from the directors for failure to file a report as required by statute, the statute making them liable for all debts. Matty *v.* Sampson, 64 N. Y. App. Div. 1 (1901). Where a citizen of Connecticut purchases stock in a Minnesota corporation, after Minnesota has passed a statute authorizing a receiver to enforce the statutory liability, and after the Minnesota courts have decided that the expense of the receivership might be enforced against the stockholders, the liability of such Connecticut stockholder may be enforced in the Connecticut courts, but not to cover the expense of enforcing such liability of other stockholders. Converse *v.* Ætna Nat. Bank, 64 Atl. Rep. 341 (Conn. 1906).

taining of a judgment against the corporation, it is clear that the statute of limitations begins to run in favor of the stockholder when the debt matures against the corporation.[1]

1 Quoted and approved in Boyd *v.* Mutual Fire Assoc., 116 Wis. 155 (1902); Davidson *v.* Rankin, 34 Cal. 503 (1868); Lindsay *v.* Hyatt, 4 Edw. Ch. (N. Y.), 97 (1842); Godfrey *v.* Terry, 97 U. S. 171 (1877); Conklin *v.* Furman, 57 Barb. 484 (1865); Schalucky *v.* Field, 124 Ill. 617 (1888). Compare Carrol *v.* Green, 92 U. S. 509 (1875); Terry *v.* Tubman, 92 U. S. 156 (1875); Terry *v.* McLure, 103 U. S. 442 (1880); Corning *v.* McCullough, 1 N. Y. 47 (1847); Jagger Iron Co. *v.* Walker, 76 N. Y. 521 (1879). See also Terry *v.* Calnan 13 S. C. 220 (1879); Lawler *v.* Burt, 7 Ohio St. 340 (1857); King *v.* Duncan, 38 Hun, 461 (1886); Stilphen *v.* Ware, 45 Cal. 110 (1872), holding that, under the California statute of limitations, the three years begin to run from the time the debt was due, and is not extended by a judgment obtained against the corporation. The statute of limitations begins to run against a bank stockholder's statutory liability from the closing of the doors of the bank. It begins to run against the corporation and stockholders at the same time. Mitchell *v.* Beckman, 64 Cal. 117 (1883). Where the statute of limitations runs from the creation of the liability, it commences when a note is given and not when it becomes due. Hunt *v.* Ward, 99 Cal. 612 (1893). Where the suit against the stockholders must be brought within three years after the liability is created, the date of a note governs. Bank of San Luis Obispo *v.* Pacific, etc. Co., 103 Cal. 594 (1894). The statute of limitations begins to run from the date of the payment by a surety for a corporate debt and not from the date of the original obligation. Ryland *v.* Commercial, etc. Bank, 127 Cal. 525 (1900). The statute of limitations begins to run against a stockholder's statutory liability on a bank account from the time when the deposit is made. Jones *v.* Goldtree Bros. Co., 142 Cal. 383 (1904). The statutory liability of stockholders in an insolvent bank accrues upon such insolvency, and must be enforced within six years thereafter. Bennett *v.* Thorne, 36 Wash. 253 (1904). A proceeding by execution against a stockholder on motion is a civil action to which the statute of limitations applies. Crissey *v.* Morrill, 125 Fed. Rep. 878 (1903). The state statute of limitations as to executors and estates will be applied by the federal courts to suits by a receiver for the enforcement of a stockholder's liability in a national bank. Butler *v.* Poole, 44 Fed. Rep. 586 (1890). The stockholder's statutory liability dates from and is based upon the original debt created by the corporation and not from or upon the judgment against the corporation. Newberry *v.* Robinson, 41 Fed. Rep. 458 (1890). The statute of limitations begins to run under the Kansas statute a year after the company suspends business. First, etc. Bank *v.* King, 60 Kan. 733 (1899). Where a stockholder's statutory liability is practically that of a surety, the statute of limitations begins to run in behalf of the stockholders when it begins to run in behalf of the corporation. Pacific, etc. Co. *v.* Whitbeck, 63 Kan. 102 (1901). A statutory liability of directors for debts in excess of a certain amount attaches when such a debt is incurred, and the statute of limitations then begins to run. Such liability exists although the creditor knew that his debt was in excess of the statutory limit. Swan *v.* Burnham, 70 N. H. 580 (1901). An action based on the notes is not on

But when the creditor must first obtain a judgment against the corporation and sue out an execution, which must be duly returned wholly or partially unsatisfied before the cause of action arises against the stockholder on his statutory liability, then the statute of limitations commences to run upon the return of the execution.[1]

the debt for which the notes were given. Griffith *v.* Green, 13 N. Y. Supp. 470 (1891); aff'd, 129 N. Y. 517. The statute of limitations under the Ohio law begins to run against the stockholder's liability from the time when the corporation makes an assignment for the benefit of creditors, even though no judgment has been obtained by the creditor. Barrick *v.* Gifford, 47 Ohio St. 180 (1890). The statute of limitations does not begin to run until the execution is returned unsatisfied or the corporate property is put in process of application to the payment of the corporate debts, as upon dissolution, or bankruptcy, or appointment of a receiver, or assignment for the benefit of creditors. Bronson *v.* Schneider, 49 Ohio St. 438 (1892); King *v.* Armstrong, 50 Ohio St. 222 (1893); Younglove *v.* Lime Co., 49 Ohio St. 663 (1892), the latter case holding also that the appointment of a receiver for the purpose of carrying on the business did not set the statute running. In a suit by one creditor for the benefit of all, other creditors may come in, although the statute of limitations would be a bar against a separate suit by them. Barrick *v.* Gifford, 47 Ohio St. 180 (1890). See also §§ 223, 225 (*a*), *supra*, and § 259, notes, *infra*.

[1] Handy *v.* Draper, 89 N. Y. 334 (1882); Merritt *v.* Reid, 13 N. Y. Week. Dig. 453 (1882); Longley *v.* Little, 26 Me. 162 (1846). The statute of limitations does not begin to run against the claim until the return of the execution unsatisfied in Kansas. Bank of North America *v.* Rindge, 57 Fed. Rep. 279 (1893). In Terry *v.* Tubman, 92 U. S. 156 (1875), where the charter of a bank contained a provision making the stockholders individually liable for the ultimate redemption of its bills, the liability of the stockholders was held to arise, and hence the statute of limitations to commence to run in their favor, upon the open and notorious insolvency of the bank. So, likewise, where stockholders were made individually liable "upon the failure of the bank," it was held that, the liability arising upon the failure, the statute of limitations began to run at that time. Carroll *v.* Green, 92 U. S. 509, 511 (1875). To the same effect is Baker *v.* Atlas Bank, 50 Mass. 182 (1845); Terry *v.* McLure, 103 U. S. 442 (1880); Godfrey *v.* Terry, 97 U. S. 171 (1877). The case of Terry *v.* Anderson, 95 U. S. 628 (1877) sustains the constitutionality of a statute shortening the statute of limitations herein. The case *Re* Bank of Sing Sing, 32 Hun, 462 (1884); affirmed in 96 N. Y. 672, held that twenty years' delay by receiver in making report bars any assessment on stockholders. A statute of limitations running from the time of dissolution of the company is not set running by corporate insolvency and cessation of business. Sleeper *v.* Goodwin, 67 Wis. 577 (1887). *Cf.* § 195, *supra*. The statute of limitations begins to run only from the time when the creditor's right to sue the stockholders begins. McDonell *v.* Alabama, etc. Ins. Co., 85 Ala. 401 (1888); Powell *v.* Oregonian Ry., 38 Fed. Rep. 187 (1889). The statute of limitations runs from dissolution, even though judgment against the corporation is obtained subsequently. Cottrell *v.* Manlove, 58 Kan. 405 (1897). As to the statute of limitations, see also 28 Am. L. Reg. 518.

As to national banks, the statute of limitations does not run against the statutory liability of a stockholder until the comptroller has levied the assessment.[1] The liability of a citizen of Nebraska as a stockholder in a national bank located in Nebraska is barred by the four-years statute of limitations of Nebraska applicable to contracts not in writing and to a liability created by statute.[2]

Where suit is brought in one state to enforce the statutory liability of stockholders in a corporation organized in another state, the

Where the statute of limitations begins to run from the time when an execution is issued against the corporation, it begins to run when such execution could have been issued. Fox *v.* First, etc. Bank, 9 Kan. App. 18 (1899). The statutory liability of stockholders in manufacturing corporations in Rhode Island is contractual, and the statute of limitations applicable to penalties does not apply. Such statute begins to run only after a creditor has exhausted his remedy against the corporation. A distribution of the corporate assets by a committee of the stockholders does not start the statute of limitations running afresh. Kilton *v.* Providence, etc. Co., 22 R. I. 605 (1901). Where by statute no judgment need be obtained against the corporation, a suit to obtain such judgment does not stop the running of the statute of limitations. Whitman *v.* Atkinson, 130 Fed. Rep. 759 (1904). See 68 Atl. Rep. 765.

1 De Weese *v.* Smith, 97 Fed. Rep. 309 (1899); Aldrich *v.* Yates, 95 Fed. Rep. 78 (1899). The principle of law that the statute of limitations commences to run on an assessment by the comptroller of the currency on national bank stock only from the time the assessment is actually made, applies to a second assessment as well as the first, and the fact that four years elapsed between the first and second assessment does not change this principle of law. Rankin *v.* Barton, 199 U. S. 228 (1905), rev'g 69 Kan. 629 (1904). The liability of a stockholder in a national bank in process of voluntary liquidation does not accrue until the court ascertains the necessity of enforcing it and determines the amount which the shareholder must pay and fixes the time of payment, so far as the statute of limitations is concerned. King *v.* Pomeroy, 121 Fed. Rep. 287 (1903).

2 McDonald *v.* Thompson, 184 U. S. 71 (1902), aff'g 101 Fed. Rep. 183 (1900). A state statute of limitations relative to unwritten contracts applies to a stockholder's statutory liability in a national bank. Aldrich *v.* McClaine, 106 Fed. Rep. 791 (1901). The liability of a stockholder in a national bank is governed by the statute of limitations in the state where suit is brought, and such right does not accrue until the receiver is authorized to bring suit by the receiver fixing the time of payment and the expiration of such time. Such a liability is not contractual, but is created by law, and hence a statute specially applicable to causes of action created by law applies. Aldrich *v.* Skinner, 98 Fed. Rep. 375 (1899); Aldrich *v.* McClaine, 98 Fed. Rep. 378 (1899.) The statute of limitations applicable to the liability of stockholders in national banks is that prescribed by the statutes of the state in which the bank is located. It does not begin to run until the Comptroller of the currency has made an assessment. If there is a statute applicable to statutory liability it applies instead of the statute relative to breach of contract. McClaine *v.* Rankin, 197 U. S. 154 (1905).

statute of limitations of the state wherein suit is brought applies,[1] unless there was a special statute applicable to that liability in the state that created it.[2] But the New York statute limiting the time within which a stockholder may be held liable for corporate debt does not apply to a suit brought in the United States court in New

[1] The New York statute of limitations applicable to the liability of stockholders in a domestic corporation applies to a suit brought in New York on a similar liability against stockholders in a foreign corporation. Platt *v.* Wilmot, 193 U. S. 602 (1904).

The New York statute of limitations as to suits against stockholders' statutory liability applies to a suit to enforce the statutory liability of a New York stockholder in a foreign corporation. Ramsden *v.* Gately, 142 Fed. Rep. 912 (1906).

In a suit in Massachusetts to enforce a stockholder's liability in a Kansas corporation, the Massachusetts statute of limitations controls. Ramsden *v.* Knowles, 151 Fed. Rep. 718 (1906). The statute of limitations of the state wherein the suit is brought may be applied to the statutory liability of stockholders in a Kansas corporation. Schiffer *v.* Trustees, 87 Fed. Rep. 166 (1898). In a suit in New York to enforce the statutory liability of a New York stockholder in a Kansas corporation the New York three-years statute of limitations applies. Seattle, etc. Bank *v.* Pratt, 111 Fed. Rep. 841 (1901). The New York three-years statute of limitations relative to the statutory liability of stockholders in certain corporations applies to a suit brought in the United States circuit court, in the New York district, to enforce the statutory liability of a citizen of New York in a Kansas mortgage company. Hobbs *v.* National Bank, etc., 96 Fed. Rep. 396 (1899). In the enforcement of a Kansas liability against a New York stockholder the New York statute of limitations of two years, applicable to stockholders' liability in New York corporations, does not apply. Platt *v.* Larter, 94 Fed. Rep. 610 (1899). Where there is no special statute of limitations applicable to a statutory liability the law of the forum governs. Whitman *v.* Citizens' Bank, 110 Fed. Rep. 503 (1901). In the case of Dexter *v.* Edmands, 89 Fed. Rep. 467 (1898), the court enforced in Massachusetts the Kansas liability, and held that the judgment returned unsatisfied in Kansas was sufficient in Massachusetts, and held also that the statute of limitations in Massachusetts, and not the statute of limitations in Kansas, applied to such a suit in Massachusetts. In a suit to enforce in Maryland the statutory liability of a stockholder in a Georgia corporation the Maryland statute of limitations does not apply if the charter creating liability prescribed a different statute of limitations. Brunswick, etc. Co. *v.* National Bank, etc., 99 Fed. Rep. 635 (1900), rev'g 88 Fed. Rep. 607. In a suit in the federal court in New York state to enforce the statutory liability of a New York stockholder in a Kansas corporation, the New York statute of limitations applicable to a statutory liability applies. Platt *v.* Hungerford, 116 Fed. Rep. 771 (1902). See also § 223, notes, *supra*.

[2] The Kansas statutory liability is contractual, and hence may be enforced in Maine against a Maine stockholder without joining other stockholders as parties defendant in the suit. If the Kansas statute creating the liability prescribes a special limitation as an enforcement, such limitation applies in Maine, but the general statute of limitations of Kansas is not applicable. Pulsifer *v.* Greene, 96 Me. 438 (1902).

York by a receiver to enforce the statutory liability of a citizen of New York in a Minnesota corporation.[1] It is a general rule of law that the statute of limitations applicable to any ordinary action to enforce a contract is the one applicable to the action to enforce the statutory liability of stockholders in incorporated companies.[2]

Accordingly, the suit must usually be commenced within six years after the cause of action has accrued.[3] Where suit may be brought

1 Bernheimer *v.* Converse, 206 U. S. 516 (1907).

2 Green *v.* Beckman, 59 Cal. 545 (1881); Corning *v.* McCullough, 1 N. Y. 47 (1847); Wiles *v.* Suydam, 64 N. Y. 173, 176 (1876); Baker *v.* Atlas Bank, 50 Mass. 182 (1845); Commonwealth *v.* Cochituate Bank, 85 Mass. 42 (1861); N. Y. Code Civ. Proc., § 382. The ten-years statute of limitation applies in Illinois on certificates of deposit or bank pass-books. Palmer *v.* Woods, 149 Ill. 146 (1894). The liability of an Illinois stockholder in a Kansas corporation for the debts of the corporation begins to run from the time he became a stockholder and expires in five years. Hutchings *v.* Lampson, 82 Fed. Rep. 960 (1897).

3 See citations in the preceding note; also Phillips *v.* Therasson, 11 Hun, 141 (1877), holding that where by statute the capital must be paid in within two years upon pain of dissolution, and imposes liability upon stockholders for the debts of the corporation until the capital is fully paid, the statute of limitations begins to run at the expiration of the two years allowed for paying the capital. Under the New York Manufacturing Act relative to the two-years statute of limitations to a stockholder's statutory liability, it begins to run upon the dissolution of the corporation. The creditor must sue within that time. Hollingshead *v.* Woodward, 107 N. Y. 96 (1887); King *v.* Duncan, 38 Hun, 461 (1886), holding that under that statute the creditor is not required to delay his suit until the two years has expired; Knox *v.* Baldwin, 80 N. Y. 610 (1880); Hawkins *v.* Furnace Co., 40 Ohio St. 507 (1884). In Georgia the twenty-years statute of limitations applies because it is a right of action accruing under a statute or act of incorporation, and begins to run in favor of stockholders only after suit has been commenced against the corporation. Wheatley *v.* Glover, 125 Ga. 710 (1906). In South Carolina, under the statute of limitations in that state, such an action must be begun within four years. Carrol *v.* Green, 92 U. S. 509 (1875); Terry *v.* McLure, 103 U. S. 442 (1880). In some of the older cases it is held that an obligation, such as this, to pay money, arising under a statute, is a debt by specialty, and accordingly that it is barred only by a lapse of twenty years. Bullard *v.* Bell, 1 Mason, 243, 289 (1817, by Judge Story); s. c., 4 Fed. Cas. 625; Thornton *v.* Lane, 11 Ga. 459 (1852); Lane *v.* Morris, 10 Ga. 162 (1851). But see this view condemned in Carrol *v.* Green, 92 U. S. 509, 515 (1875), in an opinion by Justice Swayne, construing the South Carolina statute of 1712. *Cf.* Green *v.* Beckman, 59 Cal. 545 (1881), construing Cal. Code Civ. Proc., § 359; Andrews *v.* Bacon, 38 Fed. Rep. 777 (1889). Sometimes there is a provision that the action must have been commenced by the creditor against the corporation within a given limited time after the maturity of the debt, in order to hold the stockholder on his statutory liability. Shellington *v.* Howland, 53 N. Y. 371 (1873); Birmingham Nat. Bank *v.* Mosser, 14 Hun, 605 (1878); Lindsley *v.*

against a stockholder at any time after the corporation has been adjudged insolvent, the statute of limitation commences to run from that date.[1] Where the statutory liability cannot be enforced until the corporate affairs have been liquidated by a bill in equity, the statute of limitations does not commence to run until the decree therein.[2] Where the transferrer is liable for one year after a transfer, this liability applies only to debts created before the transfer. An action to enforce a liability against him may be brought within six years after the debt against the corporation matures.[3] The giving of renewal notes by the corporation does not operate to prevent the running of the statutory limitation upon stockholders' liability for the original indebtedness.[4] It has been held that the stockholder will not be allowed to intervene in the suit against the corporation, in order to set up the defense of the statute of limitations.[5] Where there are two methods of enforcing a stockholder's statutory lia-

Simonds, 2 Abb. Pr. (N. S.) 69 (1866). *Cf.* State Sav. Assoc. *v.* Kellogg, 52 Mo. 583 (1873). See also Freeland *v.* McCullough, 1 Denio, 414, 422 (1845); Merchants' Bank *v.* Bliss, 21 How. Pr. 366 (1861); aff'd, 35 N. Y. 412 (1866); Lewis *v.* Ryder, 13 Abb. Pr. 1 (1861); Cuykendall *v.* Douglas, 19 Hun, 577 (1880); Moore *v.* Boyd, 74 Cal. 167 (1887). Frequently, also, there is a limitation applicable particularly to transfers of stock. Paine *v.* Stewart, 33 Conn. 516 (1882). In this case a statute of Minnesota imposing liability upon stockholders while they were such, and for one year thereafter, was held, in an action in Connecticut, not to be operative against one who had not been a stockholder for more than a year before the action was brought. In New York this limitation is two years. See Handy *v.* Draper, 89 N. Y. 334 (1882), and ch. XV, *infra*. See also Schiffer *v.* Trustees, 87 Fed. Rep. 166 (1898).

1 Hilliker *v.* Hale, 117 Fed. Rep. 220 (1902); aff'd, 188 U. S. 70. Under the Minnesota statute, the statute of limitations does not begin to run in behalf of stockholders until the court has adjudicated the deficiency to be paid by the stockholders. Hale *v.* Cushman, 96 Me. 148 (1902). The statute of limitations begins to run against the stockholder's liability upon the insolvency of a Kansas corporation, even though its outstanding bonds do not become due for many years thereafter. Ramsden *v.* Knowles, 151 Fed. Rep. 721 (1907).

2 Goss *v.* Carter, 156 Fed. Rep. 746 (1907).

3 Harper *v.* Carroll, 62 Minn. 152 (1895); s. c., 66 Minn. 487. If the creditor's claim is not barred at the time he commences suit against the corporation it is not barred as against stockholders who were subsequently assessed to pay his judgment. Potts *v.* St. Paul, etc. Assoc., 84 Minn. 217 (1901).

4 Close *v.* Potter, 155 N. Y. 145 (1898). See also § 225 (*a*). *supra*.

5 Stockholders will not be allowed to intervene in a suit brought by a creditor against the corporation itself, even though they wish to set up the statute of limitations, and even though the directors had directed the company's lawyer to admit the allegations of the complaint, and even though the company is insolvent, and the stockholders are liable on the stock, no fraud being shown. Meyer *v.* Bristol, etc. Co., 163 Mo. 59 (1901). *Cf.* § 750, *infra*.

bility, the statute of limitations begins to run when either one might be adopted.[1]

If a statutory liability be held to be a penalty, then of course it will be held to come within that provision of the statute of limitations which provides for actions to enforce penalties.[2]

Where the corporation is merely a guarantor, the statute of limitations against the liability of stockholders applies only when such guarantee becomes fixed by the default of the principal debtor.[3] Bonds of an insolvent corporation become due on its dissolution, and accordingly the stockholders' statutory liability thereon commences at that date.[4] The statute of limitations ceases to run upon the commencement of a judgment creditor's suit, at least as against creditors who afterwards come into that suit.[5] But a receiver of an insolvent bank has no right to continue a suit brought by a creditor to enforce the statutory liability of stockholders where such creditor has made a settlement and agreed to discontinue the suit, even though the receiver was a party to the action and even though by such discontinuance the statute of limitations is a bar to other suits.[6]

1 Willius *v.* Albrecht, 111 N. W. Rep. 387 (Minn. 1907).

2 As to whether the liability is a penalty, see § 223, *supra*. An action against a director in a national bank for violating the national bank act is in tort, being an action on the case, and the state statute of limitations applies. Cockrill *v.* Butler, 78 Fed. Rep. 679 (1897). Where the directors default for two successive years in filing a required report, a liability therefor on a claim existing before the first default arises the first year, and the statute runs against it from that time. Colorado, etc. Co. *v.* Lenhart, 6 Colo. App. 511 (1895).

3 Crissey *v.* Morrill, 125 Fed. Rep. 878 (1903).

4 Ramsden *v.* Knowles, 151 Fed. Rep. 718 (1906).

5 Richmond *v.* Irons, 121 U. S. 27 (1887); Brinckerhoff *v.* Bostwick, 99 N. Y. 185, 194 (1885); Barrick *v.* Gifford, 47 Ohio St. 180 (1890). Even though the receiver does not file a bill to enforce the statutory liability until more than six years after his appointment, yet the statute of limitations may not be a bar. Andrews *v.* Bacon, 38 Fed. Rep. 777 (1889). After one creditor has filed a bill for a receiver and to collect unpaid subscriptions, etc., the statute of limitations ceases to run from that date as against other creditors who subsequently come into the suit. Dunne *v.* Portland, etc. Ry., 40 Oreg. 295 (1901). The state statute of limitations runs against the stockholder's liability in a national bank from the day when the assessment levied by the comptroller becomes payable, and this statute is a bar both in law and in equity. Thompson *v.* German Ins. Co., 76 Fed. Rep. 892 (1896).

Under the Kansas statute, a proceeding instituted by one judgment creditor does not stop the statute of limitations as against another. McGlinchy *v.* Bowles, 68 Kan. 190 (1904).

Even though a creditor sues for the benefit of himself and other creditors, yet if no order to that effect is made before the statute of limitations has run against the claims of other creditors, the stockholders are not liable to them. Hyatt *v.* Anderson's Trustee, 74 S. W. Rep. 1094 (Ky. 1903).

6 Hirshfeld *v.* Fitzgerald, 157 N. Y.

In general, whatever the statute may be, it is the rule that a lapse of time sufficient to constitute a bar at law will in equity be given the same effect; in other words, in these cases there is the same statute of limitations both at law and in equity.[1] The legislature cannot, after a statutory liability has been incurred, extend the period of the statute of limitations applicable to it.[2] A statute shortening the statute of limitations applicable to the common-law liability of directors is unconstitutional as to existing liabilities if the shortened period does not give a reasonable time after it takes effect for the commencement of suits on existing causes of action.[3] A change in the statute of limitations, applicable to a director's statutory liability, applies to such liability already incurred, a reasonable time to sue being given.[4] A stockholder may waive the defense of the statute of limitations.[5]

(*g*) *Other defenses.*—The liability of solvent stockholders is not extended beyond the limit fixed by statute, even though other stockholders are insolvent.[6] A petition in bankruptcy by a stockholder is no bar to the enforcement of his liability unless the corporate

166 (1898). As to discontinuance of a suit after the statute of limitations has run against other creditors, see also §§ 222, 748.

1 Bank of Poughkeepsie *v.* Ibbotson, 24 Wend. 473 (1840); Carrol *v.* Green, 92 U. S. 509 (1875); Baker *v.* Atlas Bank, 50 Mass. 182 (1845); Lindsay *v.* Hyatt, 4 Edw. Ch. (N. Y.) 97 (1842); Van Hook *v.* Whitlock, 3 Paige, 409 (1832); Commonwealth *v.* Cochituate Bank, 85 Mass. 42 (1861); Terry *v.* McLure, 103 U. S. 442 (1880). When the statute prescribes the limitation, there is of course no controversy. Baker *v.* Backus, 32 Ill. 79 (1863). Laches is no defense. Sadler *v.* Nicholson, 49 S. C. 7 (1897). The statute of limitations applicable to a suit at law applies to a suit in equity to enforce the liability. Hale *v.* Coffin, 114 Fed. Rep. 567 (1902); aff'd, 120 Fed. Rep. 470.

2 Close *v.* Potter, 155 N. Y. 145 (1898). The liability of stockholders created by the constitution in California may be made subject to a three-years statute of limitations. Santa Rosa, etc. Bank *v.* Barnett, 125 Cal. 407 (1899).

3 Gilbert *v.* Ackerman, 159 N. Y. 118 (1899).

4 Davis *v.* Mills, 194 U. S. 451 (1904). It may be a question as to whether the legislature may shorten the time within which a creditor must bring suit. Lang *v.* Lutz, 180 N. Y. 254 (1905).

5 The agreement of the president of a bank who has had entire charge of the bank, that if a creditor will not sue for six months to enforce the liability of the bank as a stockholder the bank will not set up the statute of limitations, is legal. Wells, etc. Co. *v.* Enright, 127 Cal. 669 (1900). An executor has no power to waive a short statute of limitations applicable to the statutory liability on stock in a Kansas corporation. Stebbins *v.* Scott, 172 Mass. 356 (1899).

6 Crease *v.* Babcock, 51 Mass. 525 (1846). See also, under the National Bank Act, United States *v.* Knox, 102 U. S. 422 (1880).

creditor was a party to the bankruptcy proceeding.[1] Bankruptcy is a discharge, even though the corporate creditors, instead of the receiver, are named in the schedule.[2] The admissions of one stockholder cannot bind another stockholder herein.[3] Various other defenses are considered in the notes below.[4]

1 Birmingham Nat. Bank *v.* Mosser, 14 Hun, 605 (1878). *Cf.* § 197, notes, *supra.*

2 Longfield *v.* Minnesota, etc. Bank, 95 Minn. 54 (1905). A bankrupt director is released from his statutory liability in a corporation under the Massachusetts statute for loaning money to a stockholder by a discharge in bankruptcy. Old Colony, etc. *v.* Parker, etc. Co., 183 Mass. 557 (1903). A bankrupt is released on the statutory liability on stock in another state where such liability has been adjudicated, even though he was not a party thereto. Dight *v.* Chapman, 14 Oreg. 265 (1904).

3 Simmons *v.* Sisson, 26 N. Y. 264 (1863).

4 The court will not authorize the receiver of a national bank to compromise with the stockholders on their liability, even though more can be realized thereby, the stockholders having fraudulently conveyed away their property in order to avoid liability. *Re* California Nat. Bank, 53 Fed. Rep. 38 (1892). The defendant cannot set up that he intended his subscription as a gift, where he received and retained the certificate. McDowall *v.* Sheehan, 13 N. Y. Supp. 386 (1891) (reversed on another point, 129 N. Y. 200). Under the California statute it seems that a mere subscriber for stock is not liable where he did not fulfill the subscription. Bank of Yolo *v.* Weaver, 31 Pac. Rep. 160 (Cal. 1892). It is no defense that the stockholder was fraudulently induced by another party to purchase his stock from that party. Olson *v.* State Bank, 67 Minn. 267 (1897). Where the judgment against stockholders on their statutory liability states the amount of stock held by each, the enforcement of such judgment cannot be carried out so as to impose upon any stockholder more than on the amount of stock held by him as specified in such judgment. Baltimore, etc. R. R. *v.* Smith, 54 Ohio St. 562 (1896). Fraud in the purchase of the stock is no defense. See § 261, *infra.* A *de facto* director cannot defend against a statutory liability of directors on the ground that he did not hold sufficient stock to qualify himself to be a director. Donnelly *v.* Pancoast, 15 N. Y. App. Div. 323 (1897). In assessing stock to raise a fixed amount of money, no assessment is levied upon stock held by the corporation itself. Western Imp. Co. *v.* Des Moines Nat. Bank, 103 Iowa, 455 (1897). A stockholder connot avoid a statutory liability on the ground that the stock was given to him for nothing by the corporation. Hallett *v.* Metropolitan, etc. Co., 35 N. Y. Misc. Rep. 659 (1901); s. c., 69 N. Y. App. Div. 258. The expiration of the charter of the corporation does not put an end to an existing statutory liability of the stockholder. Wheatley *v.* Glover, 125 Ga. 710 (1906). Where a reorganization is had under a statute without foreclosure and some of the old stockholders do not take part and the reorganized company becomes insolvent, the statutory liability of the old stockholders continues only after the liability of the new stockholders is exhausted. *In re* Receivership, etc. 91 Minn. 494 (1904). It is no defense that the corporation has not paid a statutory incorporation fee to the state. Murphy *v.* Wheatley, 102 Md. 501 (1906). It is no defense that the creditor is secured by a mortgage. Knowles *v.* Sandercock, 107 Cal. 629

In a suit at law brought by the receiver of a national bank against a stockholder on his statutory liability, he cannot set up fraud on the part of the bank in inducing him to subscribe. That defense, if good at all, is available only by a suit in equity. Neither can the defendant set up a counter-claim for the money so paid by him for the stock.[1]

Where a guaranty by a loan and trust company is *ultra vires*, the statutory liability of stockholders cannot be enforced to pay such guaranty, even though the courts of the state where the corporation existed have held that *ultra vires* is no defense where the benefit of the guaranty has been received.[2]

(1895). In Tennessee a corporate creditor having security for his debt cannot enforce the stockholder's statutory liability. Albitztiqui *v.* Guadalupe, etc. Co., 92 Tenn. 598 (1893). Where the stockholders personally guaranty the debts of the corporation, they are liable on the guaranty and also on any statutory liability attached to their stock. London, etc. Bank *v.* Parrott, 125 Cal. 472 (1899). An agreement by the stockholders of an insolvent bank that they will pay to the bank certain amounts to make good any deficiency in the assets of the bank, such payments to be applied on their statutory liability, is valid and may be enforced by the receiver. Thompson *v.* Gross, 106 Wis. 34 (1900). A stockholder in an insolvent national bank cannot defend against the double liability on the ground that the original stock was not fully paid. Wallace *v.* Hood, 89 Fed. Rep. 11 (1898); aff'd, 182 U. S. 55. A holder of over-issued stock is not liable on the statutory liability. Lyon *v.* Boston, etc. R. R., 107 Fed. Rep. 386 (1901). The charter of a stock corporation organized under the general act in Minnesota may limit the stockholders to Norwegians; but if the corporation allows other persons to become members, such other persons cannot avoid the statutory liability by that defense. Blien *v.* Rand, 77 Minn. 110 (1899). Even though two persons signed the articles of incorporation as incorporators and as subscribers of stock, on condition that the articles would not be used unless a certain other party signed, and even though the latter party did not sign and the articles were filed and the stock subsequently tendered to such signers, which they refused, yet, if they took no steps to remove their names as subscribers from the books, they are liable as stockholders to corporate creditors on a statutory liability. Rehbein *v.* Rahr, 109 Wis. 136 (1901).

[1] Lantry *v.* Wallace, 182 U. S. 536 (1901). See also §§ 163, 164, *supra*.

[2] A New Hampshire stockholder in a Kansas corporation may defend against a statutory liability on the stock on the ground that the plaintiff's claim against the corporation is an *ultra vires* guaranty, even though the state court may have decided such guaranty to be valid. Ward *v.* Joslin, 186 U. S. 142 (1902), aff'g 100 Fed. Rep. 676. Where the stockholders have not authorized the issue of bonds as required by statute, the statutory liability of the stockholders cannot be enforced to pay such bonds. Boyd *v.* Heron, 125 Cal. 453 (1899). The statutory liability of stockholders in a Kansas corporation does not apply to a guarantee made by the officers of the corporation without authority and without

Where a corporate creditor agrees with some of the stockholders that a judgment obtained in a suit against contesting stockholders shall be a judgment as to stockholders not contesting, a judgment of the supreme court holding the stockholders not liable is within the terms of such agreement, although the lower court held the stockholders liable.[1]

The invalidity of the incorporation is no defense.[2] A stockholder may defend on the ground that the corporation was dissolved when the judgment was rendered against it.[3]

A holder of increased capital stock of a national bank cannot defeat the statutory liability on the ground that the increase was irregularly made and was fraudulently made, in that the directors issued it to themselves without paying therefor.[4]

A director who acts as such cannot defend against his statutory liability on the ground that he was irregularly elected.[5]

Where by statute a receiver may compromise doubtful debts upon the approval of the court, he may compromise the statutory liability

the knowledge of the stockholders. Ward *v.* Joslin, 100 Fed. Rep. 676 (1900). It is no defense that the corporation had committed an *ultra vires* act in buying out another corporation; nor that other stockholders had not paid for their stock in full, such unpaid portion being insufficient to pay the debts; nor that no certificates of stock had been issued. Mitchell *v.* Beckman, 64 Cal. 117 (1883).

1 Perry *v.* Johnston, 95 Fed. Rep. 322 (1899).

2 Davis' Estate *v.* Watkins, 56 Neb. 288 (1898). It is no defense that the corporation commenced business before one-half of its capital stock had been paid in according to the charter. Maine, etc. Co. *v.* Southern, etc. Co., 92 Me. 444 (1899). Stockholders of a corporation cannot avoid a statutory liability on the ground that the charter was unconstitutional, such charter being an act of consolidation. Gardner *v.* Minneapolis, etc. Ry. Co., 73 Minn. 517 (1898). Stockholders cannot set up that their corporation was not authorized by law. McDonnell *v.* Alabama, etc. Ins. Co., 85 Ala. 401 (1888); National Com. Bank *v.* McDonnell, 92 Ala. 387 (1891). A corporation is not liable on a contract of its promoters to pay for drawings, plans, etc. Hence, although by statute stockholders are personally liable on corporate contracts if the corporation commences business before one-half of its capital is subscribed and twenty per cent. is paid in, they are not liable on such a contract. Buffington *v.* Bardon, 80 Wis. 635 (1891). See also §§ 183–186, *supra*.

3 Crossman *v.* Vivienda, etc. Co., 89 Pac. Rep. 335 (Cal. 1907).

4 Latimer *v.* Bard, 76 Fed. Rep. 536 (1896). Increased capital stock is legal, although it was issued to a person who was treasurer of a city and paid for the stock out of the city funds, the corporation not knowing thereof. Olson *v.* State Bank, 67 Minn. 267 (1897). A person who subscribes for increased capital stock, but receives original stock and holds it for several years, cannot then avoid an assessment levied thereon by the comptroller. Rand *v.* Columbia Nat. Bank, 87 Fed. Rep. 520 (1898).

5 Union, etc. Bank *v.* Scott, 53 N. Y.

of stockholders.[1] A judgment against a stockholder on one claim is no bar to a subsequent suit by the same creditor against the same stockholder on another claim.[2] A stockholder in a national bank who is sued on the statutory liability cannot set up the defense that the money is to be used to pay a liability of such bank as a stockholder in another insolvent national bank.[3]

§ 226. *Priority among creditors.*—When the creditor is entitled to maintain an action at law against an individual stockholder for the enforcement of a statutory liability, in order to collect a claim against the corporation, it has been held that the creditor first suing any stockholder is entitled to priority in enforcing his claim as against that particular stockholder. The diligent creditor is entitled to the payment of his claim, although other creditors are thereby deprived of payment.[4] The right to a priority, however, in these cases, is in general one of questionable propriety, and the courts are not inclined to favor it.[5] And one creditor may, at the instance of the rest, be restrained from the prosecution of his individual suit where it is in prejudice of the equal rights of all the others.[6] A creditor of an insolvent bank who has received from the

App. Div. 65 (1900). A hold-over director is liable on a statutory liability, and the fact tht he was a director may be proved by the corporate books. St. George, etc. Co. *v.* Fritz, 48 N. Y. App. Div. 233 (1900). Where a director must be a stockholder, and there is a statutory liability attached to the directorship, the director may transfer his stock in order to cease to be a director and in order to avoid such liability. Sinclair *v.* Fuller, 158 N. Y. 607 (1899).

1 State *v.* German Sav. Bank, 65 Neb. 416 (1902). As to compromise, see also §§ 171, 208.

2 Manley *v.* Park, 68 Kan. 400 (1904).

3 Martin *v.* Wilson, 120 Fed. Rep. 202 (1903).

4 Cole *v.* Butler, 43 Me. 401 (1857), holding, also, that the rights of a creditor who moves first cannot be affected by the fact that another creditor, pursuing a shorter remedy, obtains judgment before him. Ingalls *v.* Cole, 47 Me. 530, 541 (1860); Jones *v.* Wiltberger, 42 Ga. 575 (1871); Robinson *v.* Bank of Darien, 18 Ga. 65, 108 (1855); Thebus *v.* Smiley, 110 Ill. 316 (1884). *Cf.* Weeks *v.* Love, 50 N. Y. 568 (1872); Miers *v.* Zanesville, etc. Turnp. Co., 13 Ohio, 197 (1844). See also § 225 (*b*), *supra.*

5 Wright *v.* McCormack, 17 Ohio St. 86 (1866), holding that, if part of the creditors institute an action to enforce the liability of all, no creditor can acquire priority or institute a separate suit on his own behalf. Smith *v.* Huckabee, 53 Ala. 191 (1875); Chicago *v.* Hall, 103 Ill. 342 (1882), holding that if a suit at law by a creditor against a stockholder be enjoined by other creditors who seek to enforce the liability for the benefit of all the creditors, and the stockholders discharge their liability, the creditor so enjoined has no prior lien upon the fund.

6 Eames *v.* Doris, 102 Ill. 350 (1882); Pfohl *v.* Simpson, 74 N. Y. 137 (1878). *Cf.* Garrison *v.* Howe, 17 N. Y. 458 (1858). See also § 222, *supra.*

receiver a dividend from the general assets of the bank is entitled to share in a sum subsequently collected on the stockholders' liability, even though she failed to prove her claim a second time within the period prescribed by the order of distribution of such latter fund.[1]

A preferred claim may be preferred as to general assets and yet not preferred as to moneys collected from statutory liabilities of the stockholders.[2]

§§ 227–229. *Contribution among stockholders.*—Upon general principles of equity, where a stockholder has been held liable, under the provisions of a statute, for a debt of the corporation of which he is a member, he may maintain an action against his co-stockholders for contribution.[3] Where the stockholders' statutory lia-

1 Matter of Ziegler, 98 N. Y. App. Div. 117 (1904).

2 Sioux City, etc. Co. *v.* Fribourg, 121 Iowa 230 (1903).

3 Quoted and approved in Hinshaw *v.* Austin, 64 Kan. 460 (1902); Aspinwall *v.* Sacchi, 57 N. Y. 331 (1874); Stewart *v.* Lay, 45 Iowa, 604 (1877); Umsted *v.* Buskirk, 17 Ohio St. 113 (1866); Matthews *v.* Albert, 24 Md. 527 (1866); Hadley *v.* Russell, 40 N. H. 109, 112 (1860); Erickson *v.* Nesmith, 46 N. H. 371 (1866); Gray *v.* Coffin, 63 Mass. 192 (1852); Middletown Bank *v.* Magill, 5 Conn. 28, 61 (1823); Brinham *v.* Wellersburg Coal Co., 47 Pa. St. 43 (1864); Masters *v.* Rossie Lead Min. Co., 2 Sandf. Ch. 301 (1845); Farrow *v.* Bivings, 13 Rich. Eq. (S. C.) 25 (1866); Clark *v.* Myers, 11 Hun, 608 (1877), holding that the action cannot be against one only; O'Reilly *v.* Bard, 105 Pa. St. 569 (1884), holding that a stockholder who pays a judgment against the corporation is confined to the remedy provided in the act, and in this case could not maintain *assumpsit* for contribution against other stockholders who were not parties to the judgment. A stockholder may file a bill for contribution against all other resident and solvent stockholders. Merrill *v.* Prescott, 67 Kan. 767 (1903). As to the Pennsylvania statutory method of obtaining contribution, see also Brinham *v.* Wellersburg Coal Co., 47 Pa. St. 43 (1864). Stockholders seeking to enforce contribution from a co-stockholder in a foreign corporation must show that he, the plaintiff, is legally liable. Eastman *v.* Crosby, 90 Mass. 206 (1864). See also Ladd *v.* Cartwright, 7 Oreg. 329 (1879); Patterson *v.* Lynde, 106 U. S. 519 (1882). A stockholder, it is said, being also a creditor of the corporation, may make use of whatever advantage his position as stockholder gives him to secure the payment of his claim, even to the exclusion of other creditors who are not stockholders. Whitwell *v.* Warner, 20 Vt. 425, 444 (1848); Reichwald *v.* Commercial Hotel Co., 106 Ill. 439 (1883), holding that the securing of a large debt to a stockholder for money advanced, by means of a deed of real property, with agreement that it should be considered security, was not fraudulent. See also Bristol Milling, etc. Co. *v.* Probasco, 64 Ind. 406 (1878); Terry *v.* Bank of Cape Fear, 20 Fed. Rep. 777 (1884). See also § 226, *supra*, to the effect that a stockholder sued at law may enjoin the suit and bring all parties into a suit in equity. An officer paying the statutory liability may have contribution. Nickerson *v.* Wheeler, 118 Mass. 295 (1875). *Cf.* Ray *v.* Powers, 134 Mass. 22 (1883); Hart-

bility is enforced by a suit in equity, contribution is of course enforced, in that suit, so far as the parties can be found within the jurisdiction.[1] Where the constitution of an unincorporated association limits the debts, and the directors incur a larger amount of debts, the directors cannot obtain contribution from the stockholders.[2] Even though the trustees of a club have been obliged to pay the debts of the club, yet they cannot collect from the members.[3]

man *v.* Valley Ins. Co., 32 Gratt. (Va.) 242 (1879); Chandler *v.* Brown, 77 Ill. 333 (1875); Bronson *v.* Wilmington, etc. Ins. Co., 85 N. C. 411 (1881); Perry *v.* Turner, 55 Mo. 418 (1874). A stockholder and director who pays his liability under the California statute may have contribution from other stockholders. Redington *v.* Cornwell, 90 Cal. 49 (1891). As to the mode of enforcing contribution under the California statutes, see Myers *v.* Sierra Val. etc. Assoc., 122 Cal. 669 (1898). A stockholder who has been compelled to pay a statutory liability may have contribution from other stockholders. But where he pays before the creditor obtained judgment against the company, then, in order to obtain contribution, he must show that the company was insolvent and had no assets. Ewing *v.* Stultz, 9 Ind. App. 1 (1894). The United States statute making every person interested in a still of liquors liable for the tax thereon renders the stockholders of the distilling corporation liable, and one who pays the tax may have contribution from the others. Richter *v.* Henningsan, 110 Cal. 530 (1895); Wolters *v.* Henningsan, 114 Cal. 433 (1896). Where the vendors of stock guarantee that the stock shall be non-assessable until they have advanced $30,000, a stockholder who is held liable on a statutory liability may hold the guarantors liable if they have not paid the $30,000. Omo *v.* Bernart, 108 Mich. 43 (1895). See 95 Pac. Rep. 1045.

1 Harpold *v.* Stobart, 46 Ohio St. 397 (1889). In Guerney *v.* Moore, 131 Mo. 650 (1895), it was held that a stockholder who has paid more than his debt need not file a bill for contribution, but may pursue any or all of the remedies that are open to the other creditors. Contribution may be enforced in the suit in equity by which the liability is enforced. Harper *v.* Carroll, 66 Minn. 487 (1896).

2 McFadden *v.* Leeka, 48 Ohio St. 513 (1891). Where the articles of incorporation provide that the indebtedness shall not exceed a certain sum, but debts are contracted in excess of the limit, and, the corporation being insolvent, the officer who contracted the debt pays it off out of his own individual funds, he cannot claim contribution unless the debt in excess of the limit was contracted by the unanimous assent of the stockholders. Haldeman *v.* Ainslie, 82 Ky. 395 (1884).

3 Wise *v.* Perpetual, etc. Co., [1903] A. C. 139, the court saying: "Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition not usually expressed, but understood by every one, that clubs are formed; and this distinguishing feature has been often judicially recognized."

In assessing stock to raise a fixed amount of money, no assessment is levied upon stock held by the corporation itself.[1] Directors who have been obliged to repay money which they and others received for turning over the assets of the company to another company, they having no interest which could legally be the subject of such sale, cannot recover back from such other persons the amount paid by the latter. There can be no contribution among joint tort feasors.[2]

1 Western Imp. Co. *v.* Des Moines Nat. Bank, 103 Iowa, 455 (1897).

2 Gilbert *v.* Finch, 173 N. Y. 455 (1903).

CHAPTER XIII.

LIABILITY OF STOCKHOLDERS WHERE THE SUPPOSED INCORPORATION DOES NOT PROTECT THEM, AND FOR ASSESSMENTS BEYOND THE PAR VALUE OF THE STOCK.

§ 230. Different liabilities of a stockholder.
231–234. Liability as partners by reason of defective incorporation.
235. Extent of the liability.
236. Liability as partners by reason of unauthorized incorporation.
§§ 237–240. Liability as partners by reason of the fact that the corporation is incorporated in one state but does all its business in another state.
241, 242. Assessments in excess of par value of stock.
243. Miscellaneous cases of liability.

§ 230. *Different liabilities of a stockholder on his stock.*—A stockholder may be said to be liable on his stock in three different ways. First, he is liable to the corporation and corporate creditors until the full par value of his stock has been paid.[1] Second, he may have an additional liability imposed upon him by statute.[2] Third, it may happen that by some accident, mistake, or neglect the supposed corporation was never duly incorporated, or for some other reason the members become liable as partners in a copartnership; or it may be within the power of the corporation to assess the stockholder for sums over and above and in addition to the par value of the stock. This third kind of liability is unusual in its character, and is the subject of this chapter.

§ 231. *Liability as partners by reason of material defects in becoming incorporated.*—The general incorporating statutes under which a corporation is usually formed provide for the taking of certain steps, generally the making and filing with the state, and also with the local authorities, a certificate signed by the corporators, and containing a statement of the business, of the capital stock, and other facts material to the organization of the corporation.

Occasionally it happens that this certificate is not fully made out, as required by the statute, or is not filed, or some other step prescribed by law is not complied with. The corporation is then not duly incorporated, and the state, by *quo warranto,* may oust it from its user of corporate franchises. But it is a very different question as to whether a private individual may take advantage of such facts,

1 See chs. XI and III, *supra.*

2 See ch. XII, *supra.*

and claim that the supposed corporation is not a corporation, but only a partnership.

§ 232. *Who may question the regularity of acts in becoming incorporated.*—As already explained,[1] a subscriber for stock in a corporation cannot, when sued for calls on his stock, set up that the corporation was not duly incorporated.[2] He is estopped from so doing. Nor can a stockholder, who has funds of the corporation in his hands, defeat an action by the corporation therefor by setting up that the corporation was not duly incorporated.[3] A stockholder cannot maintain a bill in equity to have a *de facto* corporation declared to be a partnership on the ground that it was not legally organized.[4] And, in general, a party contracting to pay money to a corporation, or to transfer property to it as a corporation, cannot avoid the obligation of that contract by alleging the fact that the corporation was not duly incorporated, if it be proved that such a corporation might have been organized under the statutes, and that the supposed corporation attempted to so organize and proceeded to transact business.[5] The corporation itself cannot set up the defense that it was irregularly incorporated,[6] not even though it is a foreign corporation.[7] A corporation is not allowed to avoid

1 See §§ 183–186, *supra*.

2 Buffalo, etc. R. R. *v.* Cary, 26 N. Y. 75 (1862). A member of a mutual insurance company cannot, when sued for an assessment, set up that the articles of incorporation did not comply with the statute. Gilman *v.* Druse, 111 Wis. 400 (1901). Where a creamery company's certificate of incorporation is not properly recorded and contains no provision for the payment of the capital stock, a person who subscribed to it, but who refuses to deliver cream in accordance with his contract, can defeat a suit for breach of such contract. Byronville, etc. Ass'n *v.* Ivers, 93 Minn. 8 (1904). As against a receiver it is no defense that the corporation agreed that the subscriber need pay only fifty per cent. of the par value of the stock, or that fraudulent representations induced him to subscribe, or that the full capital stock was not subscribed, or that the company was defectively organized, or that the name of the company was different from the one contemplated. Cox *v.* Dickie, 93 Pac. Rep. 523 (Wash. 1908).

3 See Krutz *v.* Paola Town Co., 20 Kan. 397 (1878). See also § 637, *infra*.

4 Lincoln Park, etc. *v.* Swatek, 204 Ill. 228 (1903). Even though two corporations are neither of them legally incorporated, yet, if they are consolidated, a stockholder in the consolidated company cannot claim that the stockholders are partners, although the consolidated company is not a legal corporation; neither are the officers of the consolidated company merely agents for the stockholders, no partnership being intended. Hence any question of fraud on the part of the majority stockholders will be determined by the principles of corporation law. Cannon *v.* Brush, etc. Co., 96 Md. 446 (1903).

5 See § 637, *infra*.

6 See § 637, *infra*.

7 Liter *v.* Ozokerite Min. Co., 7 Utah, 487 (1891).

its contracts on such grounds.[1] The question of who may attack the legality of the organization of a corporation arises often where a corporation sues upon a note or other obligation, or brings suit to foreclose a mortgage or has suit brought against it on its notes, or for a foreclosure. In such cases the established rule is that the legality of the corporation cannot be called in question.[2]

§ 233. *Corporate creditors cannot hold stockholders liable as partners by reason of irregularities, mistakes, or omissions in the incorporation of a de facto corporation.*—There are many cases to the effect that a corporate creditor seeking to enforce the payment of his debt may ignore the existence of the corporation, and may proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming incorporated was not complied with by the company in question. For instance, it has been held that where the articles of association were signed, but not filed until some time subsequently, debts contracted in the interim might be collected from the stockholders as partners.[3] So, also, a total failure to file or record the certificate or articles of incorporation has been held to render the members liable as partners;[4] as also an omission of the members to sign and publish the

1 See § 637, *infra.*

2 See § 637, *infra.*

3 Bigelow *v.* Gregory, 73 Ill. 197 (1874); McVicker *v.* Cone, 21 Oreg. 353 (1891). *Contra,* Whitney *v.* Wyman, 101 U. S. 392 (1879); Corey *v.* Morrill, 61 Vt. 598 (1889).

4 Field *v.* Cooks, 16 La. Ann. 153 (1861); Abbott *v.* Omaha Smelting Co., 4 Neb. 416 (1876); Garnett *v.* Richardson, 35 Ark. 144 (1879); Ferris *v.* Thaw, 72 Mo. 446 (1880); Coleman *v.* Coleman, 78 Ind. 344 (1881); Martin *v.* Fewell, 79 Mo. 401, 410 (1883). Failure to record the certificate in the county recorder's office as required by statute renders the stockholders liable as partners, even to persons who did not know of the incorporation. Such persons are not given notice by the fact that their note was signed by the company by a certain person as treasurer. New York, etc. Bank *v.* Crowell, 177 Pa. St. 313 (1896). Failure to file the certificate of organization with the county recorder, as required by statute, is fatal, even though the charter has been issued by the state. The stockholders are liable as partners to one who did work, even though after the work was finished he took a corporate note therefor. Guckert *v.* Hacke, 159 Pa. St. 303 (1893). A creditor who seeks to hold stockholders liable as partners on the ground that no corporation exists must prove that the apparent corporation is not a corporation. He must prove the manner of organization by means of the partnership agreement, or whatever agreement exists, or that the concern held itself out as a partnership. *Re* Gibb's Estate, 157 Pa. St. 59 (1893). Failure in the articles to state the number of shares taken, and failure to publish as required by statute, render the stockholders liable as partners. Williams *v.* Hewitt, 47 La. Ann. 1076 (1895). In Hurt *v.* Salisbury, 55 Mo. 310 (1874), corporate officers were held personally liable on a promissory note signed by them as officers, where the certificate was not filed as required.

articles of association;[1] or an indefinite statement of where the principal place of business of the corporation is to be.[2] In Iowa,

In Richardson *v.* Pitts, 71 Mo. 128 (1879), the same officers were held to be entitled to contribution from other members of the supposed corporation. *Cf.* Blanchard *v.* Kaull, 44 Cal. 440 (1872); Western Union Tel. Co. *v.* Union Pacific Ry., 3 Fed. Rep. 721, 729 (1880). In Garnett *v.* Richardson, 35 Ark. 144 (1879), the court held stockholders liable as partners until the certificate was filed with the secretary of state. *Cf.* Harrod *v.* Hamer, 32 Wis. 162 (1873), where the statute effected an incorporation without filing, but prohibited organization until after the articles were filed. The filing of the certificate in the county clerk's office, as required by statute, is essential to incorporation. Childs *v.* Hurd, 32 W. Va. 66 (1889). In Bigelow *v.* Gregory, 73 Ill. 197 (1874), the court held that there was no corporation until the certificate was filed, and that a creditor might recover from a stockholder as a partner. In Indianapolis Furnace, etc. Co. *v.* Herkimer, 46 Ind. 142 (1874), the court held that there was no corporation until the certificate was filed, and that a subscriber to the articles who had agreed to pay the corporation his dues when it was organized could successfully resist its suit until the certificate was filed. In State *v.* Central, etc. Assoc., 29 Ohio St. 399 (1876), the court ousted an association whose notice of acceptance to the state was indefinite and ambiguous. Where the articles must be filed with the secretary of state and a fee paid in order to form a corporation, a transfer of property before this is done does not convey title to the corporation. The transferrer's creditors may attach the property. Jones *v.* Aspen Hardware Co., 21 Colo. 263 (1895). Failure to file a copy of the constitution of a society as required by statute renders the members liable personally, even though the articles of incorporation were filed. Bergeron *v.* Hobbs, 96 Wis. 641 (1897). The directors of a company not legally organized are personally liable for its debt to a creditor, even though the latter has obtained judgment on a mechanic's lien as against the supposed corporation. Kruse *v.* Humpert, 53 S. W. Rep. 657 (Ky. 1899).

1 Unity Ins. Co. *v.* Cram, 43 N. H. 636 (1862); Kaiser *v.* Lawrence Sav. Bank, 56 Iowa, 104 (1881), where the articles were not properly signed and acknowledged. This case also disapproves the decision in Humphreys *v.* Mooney, 5 Colo. 282 (1880). In enforcing this partnership liability, the assumed corporation is not to be made a party defendant with the members thereof. Smith *v.* Colorado F. Ins. Co., 14 Fed. Rep. 399 (1882).

2 Harris *v.* McGregor, 29 Cal. 124 (1865). The case of Chaffe *v.* Ludeling, 27 La. Ann. 607 (1875), says: "Obligors are bound, not by the style which they give to themselves, but by the consequences which they incur by reason of their acts. It matters not what they choose to call themselves." In Louisiana it is held that a creditor, who is contracting with a company which holds itself out as a corporation, may nevertheless hold the parties liable as partners, if the statutes have not been complied with in incorporation, and the capital stock has not been subscribed, nor paid for, nor intended to be. Provident, etc. Co. *v.* Saxon, 116 La. 408 (1906); Louisiana, etc. Bank *v.* Henderson, 116 La. 413 (1906). See also National Union Bank *v.* Landon, 45 N. Y. 410, 414 (1871); Ridenour *v.* Mayo, 40 Ohio St. 9 (1883). *Cf.* Wentz *v.* Lowe, 3 Atl. Rep. 878 (Pa. 1886). An individual may enforce a contract which he makes for himself but in the name "The National Associated Press,

Florida and Nebraska statutes make the stockholders liable if the incorporation was irregular,[1] while in Illinois the directors are made

James H. Goodsell, President." Goodsell *v.* Western Union Tel. Co., 130 N. Y. 430 (1892). Corporate creditors may attack the validity of the corporate organization. Empire Mills *v.* Alston Grocery Co., 15 S. W. Rep. 505 (Tex. 1891). An insufficient statement in the papers to be filed as to the property which is turned in for stock renders the stockholders liable as partners. Vanhorn *v.* Corcoran, 127 Pa. St. 255 (1889).

[1] In Clegg *v.* Hamilton, etc. Co., 61 Iowa, 121 (1883), the court held that publishing the articles which did not contain all the requirements of the statutory notice was insufficient, and stockholders were liable as partners. In Iowa stockholders are liable as partners, by statute, if the incorporation is not regular. Eisfeld *v.* Kenworth, 50 Iowa, 389 (1879). In First Nat. Bank *v.* Davies, 43 Iowa, 424 (1876), the court held that, where the state waived notice by permitting the filing to be made with its secretary within ninety days, vested rights accrued which would not be affected by failure to file within that time. See also Jessup *v.* Carnegie, 80 N. Y. 441 (1880). Under the Iowa statutes the stockholders are liable as partners where the certificate of incorporation failed to state the highest amount of indebtedness which the company might incur. Heuer *v.* Carmichael, 82 Iowa, 288 (1891). Although the articles are not recorded, as required by statute, yet as between themselves the parties are stockholders and not partners. Heald *v.* Owen, 79 Iowa, 23 (1890). Under the Iowa statutes an insufficient incorporation of the plaintiff foreign corporation is not put in issue by a denial of incorporation. The deficiency must be specifically alleged. Wardner, etc. Co. *v.* Jack, 82 Iowa, 435 (1891). In an action against individual stockholders to charge their property with a judgment rendered against the corporation, the plaintiff is not estopped to allege defects in the organization by reason of having recognized the corporation in dealing with it and in bringing suit against it as such. Heuer *v.* Carmichael, 82 Iowa, 288 (1891). Failure to complete the publication as required by statute does not render the stockholders liable under the Iowa statute to a creditor who entered into his contract before the time allowed for publication had expired. Thornton *v.* Balcom, 85 Iowa, 198 (1892). Although the statute requires the articles to state the amount of indebtedness which may be incurred, the articles may fix the amount, with the right to the stockholders to increase it up to the statutory limit. Thornton *v.* Balcom, 85 Iowa, 198 (1892). The fact that the whole capital stock is not subscribed is not a failure to comply with the law relative to organizations so as to render the stockholders liable as partners under the Iowa statute. Sweney *v.* Talcott, 85 Iowa, 103 (1892). Where a *de facto* corporation incurs debts, and subsequently a new corporation, legally organized, takes over the business and assumes the debts, the creditors of the *de facto* corporation may hold the latter corporation liable. Calumet Paper Co. *v.* Stotts Inv. Co., 96 Iowa, 147 (1895). Even though a statute makes the stockholders personally liable for failure to comply with the formalities of incorporation, yet creditors who are incorporators are estopped from enforcing this liability. Seaton *v.* Grimm, 110 Iowa, 145 (1899). Stockholders are liable personally under the Iowa statute where the certificate of incorporation is published in a weekly newspaper in a small town sixty miles distant from the place of business of the corporation, which

liable.[1] The question of whether a person, dealing with what he reasonably supposed to be a copartnership, but which really was a corporation, may hold the parties liable personally, is considered

is in a city having daily papers, the statute prescribing that the publication shall be as convenient as practicable to the principal place of business. Berkson *v.* Anderson, 115 Iowa, 674 (1901). Under the Iowa statute a stockholder is liable for corporate debts where the notice of incorporation was not published as required by statute, it appearing that he became a stockholder during the time allowed for the publication. Clinton, etc. Works *v.* Neiting, 111 N. W. Rep. 974 (Iowa 1907). The Iowa provision that the stockholder shall be liable for the debts unless there is published a statement of the time and conditions on which the capital stock so paid will be strictly construed, and the further provision that they shall be liable if there are defects in the organization does not apply to errors after incorporation. Brinkley, etc. Co. *v.* Curfman, 114 N. W. Rep. 12 (Iowa 1907). Although the statute renders stockholders liable as partners unless there has been a substantial compliance with the statute relative to organization, yet the courts are not inclined to liberally construe and apply such liability. Porter *v.* Sherman, etc. Co., 36 Neb. 271 (1893). Failure to publish the charter as required by statute does not render the stockholders individually liable. Kleckner *v.* Turk, 45 Neb. 176 (1895). Failure to file the articles of incorporation with the secretary of state, and the fact that the debts exceed the amount specified in the charter, and failure to publish notice of the debts of the corporation as required by law, do not render the stockholders personally liable on notes which were given by the corporation in the corporate name, especially where judgment was first obtained against the corporation on the notes. Nebraska Nat. Bank *v.* Ferguson, 49 Neb. 109 (1896). A person contracting with a corporation as such cannot hold the stockholders personally liable on the ground that the company did not publish notice of its incorporation as required by statute, nor have its capital stock subscribed at a certain time nor paid for, and on the ground that it failed to post a copy of its by-laws and to make statements as required by statute, and to keep a record book or stock book. Hogue *v.* Capital Nat. Bank, 47 Neb. 929 (1896). In Florida, by statute, the stockholders are liable for the debts the same as partners where the statute relative to incorporation is not complied with. Heinberg Bros. *v.* Thompson, 47 Fla. 163 (1904).

[1] Under the Illinois statute making directors liable for debts before the statute is complied with as to incorporation, and the issue, by the secretary of state, of a certificate of completed organization and recording of the same in the county where the principal office is, the directors are liable if such certificate is not so recorded. The liability may be enforced even by a corporate creditor who has filed his claim with an assignee of the corporation for the benefit of its creditors. Loverin *v.* McLaughlin, 161 Ill. 417 (1896). Where incorporators under the Illinois statute have not recorded the certificate of incorporation in the county where the principal office is, as required by statute, a suit against the incorporators to enjoin unfair competition will lie, inasmuch as the alleged corporation never had a legal existence. Elgin, etc. Co. *v.* Loveland, 132 Fed. Rep. 41 (1904). The Illinois statute rendering a director personally liable

elsewhere.[1] The mere assumption of corporate powers, without any attempt at incorporation, cannot, of course, exempt the members from full liability as partners.[2] "And a mere feigned compliance with the laws of the state of which it is claimed a corporation is a citizen" is not sufficient.[3] Yet, even though the stockholders are liable as partners because the articles were not properly acknowledged, the legislature may cure the defect and thus destroy any cause of action then existing.[4] Questions relative to the liability of promoters for purchases or work prior to incorporation are considered elsewhere.[5]

for the debts of a corporation where the incorporating act is not complied with in certain particulars was applied in Edwards v. Armour, etc. Co., 190 Ill. 467 (1901). 85 N. E. Rep. 496.

1 See § 243, *infra*.

2 Pettis v. Atkins, 60 Ill. 454 (1871); Fuller v. Rowe, 57 N. Y. 23 (1874). Where the incorporators never organize and neither subscribe for nor pay for any capital stock, but merely do business in the corporate name, they may be held liable as partners. Brooke v. Day, 59 S. E. Rep. 769 (Ga. 1907).

3 Owen v. Shepard, 59 Fed. Rep. 746 (1894), holding that, where the stockholders are sued as individuals for the debts of the company, it is for them to prove that the corporation existed. The testimony of two persons that they complied with the laws and got a charter is insufficient, it appearing that the law required at least three incorporators. The charter itself is the best evidence. Persons transacting business without incorporation are liable as partners, even though they do so in the name of a corporation which has assigned all its property to them. Forbes v. Whittemore, 62 Ark. 229 (1896). A demurrer does not lie to a complaint alleging that the plaintiff sold goods to defendants who pretended to be officers of a pretended corporation organized in Illinois. Such a suit may be maintained, irrespective of the Illinois statute on that subject, if the proof sustains the allegations. Worthington v. Griesser, 77 N. Y. App. Div. 203 (1902). Where the incorporators' subscriptions were never paid and the directors never met and the money to transact the business was furnished by one person, the lower court in Missouri held that it was a fraud on the persons dealing with the supposed corporation and that the parties were liable as partners. Hyatt v. Van Riper, 105 Mo. App. 664 (1904). Where no effort has been made to incorporate, all are liable as partners. McLennan v. Hopkins, 2 Kan. App. 260 (1895), a case where it was supposed by all that a corporation existed. Where no certificate is filed with the secretary of state, no stock issued, no record book, and no real effort to perfect a corporation, the members are liable individually. Queen, etc. Co. v. Crawford, 127 Mo. 356 (1895). Persons seeking to organize under a certificate of incorporation, having a capital less than required by law, are liable as partners, especially where they have abandoned such incorporation. *In re* Browne, etc. Co., 106 La. 486 (1901).

4 Shields v. Clifton Hill Land Co., 94 Tenn. 123 (1894).

5 See §§ 705–707, *infra*. The promoters are not liable personally for goods purchased for and in the name of the corporation before the final incorporation papers were filed. Western, etc. Co. v. Davis, 104 S. W. Rep. 573 (Ind. Ter. 1907).

§ 234. Notwithstanding the above decisions, the great weight of authority has clearly established the rule that, where a supposed corporation is doing business as a *de facto* corporation, the stockholders cannot be held liable as partners, although there have been irregularities, omissions, or mistakes in incorporating or organizing the company. The corporation is a *de facto* corporation where there is a law authorizing such a corporation and where the company has made an effort to organize under the law and is transacting business in a corporate name.[1] This rule applies to claims based on tort the same as to those based on contract.[2]

This conclusion of the law is reasonable and just. There is no reason why parties who have dealt with a corporation as a corporation should afterwards be allowed to claim more than they originally bargained for, and to hold the stockholders personally liable. Such is the established rule beyond reasonable doubt.[3]

1 See cases in notes below; also § 185, *supra*, note.

2 Demarest *v.* Flack, 32 N. Y. St. Rep. 675; aff'd, 128 N. Y. 205 (1891).

3 Whitney *v.* Wyman, 101 U. S. 392 (1879). Even though a corporation is not legally organized, a person selling goods to it cannot hold the stockholders personally liable therefor. Love *v.* Ramsey, 139 Mich. 47 (1905). Even though the statute requires ten days' notice of the organization meeting to the subscribers to the capital stock, and that a copy of such notice be included in the report to the secretary of state, yet the stockholders may unanimously waive this provision. Butler, etc. Co. *v.* Cleveland, 220 Ill. 128 (1906). A false statement in the articles of incorporation that a certain amount of stock had been subscribed and paid for does not render the incorporators liable as partners. Webb *v.* Rockefeller, 195 Mo. 57 (1906). Incorporators are not personally liable for the debts, even though the articles of incorporation were not acknowledged and the stock not paid for as required by statute, it appearing that the articles had been regularly filed and a certificate issued by the secretary of state. First Nat. Bank *v.* Rockefeller, 195 Mo. 15 (1906). A requirement that the articles of incorporation be signed by the president and directors does not require them in signing to add their official positions. St. Louis, etc. R. R. *v.* Southwestern, etc. Co., 121 Fed. Rep. 276 (1903). A person who sells goods to a supposed corporation cannot hold the stockholders liable as partners on the ground that there were but three incorporators when the statute required five, and on the ground that a copy of the certificate of incorporation was not filed with the secretary of state, and 10 per cent. was not paid in as required by statute, especially where it is not proved that the defendants had anything to do with such a corporation. Mitchell *v.* Jensen, 29 Utah, 346 (1905). Even though an original certificate of incorporation is void by reason of an uncertified check having been given in payment of the amount required by statute, yet, if after the check is cashed a so-called amended certificate is filed, the latter stands as an original certificate of incorporation. People *v.* Comrs., 81 N. Y. App. Div. 242 (1903); aff'd, 175 N. Y. 516. As regards the jurisdiction of the federal courts the incorporation of a company cannot be questioned on the ground that the charter required a certain amount of

In England the remarkable conclusion was reached in the lower courts that where the owner of a business incorporates a company

money to be paid in before business was commenced, and that business had been commenced without that amount being paid. Wells Co. *v.* Gastonia Co., 198 U. S. 177 (1905). The members of a supposed corporation are not liable individually on a loan of money made to it, even though it was irregularly incorporated. Larned *v.* Beal, 65 N. H. 184 (1889). A stockholder who is also a creditor of a supposed corporation cannot hold the other stockholders liable as partners on the ground that the articles of incorporation were not properly acknowledged and executed in duplicate and filed in the office of the secretary of state, in addition to filing in the county clerk's office as required by statute. Doty *v.* Patterson, 155 Ind. 60 (1900). "Where there is a statute authorizing the creation of a corporation, an attempt to comply with the statute, and an actual exercise of corporate functions, the existence of the corporation can only be destroyed by a direct proceeding." Crowder *v.* Sullivan, 128 Ind. 486 (1891). After a party has recovered judgment against a corporation, as such, and obtained the appointment of a receiver therefor, he cannot in the same suit deny its corporate entity, and seek to hold the stockholders thereof liable as partners. First Nat. Bank *v.* Dovetail, etc. Co., 143 Ind. 534 (1896). Where a man has acted as director of a company he cannot afterwards sue the stockholders to hold them liable as partners on the ground that the certificate of organization was not filed for record as required by statute, and he cannot hold them liable, although the statute renders them liable where the provisions of the statute are not complied with. Curtis *v.* Meeker, 62 Ill. App. 49 (1895); aff'd, 169 Ill. 233 (1897). In the case of Johnson *v.* Okerstrom, 70 Minn. 303 (1897), the court held that the individual defendants were not liable as partners, although they were doing business under the name of "Schulin, Linden, Lindberg, & Co.," and although the articles of incorporation were signed by only five members, whereas the statute required seven, and although the certificate of incorporation was not recorded, although it was filed. It seems, however, that the plaintiffs knew that the defendants were acting as a corporation. Where the articles were filed with the county clerk on November 9, 1886, and goods were purchased of plaintiff soon after, and the articles were not filed with the secretary of state until August 17, 1887, the plaintiff cannot ignore the corporation and hold the parties liable as partners. The plaintiff made the contract supposing he was dealing with a corporation. Vanneman *v.* Young, 52 N. J. L. 403 (1890). Where the statute authorizes seven or more "persons" to incorporate a railroad company, the word "persons" does not require the incorporators to be residents. The incorporation is legal although three of the seven incorporators are non-residents. Central R. R. *v.* Pennsylvania R. R., 31 N. J. Eq. 475 (1879). Under the Colorado statute requiring the certificate to set forth by whom the corporate affairs shall be conducted, a provision that they shall be conducted by the president, vice-president, and attorney, instead of providing for directors, is insufficient. The corporation is only *de facto*, but an incorporator and a vendor of property to it cannot question the incorporation. Bates *v.* Wilson, 14 Colo. 140 (1890). Though the provision in the Kentucky statutes requiring publication of the charter is not complied with, yet the corporation is valid and complete, except that the state may

for the purpose of carrying on the business, the incorporators being merely the nominees of the owner of the business, which is to be

proceed to annul the charter. No other party can raise the objection. Stutz *v.* Handley, 41 Fed. Rep. 531 (1890) (reversed on other grounds, 139 U. S. 417); Walton *v.* Riley, 85 Ky. 413, 421 (1887), overruling Heinig *v.* Adams, etc. Mfg. Co., 81 Ky. 300 (1883). Failure to file the articles with the secretary of state is not fatal. Portland, etc Turnp. Co. *v.* Bobb, 88 Ky. 226 (1889). Incorporators are not personally liable, even though they do not publish the articles as required by statute. Clark *v.* Richardson, 31 S. W. Rep. 878 (Ky. 1895). In proving incorporation it is not necessary to prove publication as required by statute. Brown *v.* Corbin, 40 Minn. 508 (1889). Although there are less stockholders and less directors than the statute or charter require, yet the acts of these are sufficient to sustain obligations incurred by the corporation with third persons. Welch *v.* Importers', etc. Bank, 122 N. Y. 177 (1890). The grantor of land cannot claim that the grantee was unincorporated and not qualified to hold land, the incorporation being only partially completed. Reinhard *v.* Virginia, etc. Co., 107 Mo. 616 (1891). The failure to specify the term of existence is not fatal where the general act limits the time. Albright *v.* Lafayette, etc. Assoc., 102 Pa. St. 411, 423 (1883); Becket *v.* Uniontown, etc. Assoc., 88 Pa. St. 211 (1878).

In Seacord *v.* Pendleton, 55 Hun, 579 (1890), there was no pretense of any attempt to incorporate the bank, and yet the stockholders were held not liable. See s. c., *sub nom.* Merchants' Nat. Bank *v.* Pendleton, 9 N. Y. Supp. 46 (1890). In Christian *v.* Bowman, 49 Minn. 99 (1892), where there was a failure to file the proper affidavit of publication, the directors were held personally liable for debts, but the court stated that if the case had been properly tried a different conclusion might have been reached. One who takes part in organizing the company cannot hold its members liable as partners on the ground that it was irregularly organized. Allegheny Nat. Bank *v.* Bailey, 147 Pa. St. 111 (1892). Nor can one to whom he assigns a leasehold. Egbert *v.* Kimberly, 146 Pa. St. 96 (1892). Where a creditor of a bank sues the stockholders as partners, the burden of proof is on him to prove that no corporation existed, it being shown that the bank always acted as a corporation and held itself out as such and was supposed so to be by the stockholders. Hallstead *v.* Coleman, 143 Pa. St. 352 (1891). Although a majority of the incorporators assume to be residents, but are not, and the charter is forfeited, yet stockholders who become such after incorporation and without knowledge of the fraud cannot be held liable as partners. American Salt Co. *v.* Heidenheimer, 80 Tex. 344 (1891). A stockholder cannot sustain a bill in equity to have the *de facto* going corporation wound up as a partnership by proving that the articles were not filed in the office of the recorder of deeds for the county, nor by proof that his subscription was not in good faith. "The general rule is that one who deals with a corporation as existing *de facto* is estopped to deny that, as against it, it has been legally organized." Bushnell *v.* Consolidated, etc. Co., 138 Ill. 67 (1891). *Cf.* notes in § 233, *supra.* Stockholders of a *de facto* corporation are not liable as partners merely because the probate judge has not recorded the certificate of incorporation, and the subscription to the stock and issued the certificate of incorporation as required by statute. Owensboro, etc. Co. *v.* Bliss, 132 Ala. 253 (1901).

sold to the corporation, the business being transferred to the corporation in payment for its stock, the corporate entity would be

A failure to organize does not render the stockholders liable as partners, business having been carried on without organization after the filing of the papers. Cory *v.* Lee, 93 Ala. 468 (1891). The failure to insert in the certificate a provision as to the residences of the persons does not render the stockholders liable as partners. The defendant in this case alleged that it was a corporation *de facto*, and that plaintiff sold goods to and contracted with defendant as a corporation, knowing that it was doing business as such. The contract was made with it in its corporate name and capacity. Snider's Sons Co. *v.* Troy, 91 Ala. 224 (1890).

In Alabama the stockholders are not liable for the debts, merely because the articles of incorporation do not specify the instalments by which the unpaid capital stock shall be paid in. Bolling *v.* Le Grand, 87 Ala. 482 (1889). Where a corporation has been authorized by a judge as provided by statute, but no certificate has been issued, the corporation is sufficiently formed to defeat the plea of *nul tiel corporation*. Sparks *v.* Woodstock, etc. Co., 87 Ala. 294 (1889). If proof is given by plaintiff that a copartnership existed and the defense is that it was a corporation, the defendant must prove that fact. Although the company had a president and secretary, this in itself does not raise a presumption of a corporation. Clark *v.* Jones, 87 Ala. 474 (1889). Failure to file the articles of association with the county clerk, as required by statute, does not render the stockholders liable as partners. Granby, etc. Co. *v.* Richards, 95 Mo. 106 (1888).

A private citizen cannot contest the validity of a grant by a city to a water-works company. Stedman *v.* City of Berlin, 97 Wis. 505 (1897). A person who contracts with a corporation, knowing that it claims to be a corporation, and knowing that there was a stipulation for a limited liability, cannot hold the parties liable as partners. Sentell *v.* Hewitt, 50 La. Ann. 3 (1898). A promoter and organizer of a corporation cannot sue a stockholder on the ground that the incorporation was not in compliance with the statute and hence that it is a partnership. Anderson *v.* Thompson, 51 La. Ann. 727 (1899). Where the certificate or articles are to be filed both with the state and the local authorities, a failure as to the former does not render the stockholders liable as partners, provided the articles or certificate are filed with the local authorities. Mokelumne Hill Min. Co. *v.* Woodbury, 14 Cal. 424 (1859); Raisbeck *v.* Oesterricher, 4 Abb. N. Cas. 444 (1878); Cross *v.* Pinckneyville Mill Co., 17 Ill. 54 (1855). The creditor cannot sue the directors for damages for a fraudulent conspiracy herein, especially when he was informed that the corporation had been irregularly incorporated. Nelson *v.* Luling, 62 N. Y. 645 (1875). A statement of the location of the "place of business" is a sufficient statement of the "principal place of business." *Re* Spring Valley Water-works, 17 Cal. 132 (1860). That a failure to file the certificate with the secretary of state does not invalidate the corporation, see Tarbell *v.* Page, 24 Ill. 46 (1860). See, also, to same effect, Planters', etc. Bank *v.* Padgett, 69 Ga. 159 (1882); Humphreys *v.* Mooney, 5 Colo. 282 (1880); Gartside Coal Co. *v.* Maxwell, 22 Fed. Rep. 197 (1884); Merriman *v.* Magiveney, 12 Heisk. (Tenn.) 494 (1873); Merchants', etc. Bank *v.* Stone, 38 Mich. 779 (1878); Jessup *v.* Carnegie, 80 N. Y. 441 (1880), applying an Iowa decision to an Iowa case. First Nat. Bank *v.* Davies, 43 Iowa, 424 (1876). In Holmes

disregarded in case of the insolvency of the corporation, and the party so selling his business to the corporation and carrying it on

v. Gilliland, 41 Barb. 568 (1864), the court held that failure to give notice to the community by publication does not make the stockholders partners. In De Witt *v.* Hastings, 69 N. Y. 518 (1877), where no certificate was filed owing to an abandonment of the enterprise, it was held that a subsequent filing of it could not render liable one of the original promoters who took no part in the filing of the articles of association, although his name was attached thereto. Stockholders are not personally liable on the ground that the certificate of incorporation was not properly executed and acknowledged. Tennessee, etc. Co. *v.* Massey, 56 S. W. Rep. 35 (Tenn. 1899), the court holding that a person who contracts with a *de facto* corporation is estopped from denying its existence and from holding the incorporators liable as partners on the contract. A charter is valid, even though the register of deeds in copying the charter, as required by statute, did not accurately copy the seal of the state attached thereto. Carpenter *v.* Frazer, 102 Tenn. 462 (1899). The general rule is that stockholders are not personally liable for informalities, etc. Seaton *v.* Grimm, 110 Iowa, 145 (1899). A creditor who has filed his claim with the assignee of a corporation cannot afterwards claim that it was not a corporation and that the stockholders are individually liable, even though the court has decided that it was not a corporation. Clausen *v.* Head, 110 Wis. 405 (1901). A person who sells land to a supposed corporation and takes a purchase-money mortgage in partial payment cannot enforce the statutory liability of stockholders, where the corporation was never substantially organized, such mortgagee being fully cognizant of all the facts. Cole *v.* Great Bend, etc. Co., 54 Pac. Rep. 920 (Kan. 1898). Where a certificate of incorporation is prepared and filed and the company is organized and for eleven years transacts business, one of the stockholders cannot maintain a suit to have the corporation adjudged not to be a corporation on the ground that the certificate of incorporation did not contain all the statements required by the statute. Marsh *v.* Mathias, 19 Utah, 350 (1899). Where the charter requires a statement of the limit of debts not exceeding two-thirds of the capital stock, it suffices to state that the debt shall not exceed such two-thirds. Park *v.* Zwart, 92 Iowa, 37 (1894). The articles of incorporation are legal even though the subscribers designate their Christian names by initials instead of full name. State *v.* Beck, 81 Ind. 500 (1882). Where the statute authorizes incorporation by "any number of persons," one alone cannot organize a company. Louisville Bkg. Co. *v.* Eisenman, 94 Ky. 83 (1893). Where the statute requires the charter to state the initial terminus and the end of the terminus, and general route, the charter cannot definitely describe one route and conclude with a general statement that it covers "all the streets of the city, then or thereafter to be established." Knoxville *v.* Africa, 77 Fed. Rep. 501 (1896). The omission of an immaterial part of the acknowledgment by an incorporator, and the omission of a certificate of notaryship, do not render the incorporators liable as partners. Stout *v.* Zulick, 48 N. J. L. 599 (1886). An incorporator may sign by making his mark. Board, etc. Church *v.* Campbell, 48 La. Ann. 1543 (1896). An infant cannot be an incorporator. Hamilton, etc. Co. *v.* Townsend, 13 Ont. App. Rep. (Can.) 534 (1886). Stockholders cannot be held liable as partners on the ground of illegal incorporation, where there

would be held personally responsible for all the debts of the corporation, on the theory that the corporation was merely his agent. This decision was severely criticised, and an appeal was taken to the House of Lords, where the judgment of the lower courts was unanimously reversed.[1]

is a law authorizing incorporation for that purpose, and an attempt was made to organize thereunder, and there was user. Finnegan *v.* Noerenberg, 52 Minn. 239 (1893). Although the statutes require the directors to be residents of the state, nevertheless, even though the directors are non-residents, the incorporation is valid, and the corporation is not dissolved, nor are the stockholders liable as partners. Demarest *v.* Flack, 128 N. Y. 205 (1891). The fact that a corporation has not filed its certificate of incorporation in the proper county clerk's office does not prevent its bringing suit, its certificate having been properly filed with the secretary of state. Young, etc. Co. *v.* Young, etc. Co., 72 Fed. Rep. 62 (1896). Failure to insert in the articles of incorporation the number of shares taken by each does not render the stockholders liable. Wilson Cotton Mills *v.* C. C. Randleman, etc. Mills, 115 N. C. 475 (1894). Irregularities in the organization of a New Jersey corporation cannot be inquired into in the courts of another state, a charter having been issued to the company in the state where it was organized. Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576 (1894). A director is not personally liable in damages to a property owner over whose premises the company's road runs without warrant. Lamming *v.* Galusha, 81 Hun, 247 (1894); aff'd, 151 N. Y. 648, where it was also claimed that the incorporation had been insufficient. For a detailed digest of the decisions on what may and what must be stated in certificates of incorporation, and what informalities will be fatal, and what meaning is given to the usual provisions of general statutes for incorporation, see 12 Am. R. R. & Corp. Cases, pp. 474–522. The assignee of a corporation cannot sue its incorporators for ten per cent. of the capital stock, on the ground that they had sworn that ten per cent. had been paid in in order to obtain the charter, when in fact it had not been paid in. Patterson *v.* Franklin, 176 Pa. St. 612 (1896). A creditor who deals with a corporation as a corporation cannot hold the stockholders liable as partners. American, etc. Co. *v.* Bulkley, 107 Mich. 447 (1895). A creditor who deals with a corporation as such cannot hold its stockholders liable as partners on the ground that its organization was a fraudulent device to obtain credit for a copartnership, especially in a suit for the foreclosure of a corporate mortgage. Gow *v.* Collin, etc. Co., 109 Mich. 45 (1896). As to irregularities in the organization meetings of the stockholders and directors, see § 243, *infra.*

[1] Salomon *v.* Salomon, etc. Co., [1897] A. C. 22, rev'g Broderip *v.* Salomon, etc. Co., [1895] 2 Ch. 323. See also Munkittrick *v.* Perryman, 74 L. T. Rep. 149 (1896), where the court held that two partners might incorporate and that they would not thereafter be personally liable on the contracts of the company. The court, however, intimated that if both of the partners and the corporation had been before the court a different conclusion might have been reached. The supreme court of Louisiana has held that in such a case the corporate existence will be ignored. Samuel, etc. Co. *v.* Illinois, etc. Co., 51 La. Ann. 64 (1898).

§ 235. *Extent of the liability by reason of deficient incorporation.*—Even in those cases where stockholders have been held personally liable on account of deficient incorporation, the mere fact that an attempted incorporation has failed does not necessarily render all the participants therein liable absolutely for all the debts of the concern. At the most, each is liable only in case he would be liable if the original plan had been to form a partnership. If he was not a member when the debt was contracted, he cannot be held liable on that particular debt.[1] One case goes still further, and holds that one who becomes a member subsequently to the attempted incorporation, but takes no part in the organization or management of the company, cannot be held liable for its debts.[2]

§ 236. *Liability as partners by reason of fact that corporations cannot be organized for the business involved.*—The general incorporating acts common to most of the states usually specify the particular kinds of business for the prosecution of which corporations may be formed thereunder. It follows that no business can be carried on by persons, as a corporation, under the incorporating act, unless that particular business is specified therein. Many decisions on what kinds of business are included in the words used in various statutes of the different states are given in the notes below.[3] Thus,

1 Fuller *v.* Rowe, 57 N. Y. 23 (1874). See also § 508, *infra*. In a suit against stockholders as partners, the defendants may require the joinder of their associates. De Witt *v.* Hastings, 69 N. Y. 518 (1877).

2 Stafford Nat. Bank *v.* Palmer, 47 Conn. 443 (1880). *Cf.* Richardson *v.* Pitts, 71 Mo. 128 (1879).

3 Thus, where a rifle club attempted incorporation under the statute allowing incorporation for "literary, scientific, and charitable purposes," the members were held individually liable for damages to the widow of a man who was killed by a bear which the club was keeping. Vredenburg *v.* Behan, 33 La. Ann. 627 (1881). See also Glen *v.* Breard, 35 La. Ann. 875 (1883). Many business purposes may be specified in one charter. Bird *v.* Daggett, 97 Mass. 494 (1867). Several objects may be included in the same articles of incorporation. West *v.* Crawford, 80 Cal. 19 (1889). Where the general act authorizes incorporation for manufacturing gas "or" manufacturing electricity, a company may be organized for both of these purposes. People *v.* Rice, 138 N. Y. 151 (1893). Even though the certificate of incorporation recites several purposes where the statute allows but one purpose, yet a corporation exists and may be held liable as such. Marion Bond Co. *v.* Mexican, etc. Co., 160 Ind. 558 (1902). Under a statute authorizing incorporation for purposes mentioned in several succeeding sections, a corporation cannot be organized for purposes in two of those sections. Ramsey *v.* Tod, 95 Tex. 614 (1902).

Where the charter authorizes incorporation to improve and sell lands, a company may be organized to buy, sell and improve land. Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 570 (1894). Where corporations may be formed for any legal purposes they may be formed to buy and sell stocks or land. Market St. Ry. *v.* Hellman, 109 Cal. 571 (1895). A bank cannot incorporate under an act for "any

where a New Jersey corporation illegally practices dentistry in Pennsylvania, and one of its employees does negligent dental work,

species of trade or commerce." Bank of California *v.* Collins, 7 Hun, 336 (1876). Where the statutes of a state or territory do not provide for the incorporation of banks, an attempted incorporation of a bank thereunder is void, and the incorporators are liable as partners for the debts. Davis *v.* Stevens, 104 Fed. Rep. 235 (1900). A statute authorizing incorporation for "other lawful business" will be liberally construed, and includes the business of booming logs. Lindsay, etc. Co. *v.* Mullen, 176 U. S. 126 (1900). Under a statute authorizing incorporation for the promotion of "trade and commerce," a company may be organized to promote the welfare and interests of persons engaged in metal working. *In re* Roofing, etc. Assoc., 200 Pa. St. 111 (1901). Where the statute prescribes that companies organized for profit must be organized under a certain statute, a company organized for the purpose of dealing in real estate must be organized under that statute. State *v.* Home, etc. Union, 63 Ohio St. 547 (1900). So, also, as to a corporation organized for business purposes. People *v.* Rose, 188 Ill. 268 (1900). The general incorporating law of Massachusetts, which does not allow incorporation for manufacturing liquor, does not prevent incorporation for selling liquor, and hence a foreign corporation may sell liquor in that state. Enterprise, etc. Co. *v.* Grimes, 173 Mass. 252 (1899). Under a statute authorizing incorporation of railroads to carry freight and passengers, a railroad to carry passengers only cannot be organized. Chicago, etc. Ry. *v.* Oshkosh, etc. Ry., 107 Wis. 192 (1900). Under the statute authorizing corporations for any lawful "business" or "pursuit," a corporation may be formed to guaranty the bonds of an educational institution, and at any rate the stockholders in such corporation cannot question the power of the corporation to make such guaranty. Maxwell *v.* Akin, 89 Fed. Rep. 178 (1898). Even though a charter has been taken out for water-works and also electric light purposes, although the statutes do not authorize the combining of those two businesses in one corporation, yet a contract made by the city with such corporation to pay certain hydrant and electric-light rentals may be enforced, inasmuch as the contract is valid, even if the corporation be considered but a partnership. Cunningham *v.* City of Cleveland, 98 Fed. Rep. 657 (1899). A provision inserted in a certificate of incorporation under the Nebraska statutes limiting the liability of the stockholders so that they are not even liable for the subscription price is void. Van Pelt *v.* Gardner, 54 Neb. 712 (1898). See also § 4, *supra*. The business of selling instalment bonds is authorized under a statute allowing incorporation for any lawful business. Vokes *v.* Eaton, 119 Ky. 913 (1905). Under a statute authorizing incorporation for any enterprise or business, a company may be organized with a capital stock to maintain a home for indigent and infirm women. Jordan's Adm'x *v.* Richmond, etc., 106 Va. 710 (1907). Where the statute authorizes incorporation to conduct business, a corporation may be organized to act as an agent. State *v.* Michel, 36 S. Rep. 869 (La. 1904). Where by its charter a corporation may sell all its property and deal in stocks, it may sell all its property for stock. Traer *v.* Lucas, etc. Co., 124 Iowa, 107 (1904). A company organized to plant, manufacture and sell chicory is a manufacturing corporation. Bolton *v.* Nebraska Chicory Co., 69 Neb. 681 (1903). A corporation to deal in bonds cannot be organized un-

the directors and officers are personally liable for the damage, it appearing that they knew and assented to the company doing busi-

der a statute authorizing the formation of corporations to deal in merchandise and conduct mercantile operations. Such a corporation is not even a *de facto* corporation, inasmuch as such a *de jure* corporation is impossible under such a statute. Hence such a corporation cannot bring suit as a corporation. Indiana, etc. Co. *v.* Ogle, 22 Ind. App. 593 (1899). Under the Indiana statute authorizing a corporation for manufacturing *or* various other purposes, a corporation cannot be formed for several of these purposes, and hence a subscription made before incorporation cannot be enforced by a company organized for several objects. Williams *v.* Citizens', etc. Co., 25 Ind. App. 351 (1900). A laundry business is not a mechanical business. *In re* Fuller Co., 79 Minn. 414 (1900). Under the Mississippi statutes a corporation cannot be organized to deal in the stock of other corporations. Woodbury *v.* McClurg, 78 Miss. 831 (1901). Even though the statutes do not authorize the formation of a corporation for banking purposes, yet if a subsequent statute does so authorize and legalizes prior attempted incorporations upon their filing a certificate, the stockholders are not liable as partners, even though such certificate has not been filed. Mason *v.* Stevens, 16 S. D. 320 (1902). A statement in the articles of incorporation that the company may carry on such busines as it thinks to be for the benefit of the stockholders is void. *Re* Crown Bank, L. R. 44 Ch. D. 634 (1890). Charters for enumerated objects "and other purposes" will be rejected. *Re* Journalists' Fund, 8 Phila. 272 (1871). So as to mining for "minerals." *Re* Glenwood Co., 6 Pa. Co. Ct. Rep. 575 (1889). A purchaser of stock from one of the supposed stockholders cannot recover back the purchase price from all of such stockholders. His remedy is other than this. Perry *v.* Hale, 143 Mass. 540 (1887). An application for a charter for "the mining for and manufacturing of oil and gas" is too general and indefinite to be granted. An application should express singleness of purpose, but two pursuits may be combined when kindred and cognate. Op. Atty. Gen., *Re* Newton Hamilton Oil, etc. Co., 10 Pa. Co. Ct. Rep. 452. A mercantile business may be incorporated under a statute authorizing the incorporation of "industrial business." Bashford, etc. Co. *v.* Agua, etc. Co., 35 Pac. Rep. 983 (Ariz. 1894).

Under the words "or other lawful business," in the general incorporating statute, a company may be organized to buy and sell real estate. Brown *v.* Corbin, 40 Minn. 508 (1889). Indefiniteness in the statement of the object of incorporation is no defense. Owenton, etc. Turnp. Co. *v.* Smith, 13 S. W. Rep. 426 (Ky. 1890). A company may incorporate to buy, sell, and deal "in real estate, live-stock, bonds, securities, and other properties of all kinds, on its own account and for commission, in the United States and elsewhere," under the Texas statute authorizing incorporation for purposes of "mutual profit or benefit." Jefferson Nat. Bank *v.* Texas Inv. Co., 74 Tex. 421 (1889). A constitutional prohibition against the incorporation of any church does not prevent the incorporation of the "General Assembly of the Presbyterian Church in the United States." Guthrie *v.* Guthrie, 10 S. E. Rep. 327 (Va. 1889). A corporation for mining and trading cannot be organized under an act for mining. Isle Royale Land Corp. *v.* Osman, 76 Mich. 162 (1889). A medical college cannot be incorporated under an act to incorporate benevolent, charitable, scientific, and missionary societies. People *v.* Gunn, 96 N. Y.

ness in Pennsylvania.[1] The fact that a certificate of incorporation includes a purpose for which incorporation is not provided for by the

317 (1884). A mutual reliance society cannot be incorporated under an act for incorporating benevolent, charitable, scientific, and missionary societies. People *v.* Nelson, 46 N. Y. 477 (1871). Where the statute authorizes incorporation for producing and selling electricity, and the certificate of incorporation includes this as well as manufacturing and selling electrical appliances, apparatus and supplies, the corporation is not a *de jure* corporation, and hence insufficient to support an action by one promoter against another on a contract of the latter to convey land to a corporation to be formed and to take stock in payment, especially where the full capital stock of such corporation had not been subscribed for. Burk *v.* Mead, 159 Ind. 252 (1902). The secretary of state cannot be compelled to accept the certificate of incorporation for growing, selling and purchasing rice and other agricultural products under a statute organizing a corporation for growing, selling and purchasing seeds, plants, etc., for agricultural purposes. Miller *v.* Tod, 95 Tex. 404 (1902). After the state has caused a charter to be declared illegal, the duty of the state is finished, and a receiver will not be appointed, all the debts having been paid and all the parties in interest being satisfied, the stockholders having been declared personally liable the same as in a copartnership. State *v.* New Orleans, etc. Co., 107 La. 562 (1902). The validity of the charter of a school incorporated as a joint-stock incorporation cannot be tested in *quo warranto* proceedings brought to determine the rights of parties claiming to be trustees. Commonwealth *v.* Yetter, 190 Pa. St. 488 (1899). Under a general act authorizing incorporation for purposes other than profit, a cemetery cannot be organized for profit, and hence the incorporators are not entitled to moneys received from the sale of lots, but are bound to use such moneys to improve the property. Brown *v.* Maplewood, etc. Assoc., 85 Minn. 498 (1902). A stock corporation cannot be formed under the laws of West Virginia to promote religion by aiding in the support of Baptist ministers and in the erection of churches, etc. Powell *v.* Dawson, 45 W. Va. 780 (1899). "Any other lawful purpose" does not include mutual contribution and aid, and the encouragement of frugality, etc. State *v.* International Inv. Co., 88 Wis. 512 (1894). A trust company is not a bank within the meaning of a criminal statute. State *v.* Reid, 125 Mo. 43 (1894).

Express business is an "industrial pursuit," as used in the federal statute allowing incorporation in territories. Wells, etc. Co. *v.* Northern Pac. Ry., 23 Fed. Rep. 469 (1881). A mercantile enterprise may be incorporated under an act authorizing incorporation for any "industrial or productive interest." Carver Merc. Co. *v.* Hulme, 7 Mont. 566 (1888). An elevator company cannot incorpo-

[1] Mandeville *v.* Courtright, 142 Fed. Rep. 97 (1905). A corporation cannot take out a license to practice medicine. State, etc. Inst *v.* State, 103 N. W. Rep. 1078 (Neb. 1905); but may contract to furnish medical assistance. State, etc. Inst. *v.* Platner, 103 N. W. Rep. 1079 (Neb. 1905). An application for a charter for a place of public worship to preach Christian Science was denied in *In re* First Church, etc., 205 Pa. St. 543 (1903), on the ground that it interfered with the proper treatment of disease.

statute does not invalidate the charter nor render the stockholders personally liable, there being other purposes in the certificate which are authorized.[1] If a general incorporating act is unconstitutional, all supposed corporations formed thereunder are merely partnerships and the members are liable as partners.[2] If the business itself, for which a corporation is attempted, is illegal, the charter is no protection.[3] Frequently certain kinds of business are not mentioned

rate under a manufacturing company act. Mohr *v.* Minnesota Elev. Co., 40 Minn. 343 (1889). Printing and publishing a newspaper is not a manufacturing business. Press Printing Co. *v.* State Board of Assessors, 51 N. J. L. 75 (1888). Under an act authorizing incorporations for "trade," an incorporation for buying and selling land will be sustained. Finnegan *v.* Noerenberg, 52 Minn. 239 (1893).

Where the general incorporating act does not provide for the incorporation of railroad or banking corporations under it, a corporation organized under it to buy and sell railroad stock and bonds and to lease railroads and operate and aid them is void. Clarke *v.* Central R. R., 50 Fed. Rep. 338 (1892). But see s. c. *sub nom.* Clarke *v.* Richmond, etc. Ry., 62 Fed. Rep. 328 (1894).

1 Tennessee, etc. Co. *v.* Massey, 56 S. W. Rep. 35 (Tenn. 1899). Even though the certificate of incorporation includes powers which the statute does not authorize, yet this does not render the corporation void and the stockholders liable as partners, especially where the creditor had obtained a judgment against the corporation as a corporation. Shoun *v.* Armstrong, 59 S. W. Rep. 790 (Tenn. 1900). See also § 4, *supra.* If a charter contains purposes, some of which are legal and some illegal, it is good to the extent of the former. Galveston Land & Imp. Co. *v.* Perkins, 26 S. W. Rep. 256 (Tex. 1894).

2 Eaton *v.* Walker, 76 Mich. 579 (1889). There may be a question as to the validity of the law itself allowing the incorporation. Williams *v.* Bank of Michigan, 7 Wend. 539 (1831); State *v.* How, 1 Mich. 512 (1846); Chenango Bridge Co. *v.* Paige, 83 N. Y. 178, 190 (1880). As to a corporation incorporated by a state as a state, before it was admitted to the Union, see Mayers *v.* Manhattan Bank, 20 Ohio, 283 (1851). Persons acting as agents for a corporation which does not exist are personally liable, even though they acted in good faith. Lagrone *v.* Timmerman, 46 S. C. 372 (1895), a case where one corporation undertook to grant a charter to another corporation. *Contra*, Scott *v.* Detroit, etc. Soc., 1 Doug. (Mich.) 119 (1843). A stockholder who has given a mortgage to the corporation cannot defeat the same on the ground that the charter was unconstitutional. Building, etc. Assoc. *v.* Chamberlain, 4 S. D. 271 (1893). A creditor who has dealt with a bank as a corporation cannot afterwards claim that the stockholders are liable as partners by reason of the charter being unconstitutional. Richards *v.* Minn. Sav. Bank, 75 Minn. 196 (1899). See also § 637, *infra.* It is no defense to a mortgage given to a corporation that the statute under which it was organized was unconstitutional. Crete, etc. Ass'n *v.* Patz, 95 N. W. Rep. 793 (Neb. 1901). Where a statute extending the existence of a corporation was unconstituional, the corporation cannot maintain a suit to enjoin its grantee of land from violating a restriction in the deed. Clark *v.* American, etc. Co., 165 Ind. 213 (1905).

3 Edwards *v.* Mich. etc. Co., 132 Mich. 1 (1902). Notes given in the purchase of stock in a corporation

in the act, for the reason that it is not deemed wise public policy to allow a limited liability in that class of business, such as construction companies for the building of railroads.[1] Accordingly, where the business for which incorporation is sought is not within

whose sole business is to carry on an infringing telephone business are without consideration and void. Clemshire *v.* Boone County Bank, 53 Ark. 512 (1890). Where a scheme involving a lapse of membership and rights is organized under the act authorizing the organization of benevolent and charitable institutions, a court of equity will enjoin the continuance of business and will wind it up, the officers being guilty of illegal conduct. Peltz *v.* Supreme, etc. Union, 19 Atl. Rep. 668 (N. J. 1890). Where a company is organized for an illegal purpose, *i. e.*, a lottery, and its capital stock is issued without consideration, a person buying stock with notice of the facts cannot maintain a bill for an injunction against the issue of preferred stock and for a receiver. Le Warne *v.* Meyer, 38 Fed. Rep. 191 (1889). The organization of a company to carry on the lottery business in foreign countries was held legal in Macnee *v.* Persian Inv. Corp., L. R. 44 Ch. D. 306 (1890). *Cf.* Le Warne *v.* Meyer, 38 Fed. Rep. 191 (1889). The secretary of state will not be compelled to accept articles of incorporation for bookmaking,—*i. e.*, gambling on races,—even though the statute legalizes and regulates race tracks. *Re* New York Booking Co., N. Y. L. J., April 29, 1892. It is no defense to a subscription for stock as against a receiver that the real object of the corporation was to promote selling pools on horse racing and gambling. Augir *v.* Ryan, 63 Minn. 373 (1896). Under a statute authorizing incorporation "for pecuniary profit or gain," persons may incorporate to issue bonds to be paid for by purchasers thereof in monthly instalments and to be redeemed as might be prescribed and to sell and dispose of such bonds. State *v.* Corkins, 123 Mo. 56 (1894). The courts will refuse a charter to a company whose business is to be "to promote the business of such retail coal dealers as become members thereof and to protect them," etc., the intent being to combine the retail coal dealers. *Re* Richmond, etc. Coal Co., 9 Ry. & Corp. L. J. 31 (Phila. 1890). Persons incorporated for the purpose of doing a grain-gambling business have been held jointly and severally liable for money obtained from a customer. The corporate character does not protect them. McGrew *v.* City Produce Exchange, 85 Tenn. 572 (1887). A subscriber who is sued by a receiver of the corporation on a subscription cannot set up the defense that the purpose of the corporation was illegal, in that it involved a drawing for distribution among the stockholders of lots of unequal value. Cardwell *v.* Kelly, 95 Va. 570 (1898).

[1] It has been held, however, that, under the general act for the incorporation of companies for constructing and operating a railroad, a company for the construction alone of the road may be incorporated. "That there can be a railroad company which does nothing but construct the road, and a railroad company which does nothing but operate the constructed road, cannot be doubted. It is not essential to the idea of a railroad company that it should both construct and operate a railway." First Nat. Bank of Davenport *v.* Davies, 43 Iowa, 424 (1876), followed in Jessup *v.* Carnegie, 80 N. Y. 441 (1880); Langan *v.* Iowa, etc. Constr. Co., 49 Iowa, 317 (1878).

the classes of business mentioned in the act itself, the attempted incorporation is void and the participants are liable as copartners.

§ 237. *Liability as partners by reason of the fact that the corporation is incorporated in one state, but does all its business in another state.*—By the comity of states the rule has become well established that a corporation organized under the laws of a state may transact business beyond the borders of that state.[1]

A broad and liberal view of this comity of states and the interests of business was taken by the New York court of appeals in the cases of Demarest *v.* Flack,[2] and Merrick *v.* Van Santvoord,[3] where the court refused to hold the stockholders liable as partners, although the companies were clearly organized for the purpose of doing all

1 "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. . . . But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another." Taney, Ch. J., in Bank of Augusta *v.* Earle, 13 Pet. 519, 588 (1839).

2 It is legal for citizens of New York to take out a charter in West Virginia, even though all the corporate business is to be transacted in New York. The stockholders are not liable as partners. Demarest *v.* Flack, 128 N. Y. 205 (1891). The court said (p. 217): "If in any particular case it is thought by those interested in the matter that the business can be done in our own state and by our own citizens with greater facility under the form of a foreign corporation than under that of a domestic one, there is no public policy which forbids its transaction under such form." Affirming Demarest *v.* Flack, 11 N. Y. Supp. 83 (1890).

3 Merrick *v.* Van Santvoord, 34 N. Y. 208 (1866), reversing Merrick *v.* Brainard, 38 Barb. 574 (1860), where, although a Connecticut corporation did all its corporate business and performed all its corporate acts in New York except the holding of elections, yet the court, in a well-considered and ably-written opinion, held that the corporation did not thereby lose its corporate character, and that its members were not liable as partners, saying: "We think the recognition, in our state, of the rights hitherto conceded in our courts to foreign corporations is neither injurious to our interests, repugnant to our policy, nor opposed to the spirit of our legislation. . . . It would be neither provident nor just to inaugurate a rule which would unsettle the security of corporate property and rights, and exclude others from the enjoyment here of privileges which have always been accorded to us abroad. . . . A corporation is an artificial being, and has no dwelling, either in its office, its warehouses, its depots, or its ships. . . . The grant of franchises without restriction is equivalent to a specific authority to exercise them wherever the company might find it convenient or profitable, whether within or without the limits of the state of Connecticut." A New Jersey corporation is legally organized even though all of its incorporators, with one exception, are citizens and residents of New York state. Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576 (1894).

An Australian corporation which has offices in London and weekly

of their business outside of the state wherein they took out their charters. This rule of law has been sustained by the courts of Ohio also, and is established by the great weight of authority.[1] A foreign

directors' meetings and stockholders' meetings in London where its general accounts are kept, may be subject to the English income tax levied on persons residing therein. De Beers, etc. *v.* Howe, [1905] 2 K. B. 612.

A Montana corporation cannot legally maintain its chief office outside of the state and keep all its books there and hold all its directors' meetings there. McConnell *v.* Combination, etc. Co., 30 Mont. 239 (1904); s. c., 31 Mont. 563 (1905).

1 Although parties incorporate in Kentucky, by reason of the greater liberality of the Kentucky corporation statutes, and although the corporation does all its business in Ohio, nevertheless its corporate charter is recognized, and the stockholders are not liable as partners on a corporate note. Second Nat. Bank *v.* Lovell, 2 Cin. (Ohio), 397 (1873); Second Nat. Bank *v.* Hall, 35 Ohio St. 158 (1878), the court holding it to be no fraud on the Ohio laws for a corporation organized under the laws of Kentucky to do all its business in Ohio, even though thereby the stockholders escape a personal liability. A party contracting with a foreign corporation to pay it in oil from land assigned by it to him cannot defeat the suit of the corporation by alleging that it was incorporated in another state to do all its business in the state, and thereby was guilty of a fraud. Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343 (1875). A corporation may be organized in one state and do all of its business in another state. Missouri Lead, etc. Co. *v.* Reinhard, 114 Mo. 218 (1893). Citizens of Rhode Island may incorporate a company in Kentucky for the purpose of doing business in Rhode Island. Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484 (1894). In People *v.* Fidelity, etc. Co., 153 Ill. 25 (1894), it was held that, in the absence of an express prohibitory statute, a corporation legally organized under the laws of another state to do a multiform insurance business may do such business in Illinois, although such a corporation could not be organized under the laws of Illinois. See also Danforth *v.* Penny, 44 Mass. 564 (1842). A judgment against a West Virginia corporation cannot be enforced against the president, even though it is alleged that the corporation was a myth and did not exist, and that its organization had not been kept up and that the president was the real owner and carried on the business. The remedy is an original suit against him. Tilley *v.* Coykendall, 172 N. Y. 587 (1902). A subscriber to stock in a West Virginia corporation doing all its business in Minnesota cannot set up that the company was not legally incorporated, and cannot set up that the plaintiff is not a corporation, he having participated in its incorporation. Minnesota, etc. Co. *v.* Denslow, 46 Minn. 171 (1891). In Wright *v.* Lee, 2 S. D. 596 (1892), s. c., 4 S. D. 237, it appears that a Minnesota corporation did all its business in South Dakota. The court held this to be legal. See also Atchison, etc. R. R. *v.* Fletcher, 35 Kan. 236, 242, 244 (1886). Concerning the legality, purpose, and effect of persons incorporating in one state with the intention of doing all of the corporate business in another state, see an article in 25 Am. Law Rev. 352, criticising the law as laid down above, and another article in 26 Am. Law Rev. 342, commending the law as laid down above. Bateman *v.* Service, L. R. 6 App. Cas. 396 (1881); Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149 (1869). A charter will not be forfeited merely because the corporation was incor-

corporation authorized by its charter to do certain business, may transact that business in another state, even though the statutes of

porated in one state and all its officers and stockholders reside in another state; nor because it keeps its books out of the state in violation of a statute. North, etc. Stock Co. *v.* People, 147 Ill. 234 (1893). A corporation of one state "lawfully may, as they often actually do, remove their officers, agents, offices, and effects into another sovereignty, and there exercise their functions and franchises." Pennsylvania Co. *v.* Sloan, 1 Ill. App. 364 (1878). A Connecticut corporation may hold land in New Hampshire, although it does little or no business in Connecticut. New Hampshire Land Co. *v.* Tilton, 19 Fed. Rep. 73 (1884). A corporation may sell its products in any state and collect notes given in payment. Hall *v.* Tanner, etc. Co., 91 Ala. 363 (1890). "Comity between the states authorizes a corporation to exercise its charter powers within another state, but it does not permit the exercise of a power where the policy of that state, distinctly marked by legislative enactments or constitutional provision, forbids it." In this case the consolidation of competing lines of railway was involved. Clarke *v.* Central R. R., 50 Fed. Rep. 338 (1892). See s. c. *sub nom.* Clarke *v.* Richmond, etc. Ry., 62 Fed. Rep. 328 (1894). A limited partnership formed under the laws of Spain will be recognized and upheld by our courts. King *v.* Sarria, 69 N. Y. 24 (1877), where the court discusses the comity of states. See also Missouri Lead Min. Co. *v.* Reinhard, 114 Mo. 218 (1893), where a Missouri corporation sold all its property to an English corporation. In Christian Union *v.* Yount, 101 U. S. 352 (1879), involving the question whether a foreign corporation could, by bequest, take land in Illinois, the court said: "In harmony with the general law of comity obtaining among the states composing the Union, the presumption should be indulged that a corporation of one state, not forbiden by the law of its being, may exercise within any other state the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter state, or by its public policy, to be deduced from the general course of legislation or from the settled adjudications of its highest court." See also Oregonian Ry. *v.* Oregon Ry. & Nav. Co., 23 Fed. Rep. 232 (1885), where the plaintiff, an English corporation, did all its business in Oregon; reversed on another point, 130 U. S. 1 (1889). A corporation "may do business in all places where its charter allows and the local laws do not forbid." Canada Southern Ry. *v.* Gebhard, 109 U. S. 527 (1883). See also Cowell *v.* Springs Co., 100 U. S. 55 (1879), holding that a Pennsylvania corporation authorized to purchase land in states and territories west of the Mississippi may purchase land in Colorado, and such purchase is valid, where no statute of Colorado prohibits it. And see Stockton *v.* Baltimore, etc. R. R., 32 Fed. Rep. 9 (1887). Even though a corporation has its real and actual place of business outside of the state for portions of the year, yet this does not invalidate its incorporation. Hastings *v.* Anacortes, etc. Co., 29 Wash. 224 (1902). Even though a corporation intends to do all its business in one county, it may fix its principal place of business in its charter in another county. McCandless *v.* Inland, etc. Co., 115 Ga. 968 (1902). In Hollis *v.* Drew Theol. Sem., 95 N. Y. 166 (1884), the court said, as to foreign corporations, that the courts could not exclude them from doing business in the state. "Unless the legislature forbids, they can come here as freely as

such state do not authorize incorporation for that purpose, the purpose itself being legal.[1]

A New Jersey corporation may do business in Missouri even though all of its stock excepting one share is held by citizens of Missouri, and even though the statutes of Missouri forbid foreign corporations doing business in that state where they were organized for the purpose of avoiding the laws of that state.[2] Although a bill in equity sets forth that a corporation is merely a pretended corporation as a part of a fraudulent scheme, and is really nothing but a partnership, nevertheless, if such corporation has an existing charter, it exists as a corporation, sufficiently at least to determine the right of the federal courts to entertain jurisdiction of a case.[3] But where property is transferred to a non-resident corporation for the

natural persons and exercise here all the powers conferred upon them by their charters, subject to the same limitations imposed upon natural persons; that is, they can do no acts in violation of our laws or of our policy. But, unless prohibited by law, they can do here, within the limits of their chartered powers, precisely what domestic corporations could do." See also Bard *v.* Poole, 12 N. Y. 495 (1855); Mumford *v.* American Life, etc. Co., 4 N. Y. 463, 482 (1851); *Re* New York, L. & W. R. R., 35 Hun, 220 (1885); aff'd, 99 N. Y. 12. In People *v.* Fire Assoc., 92 N. Y. 311 (1883), the court, in holding that the state may prohibit a foreign insurance company from doing business within its borders unless a certain tax was paid, said: "The right of a state to exclude foreign corporations is perfectly settled and not open to debate. Out of comity between the states has grown a right founded upon implied consent. Where a state does not forbid, or its public policy, as evidenced by its statutes, is not infringed, a foreign corporation may transact business within its boundaries, and be entitled to the protection of its laws." As was said by Chancellor Kent in Silver Lake Bank *v.* North, 4 Johns. Ch. 370 (1820), in reference to allowing foreign corporations to sue in our courts, such a policy is demanded by comity, since otherwise they might say: "What race of men is this, from whose shores we are excluded?" See 46 S. Rep. 185.

1 Haskins *v.* Kelly, 93 Pac. Rep. 605 (Kan. 1908).

2 State *v.* Cook, 181 Mo. 596 (1904). Where a corporation endorses a note in the corporate name the endorsee of the note cannot hold the stockholders of the corporation personally liable on the ground that the corporation was organized by non-residents to do all its business outside the state. Boatmen's Bank *v.* Gillespie, 108 S. W. Rep. 74 (Mo. 1908). Even though a telephone company is incorporated in Delaware for the purpose of building and operating a telephone system in Louisville, Kentucky, yet this does not prevent such corporation bringing suit to protect its rights in Kentucky. Cumberland, etc. Co. *v.* Louisville, etc. Co., 114 Ky. 892 (1903).

3 Empire Coal, etc. Co. *v.* Empire Min., etc. Co., 150 U. S. 159 (1893). In Irvine Co. *v.* Bond, 74 Fed. Rep. 849 (1896), an owner of land in California incorporated a company under the laws of West Virginia and transferred to it, in payment for stock, certain portions of his land. He owned all the stock, and caused one share each to be issued to his lawyer, his wife, and three employees. The court held that the corporation was legal

sole purpose of enabling the parties to litigate a claim in the United States courts, the United States courts will refuse to take jurisdiction.[1]

§ 238. There are a few decisions refusing to recognize such incorporations. In Massachusetts it has been held that where a citizen of Massachusetts incorporates a company in New Hampshire, and states in the certificate of incorporation that the chief place of business is in a city in New Hampshire, and that he and his associates are jointly interested, the corporation is to be held fraudulent and void upon proof being given that all the business was carried on in Massachusetts, and that the associates were "dummies," having one share of stock each.[2]

In New Jersey, at an early day, it was held that a corporation could not become incorporated under the laws of New York for the purpose of carrying on all its corporate transactions in the state of New Jersey.[3] The stockholders were held to be merely partners. Likewise it was held that where a corporation was incorporated to do business in a certain city in the state, but actually did all its business in another city of that state, the incorporation was a fraud upon the law, and the company was the same as though unincorporated.[4]

so far as the jurisdiction of the United States court was concerned.

1 Lehigh, etc. Co. *v.* Kelly, 160 U. S. 327 (1895).

2 Montgomery *v.* Forbes, 148 Mass. 249 (1889). In this case the holder of a note signed in the corporate name, and given for goods sold, sued a stockholder for the price of the goods. The court sustained the suit and said: "The apparent corporation was not a corporation. . . . The defendant's pretended associates were associates only in name; he alone was interested in the enterprise. The articles of agreement were recorded in Nashua [N. H.], and stated that the business was to be carried on there; but it was not in fact carried on there, and was not intended to be. This is not a case where there has been a defective organization of a corporation which has a legal existence under a valid charter. Here there was no corporation. . . . The business was [defendant's] personal business, which he transacted under that name." *Cf.* Saltmarsh *v.* Spaulding, 147 Mass. 224 (1888).

3 The corporation "cannot be recognized by any court in New Jersey as a legally constituted corporation, nor be dealt with as such. If it can be, what need is there of any general or special law in our state? Individuals desirous of carrying on any manufacturing business may go into the city of New York, organize under the general laws of that state, erect all their manufacturing establishments here, and, under their assumed name, transact their business, not only free from all personal responsibility, but under cover of a corporation not amenable to our laws." Hill *v.* Beach, 12 N. J. Eq. 31 (1858).

4 The corporation was incorporated to do business in Trenton, but actually transacted all its business in Jersey City. The court said: "The doctrine that the organization cannot be inquired into collaterally has no appli-

In these days, however, when New Jersey is the favorite resort for the class of corporations now under consideration, the laws of that state having been framed especially for the purpose of attracting them, it is not at all probable that the old decisions in that state on this subject would be adhered to.[1] A stockholder in a New Jersey corporation cannot maintain a suit in equity to require the corporation to bring its books into the state merely that he may have access to them.[2]

In Texas it has been held that its citizens are liable as partners where they incorporate in another state to carry on a mercantile business in Texas, the legislature of Texas having substantially forbidden incorporation for that purpose.[3]

cation as the case stands, because the charter does not fit this company, and was not intended for it." Wonderly *v.* Booth, 36 N. J. L. 250 (1873). This doctrine was followed in a New York case in a lower court, the facts being that a New Jersey corporation had no office or place of business in New Jersey, and did no business there, but transacted its business in New York. "It was not an existing corporation within the meaning of the statute of New Jersey, under which it purports to have been incorporated. . . . It was a fraud upon the laws of New Jersey and cannot screen defendants and its organizers from personal responsibility as partners for contracts made in New York under the assumed name." Kruse *v.* Dusenbury, 19 N. Y. Week. Dig. (N. Y. Com. Pl.) 201 (1884). This last case seems to have been decided without noticing Merrick *v.* Van Santvoord, 34 N. Y. 208 (1866), and the case certainly is not the law of New York. A contract between an author and a New Jersey corporation for the publication of his books cannot be assigned by the New Jersey corporation to an Arizona corporation, even though the stockholders and directors are the same, the author being entitled to the protection of the New Jersey corporation laws. Wooster *v.* Crane, 66 Atl. Rep. 1093 (N. J. 1907).

1 An injunction does not lie at the instance of the state against a corporation doing business on the ground that its stock was not properly issued and that there was no intent to do any business within the state or to have an office therein. Stockton *v.* American, etc. Co., 55 N. J. Eq. 352 (1897). Chief Justice Beasley, in Erie Ry. *v.* State, 31 N. J. L. 531, 544 (1864), said: "A statute that should abolish the rule of comity, and should refuse a recognition of foreign corporations, would, it is conceived, have this effect and no more, *i. e.*, to convert the foreign corporators, as to the state enacting the supposed law, into a partnership of individuals."

2 Maeder *v.* Buffalo, etc. Co., 132 Fed. Rep. 280 (1904).

3 Stockholders are liable as partners in Texas, on business done in Texas, where they organized a corporation in Iowa to do a mercantile business, the laws of Texas not authorizing incorporation for that purpose. Empire Mills *v.* Alston Grocery Co., 15 S. W. Rep. 200 (Tex. 1891). It appeared in this case, however, that the legislature had expressly declared the policy of the state by repealing a statute that authorized incorporation for mercantile purposes. See s. c., 15 S. W. Rep. 505, on rehearing. The fact that the company is doing all its business in another state does not release the company from its obligation to issue certificates of stock to its

In Canada also, at an early day, the same rule seems to have been laid down.[1]

§§ 239, 240. There certainly is a limit beyond which the courts will not go. In order that contracts may be upheld and the corporate character be sustained, it is necessary that both the state creating the corporation and the corporation so created shall have acted in good faith in conferring and taking the corporate privileges.[2] Thus, where a corporation was incorporated by the legislature of Pennsylvania, and authorized to do business anywhere but

stockholders. Rio Grande Cattle Co. *v.* Burns, 82 Tex. 50 (1891). Where a Colorado corporation has power, among other things, to deal in real estate, its purchases of land in Texas cannot be questioned by any one except the state, even though Texas did not allow incorporation for that purpose. Galveston, etc. Co. *v.* Perkins, 26 S. W. Rep. 256 (1894). Where the charter need not state the principal place of business within the state the charter is legal, although it states that the business is to be carried on in certain other states. Beattie *v.* Hardy, 93 Tex. 131 (1899). Because a corporation does business outside of the state wherein it is incorporated it will not be presumed that it does no business within such state. Lasater *v.* Purcell, etc. Co., 22 Tex. Civ. App. 33 (1899).

1 In Canada it has been held that no state can validly authorize a body corporate to transact business out of its own territory. Bank of Montreal *v.* Bathune, 4 Up. Can. (Q. B.) (O. S.) 341 (1832); Genesee Mut. Ins. Co. *v.* Westman, 8 Up. Can. (Q. B.) 487 (1852); Union Rubber Co. *v.* Hibbard, 6 Up. Can. (C. P.) 77 (1855). If carefully examined, these cases decide that a corporation formed to carry on a particular business in one country exceeds its powers if it carries on a similar business out of that country. At the same time the judges who decided those cases based their judgments on supposed grounds of international law. The first case mentioned above held that a bank chartered in Lower Canada has no power to discount a note in Upper Canada and sue upon the same, but may recover for money had and received. In the case of Genesee Mut. Ins. Co. *v.* Westman, 8 Up. Can. (Q. B.) 487 (1852), the court held that a New York corporation had no right or power to enter into any contract at all or transact any business in a corporate capacity in that province. In Reynolds *v.* Gallihar, etc. Co., 19 Nova Scotia Rep. 466 (1886), it appears that a Massachusetts corporation owned a mine in Nova Scotia. The decision was concerning an attachment, and the legality of the company's acts was not questioned. A foreign corporation may hold personal property in Ontario. Commercial, etc. Bank *v.* Concoran, 6 Ont. Rep. (Can.) 527 (1884).

2 Where a Texas corporation is to do business only in certain counties of that state, and it proceeds to transact business in Louisiana under another name, the parties doing the business may be held liable as partners. Campbell *v.* Campbell Co., 117 La. 402 (1906). The reason for doing business in this way was stated in the testimony as follows: "Sometimes they do it for a blind, they do not want people to know who owns the business; and sometimes the farmers are prejudiced against corporations, and they just use a local name, putting a local man in there as manager."

in that state, the courts of Kansas refused to recognize its corporate character.[1] The comity of states does not prevail to that extent. So also, where parties take out a charter in Tennessee, but, instead of holding their organization meetings in Tennessee, hold them in Florida, where they do all their business, they are liable in Florida as partners.[2] In Minnesota it is held that it may be good ground for the forfeiture of the charter that the corporation is intended solely for business in another state.[3] Where a dummy cor-

1 Land Grant Ry. *v.* Coffey County, 6 Kan. 245 (1870), the court saying: "No rule of comity will allow one state to spawn corporations, and send them forth into other states to be nurtured and do business there, when said first-mentioned state will not allow them to do business within its own boundaries." A New Jersey corporation organized under the general act to manufacture and sell gas cannot do so in New Jersey, inasmuch as such charters must be taken out under the gas company act, and hence such a company cannot exercise such powers in *another* state and cannot prevent its plant in the streets being treated as a nuisance by a party suffering special injury thereby. Seattle, etc. Co. *v.* Citizens', etc. Co., 123 Fed. Rep. 588 (1903). In the case Myatt *v.* Ponca City, etc. Co., 14 Okl. 189, 220 (1903), where a copartnership in Oklahoma transferred all their real estate in Oklahoma to a Kansas corporation formed by them for that purpose, such corporation by its charter not being authorized to do business in Kansas, but only to do business in Oklahoma, a claimant of land from the copartnership filed a bill to establish title as against the corporation, and the court held that the title to the corporation was not good for the reason that the corporation itself was not legally organized. A corporation organized in Kansas to buy and sell land in Oklahoma exclusively will not be recognized as a corporation in Oklahoma and cannot enforce a purchase money mortgage which it has received in payment for land. Lafferty *v.* Evans, 17 Okla. 247 (1906). And see Opinion of Attorney-General of Texas (1887), 2 Ry. & Corp. L. J. 433, to the effect that a Scotch corporation, authorized to purchase land anywhere excepting at home, cannot hold lands in Texas.

2 Taylor *v.* Branham, 35 Fla. 297 (1895). The *dicta* in this decision as to the liability of stockholders in foreign corporations doing business in Florida are startling, to say the least. Where a charter is taken out in one state and the organization meetings are held in another state, the presumption is that no corporation is organized, and unless proof is given that the statutes of the first-named state authorized the holding of the organization meeting in another state, the stockholders are liable as partners. Duke *v.* Taylor, 37 Fla. 64 (1896). See also § 589, *infra*. See 46 S. Rep. 185.

3 In State *v.* Park, etc. Co., 58 Minn. 330 (1894), the court forfeited the charter of a company that had been incorporated in Minnesota for the purpose evidently of doing all its business in Wisconsin. The charter was forfeited on the ground that the company had not complied with the statute, in having its place of business, and keeping its books, within the state. The court also approved of a decision in Wisconsin to the effect that at common law a charter may be forfeited where the corporation keeps its principal office, books, and records out of the state to such an extent that it is impossible for the state and its courts to have full juris-

poration is solely to avoid making a deposit required by statute, a subscriber may refuse to pay his subscription.[1]

§ 241. *Assessments by the corporation in excess of the par value of the stock—Stockholders are not liable therefor.*—It is a principle of law, coeval with the existence of corporations having a capital stock, that, unless the corporate charter or a constitutional statute provides otherwise, a stockholder, the full par value of whose stock has been paid in, is not liable for and cannot be made to pay any sums in addition thereto.[2] The mere legislative act of creating a corpo-

diction and visitorial power over the corporation. Where a corporation removes all its offices from the state, a stockholder may apply, under the statute, for a dissolution on the ground of an abuse of powers. Simmons *v.* Norfolk, etc. Steamboat Co., 113 N. C. 147 (1893). In Kansas the charter of a corporation may be forfeited at the instance of the state, if the corporation fails to keep its general office and the office of its treasurer within the state, in accordance with the terms of the statute. State *v.* Top. W. Co., 59 Kan. 151 (1898).

1 Money paid on a subscription to the stock of a New Jersey corporation may be recovered back, it being shown that such New Jersey corporation was merely a dummy corporation to enable a New York corporation to do business in New Jersey without making a deposit required by the statutes of New Jersey, and it being also shown that it was falsely represented that the New Jersey was a *bona fide* corporation. Seeber *v.* People's, etc. Assoc., 36 N. Y. App. Div. 312 (1899).

2 Quoted and approved in Nelson *v.* Keith, etc. Co., 91 Pac. Rep. 30 (Utah 1907); Great Falls, etc. R. R. *v.* Copp, 38 N. H. 124 (1859); State *v.* Morristown Fire Assoc., 23 N. J. L. 195 (1851); Morley *v.* Thayer, 3 Fed. Rep. 737 (1880); Chase *v.* Lord, 77 N. Y. 1 (1879); Slee *v.* Bloom, 19 Johns. 456, 473 (1822); Shaw *v.* Boylan, 16 Ind. 384 (1861); Coffin *v.* Rich, 45 Me. 507, 511 (1858); Gray *v.* Coffin, 63 Mass. 192, 199 (1852); French *v.* Teschemaker, 24 Cal. 518, 540 (1864); Norton *v.* Hodges, 100 Mass. 241 (1868); Buenz *v.* Cook, 15 Colo. 38 (1890). "The personal liability of stockholders for the debts of the corporation arises only from statute." United States *v.* Stanford, 161 U. S. 412, 429 (1896). Stockholders are not liable at common law over and above the stock itself. Wells *v.* Green Bay, etc. Co., 90 Wis. 442 (1895). "The creation of the corporation necessarily destroys the common-law liability of the individual members for its debts." People *v.* Coleman, 133 N. Y. 279 (1892). "After the full par value of the stock subscribed for has been paid, the common-law liability of the stockholder, both as respects the corporation and its creditors, is at an end." Toner *v.* Fulkerson, 125 Ind. 224 (1890). Stockholders are not personally liable for corporate debts. Gorder *v.* Connor, 56 Neb. 781 (1898). The chief stockholders cannot be held liable for the corporate debts on the theory of a "general understanding" that they would be responsible. The corporation alone is liable. Circulars, billheads, letters, etc., used in the business and containing the corporation's name are admissible to show that the business was conducted in the corporate name and on the corporate responsibility. Butte Hardware Co. *v.* Wallace, 59 Conn. 336 (1890). The individual stockholders of a corporation are not liable for the debts of

ration produces by implication this limited liability of its members. For this reason the statutes regulating joint-stock companies are fre-

the corporation, and an attachment against it cannot be levied on their property. Owen *v.* Marshall, 69 Wis. 486 (1891). The holders of full-paid stock cannot be assessed on such stock, even under a reorganization agreement of a majority of the stockholders. Where, however, for four years the stockholder does not object, and then applies for a transfer of his stock, a court of equity may refuse to grant the transfer and may give him damages for the value of his stock at the time of the demand of transfer, together with interest. Gresham *v.* Island City Sav. Bank, 2 Tex. Civ. App. 52 (1893). Stockholders are not liable for services rendered to the company, even though they induce the party to render such services. Davidson *v.* Westchester, etc. Co., 99 N. Y. 558 (1885); Oliver *v.* Liverpool, etc. Ins. Co., 100 Mass. 531, 539 (1868), holding that, in order to prevent this limited liability, the English parliament expressly declared joint-stock companies not to be incorporations. Moore *v.* New Jersey, etc. Co., 5 N. Y. Supp. 192 (1889); Myers *v.* Irwin, 2 Serg. & R. (Pa.) 368, 371 (1816), the court saying: "The personal responsibility of the stockholder is inconsistent with the nature of a body corporate;" Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 565, 576 (1879); New England Com. Bank *v.* Newport Steam Factory, 6 R. I. 188 (1859); Walker *v.* Lewis, 49 Tex. 123 (1878); Green *v.* Beckman, 59 Cal. 545 (1881); Jones *v.* Jarman, 34 Ark. 323 (1879); Windham Prov. Inst. *v.* Sprague, 43 Vt. 502 (1871); Woods *v.* Wicks, 7 Lea (Tenn.), 40 (1881), on the ground that the corporate creditor contracts not with the stockholders, but with the corporation; Terry *v.* Little, 101 U. S. 216 (1879), the court saying: "The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law;" Smith *v.* Huckabee, 53 Ala. 191 (1875), where the court said: "Immunity from such liability is one of the inducements which has led to the multiplication of private corporations, and caused them to supersede, to a great extent, in hazardous enterprises, or enterprises requiring large capital, partnerships;" Spense *v.* Iowa Valley Constr. Co., 36 Iowa, 407 (1873), the court saying: "It is one of the distinguishing features of incorporations that the individual property of its members may be exempt from liability for corporate debts. Herein consists the great superiority of a corporation over a partnership or an unincorporated joint-stock company;" Salt Lake City Nat. Bank *v.* Hendrickson, 40 N. J. L. 52 (1878); Van Sandau *v.* Moore, 1 Russ. Ch. 441, 457 (1826); Atwood *v.* Rhode Island Agric. Bank, 1 R. I. 376 (1850), the court saying: "At common law the stockholders in a corporation are not liable individually for the corporate debts. The capital stock is the fund to which alone the creditors must resort, unless in cases of fraud." The case of Atlantic De Laine Co. *v.* Mason, 5 R. I. 463 (1858), holds that the payment of one invalid assessment is no waiver of the right to object to another. *Cf.* Field *v.* Pierce, 102 Mass. 253 (1869). If the stockholders voluntarily contribute to the corporate treasury in order to make it a success, such gifts are not corporate debts and cannot be recovered back. Bidwell *v.* Pittsburgh, etc. Ry., 114 Pa. St. 535 (1887); Leavitt *v.* Oxford, etc. Co., 3 Utah, 265 (1883). A corporation has no power to levy an assessment. Duluth Club *v.* McDonald, 74 Minn. 254 (1898). Although a law library corporation has a capital stock which is fully paid, yet a by-

quently careful to state that nothing therein contained shall give such companies the character of corporations.[1] The older text-books and the earlier reports did not fully appreciate the importance of this principle of law. Of such importance is it that it would seem to be the great and distinguishing characteristic of corporations, and not a subsidiary or unimportant one.[2] For many years it seems to have been assumed rather than adjudicated.[3] In the early turnpike company cases of New England a contrary rule appears to have been assumed, and the subscriber appears to have been open to assessments indefinitely, except that he might refuse to pay, and thus enable the company to forfeit his stock.[4] Such companies, however, had no fixed par value of their stock. At present the rule of nonliability at common law, beyond the par value of the stock, is established beyond question, and forms the chief inducement in the formation of the many corporations of the day. The question of what the legal effect is where all the stockholders voluntarily assess themselves is considered elsewhere.[5]

§ 242. Attempts have been made in various ways to authorize the assessment of stockholders for amounts after the par value of their stock has been paid in. Such efforts have generally failed. It

law may assess annual dues upon the members. Omaha L. L. Assoc. *v.* Connell, 55 Neb. 396 (1898). Even though the by-laws provide for annual dues, yet this does not enable a creditor to file a bill to compel the directors to levy annual dues sufficient to pay his debt, the capital stock having been fully paid in. Johnston, etc. Co. *v.* Detroit, etc., 124 Mich. 115 (1900). Even though the by-laws of a natural-gas company provide that stockholders shall have gas free, yet such by-law may be changed so as to authorize the company to charge a uniform price to the stockholders for gas. Redkey, etc. Co. *v.* Orr, 27 Ind. App. 1 (1901). A by-law of a corporation, organized to own and maintain a hunting park, may authorize assessments on the stock to pay any annual deficiency, and such by-law is binding on stockholders, who accept the certificate of stock which on its face refers to the by-law. The by-law is valid as a contract, even though it is not valid as a by-law. Blue Mountain, etc. Assoc. *v.* Borrowe, 71 N. H. 69 (1901). See also § 4*a*, *supra*.

1 Oliver *v.* Liverpool, etc. Ins. Co., 100 Mass. 531, 539 (1868). And see ch. XXIX, *infra*. *Cf.* Omaha, etc. Assoc. *v.* Connell, 55 Neb. 396 (1898).

2 See § 3, *supra*, note.

3 In the case of Carr *v.* Iglehart, 3 Ohio St. 457 (1854), the court took counsel to task for questioning this principle of law. For an opinion that at common law the stockholders were liable for all corporate debts, see Harvard Law Rev., Nov. 1888, p. 160.

4 Middlesex Turnp. Co. *v.* Swan, 10 Mass. 384 (1813).

5 See § 76, *supra*. "Where stockholders voluntarily assess themselves, to relieve the corporation from pecuniary embarrassment, or for the betterment of their stock, whatever may be the occasion of the assessment, the advances thus made are not debts against, but assets of, the corporation." Brodrick *v.* Brown, 69 Fed. Rep. 497 (1895).

cannot be done by a majority vote of the stockholders, nor of the directors, nor by a by-law.[1] The liability is sometimes provided for in the statutes under which the corporation was originally organized.[2] Often the statutes authorize either a limited liability

1 Quoted and approved in Redkey, etc. Co. *v.* Orr, 27 Ind. App. 1 (1901), holding also that a stockholder may enjoin the corporation from enforcing any such assessment. Flint *v.* Pierce, 99 Mass. 68 (1868); Andover Free Schools *v.* Flint, 54 Mass. 539 (1847); Kennebec, etc. R. R. *v.* Kendall, 31 Me. 470 (1850); Reid *v.* Eatonton Mfg. Co., 40 Ga. 98 (1869). In the first-mentioned case the defendant subscribed to such a by-law, among other by-laws, when he subscribed for stock. Placing the words "individual property of stockholders liable" on the face of corporate obligations has no effect in itself. Stockholders are liable only as prescribed by law. Lowry *v.* Inman, 46 N. Y. 119 (1871). An agreement of a vendee of stock with the vendor to pay the corporate debts is not enforceable by corporate creditors. Andover Free Schools *v.* Flint, 54 Mass. 539, 543 (1847). But the agreement is enforceable if made directly with creditors. Maxwell's Case, L. R. 20 Eq. 585 (1874). By consent of the stockholders each share may be subject to further assessment; and, when this agreement is printed on the certificates, the purchaser is bound by it. Weeks *v.* Silver, etc. Co., 55 N. Y. Super. Ct. 1 (1887). The case, however, of Hume *v.* Winyah, etc. Canal Co., Carolina L. Jour. 217, held, at an early day, that where a corporation, not professing to have any fixed capital, made a by-law by which each of the corporators was bound to contribute equally or ratably to all expenses incurred, the corporators were liable personally. See Gresham *v.* Island City Sav. Bank, 2 Tex. Civ. App. 52 (1893).

2 In California, under sections 331, 333 of the Civil Code, a corporation may assess its members to any extent "for the purpose of paying expenses, conducting business, or paying debts." Santa Cruz R. R. *v.* Spreckles, 65 Cal. 193 (1884). In California all shares of stock are assessable, even though they have once been fully paid. Green *v.* Abietine Med. Co., 96 Cal. 322 (1892). Under the California statute which renders stockholders personally liable for an assessment on their stock after the stock has been advertised for sale, the stockholders are not liable before such stock has been advertised for sale. Shively *v.* Eureka, etc. Co., 129 Cal. 293 (1900). For a further decision under the California statute that an asessment may be made on stock for "paying expenses, conducting business or paying debts," see Younglove *v.* Steinman, 80 Cal. 375 (1889), and 95 Pac. Rep. 39 In Utah, by statute, stockholders may be assessed on their stock, even after the stock has been paid up, the assessment being for working expenses. Gary *v.* York Min. Co., 9 Utah, 464 (1894). In Vermont it is held that under a charter provision that "if at any time the capital stock paid into said corporation shall be impaired by losses or otherwise, the directors shall forthwith repair the same by assessment," a receiver was not allowed to assess, since the provision is only to prevent a continuance of business with an impaired capital. Dewey *v.* St. Albans Trust Co., 57 Vt. 332 (1885). In Pennsylvania it is held that, though the corporation has power to assess beyond the par value of the stock, yet such power may be restricted by by-law. Price's Appeal, 106 Pa. St. 421 (1884). In Texas it is possible to form a corporation wherein assessments may be made on members ratably to any amount for

corporation or one with unlimited liability, as the incorporators may desire. Such is the case in New York [1] and in England.[2]

An American stockholder in an English corporation is liable to assessments upon his stock where such assessment has been levied in accordance with the English statutes, even though the stock originally was fully paid.[3]

A statute which authorizes an additional assessment upon existing paid-up stock is unconstitutional.[4] But where the state has reserved the power to alter, repeal, or amend the charter, it may authorize the corporation to levy assessments on its stockholders, in addition to the subscription of their stock. The reasoning of this rule is clear. The limited liability is a part of the corporate privileges conferred. A right to repeal the franchises includes the right to repeal in part or altogether the franchise or privilege of limited liability. On such grounds, laws of this character, however harsh in their operation, are upheld as constitutional.[5] It is to be borne in mind, however, that there is a limit to the power of the legislature to amend a charter, even under this reserved right;[6] and it has been contended with great force that even though the legislature has reserved the right to amend a charter, yet it cannot authorize the corporation to assess stock which was issued as being full-paid and non-assessable and that a minority stockholder may enjoin

corporate purposes. Guadalupe, etc. Assoc. *v.* West, 70 Tex. 391 (1888)—a live-stock-protecting corporation. In Idaho it is held that the statutory provisions rendering stockholders jointly and severally liable for debts authorize the directors to levy assessments to pay for improvements already made. Sparks *v.* Lower Payette Ditch Co., 2 Idaho, 1030 (1892).

1 L. 1892, ch. 691. Under the Utah statutes a certificate of incorporation may authorize assessments on full paid stock. Nelson *v.* Keith, etc. Co., 91 Pac. Rep. 30 (Utah 1907).

2 In England "the liability of a shareholder in a corporate body is determined by the conditions of incorporation. Without express provision, no member of a corporate body is individually liable for the corporate debts. A company may be registered under the Companies Act, 1862, with limited or unlimited liability; according to the nature of such registration a shareholder will be liable to contribute, respectively, the unpaid amount on his shares, or to the extent of the company's guaranty, or indefinitely." Cavanagh, Money Securities (2d ed.), 494, citing Lion, etc. Ins. Assoc. *v.* Tucker, L. R. 12 Q. B. D. 176 (1883); *Re* Norwich Ins. Soc., L. R. 13 Ch. D. 693 (1880); *Re* City of Glasgow Bank, L. R. 4 App. Cas. 337, 550, 567, 581, 583, 598, 607, 615, 624, 632 (1879); Houldsworth *v.* City of Glasgow Bank, L. R. 5 App. Cas. 317 (1880).

3 Giesen *v.* London, etc. Mortg. Co., 102 Fed. Rep. 584 (1900). *Cf.* Bank of China *v.* Morse, 168 N. Y. 458 (1901).

4 Enterprise, etc. Co. *v.* Moffitt, 58 Neb. 642 (1899).

5 Gardner *v.* Hope Ins. Co., 9 R. I. 194 (1869); South Bay, etc. Co. *v.* Gray, 30 Me. 547 (1849). See also §§ 280, 497, *infra*.

6 See § 501, *infra*.

the sale of the stock for non-payment of such an assessment.[1] Where certificates of full-paid stock recite that further assessments may be made, a director who takes part in levying such an assessment cannot defend against it as being illegal.[2] A person who by proxy votes for assessments and afterwards pays some of them cannot defend against others on the ground that all of them were illegal, the stock being fully paid.[3]

§ 243. *Miscellaneous cases of liability or non-liability.*—It has been held, on grounds of public policy, that although a corporation is advertised as having a capital stock of a fixed amount, the stockholders and directors are not liable personally, even though subscriptions have not been taken to that amount. They are not liable either for the untaken stock, or on the ground of false representations, since the capital stock is understood to represent what the corporation hopes to obtain in subscriptions.[4] Even though the directors

1 Garey *v.* St. Joe Mining Company, 91 Pac. Rep. 369 (Utah 1907).

2 Mirage Irr. Co. *v.* Sturgeon, 108 N. W. Rep. 977 (Neb. 1906).

3 Callahan *v.* Chilcott, etc. Co., 37 Colo. 331 (1906). See 69 Atl. Rep. 788.

4 First Nat. Bank *v.* Almy, 117 Mass. 476 (1875); Wakeman *v.* Dalley, 51 N. Y. 27, 30 (1872); Evans *v.* Coventry, 25 L. J. (Ch.) 489 (1856); Crease *v.* Babcock, 51 Mass. 525, 557 (1846). *Contra*, Haslett *v.* Wotherspoon, 1 Strobh. Eq. (S. C.) 209, 229 (1847). In Illinois there is a statutory liability in a case like this. Stat. of Ill., ch. 32, § 18. Stockholders are not liable as partners by reason of the fact that the full capital stock was never subscribed. Coalter *v.* Bargamin, 99 Va. 65 (1901). Where a receiver sues to recover back property which an insolvent corporation has illegally transferred to prefer a debt, the party receiving such preference cannot set up that the corporation had never received any subscriptions for stock, it being shown that the company had filed articles of incorporation and had acted as a corporation. Carroll *v.* Pacific Bank, 19 Wash. 639 (1898). In the case of Burnham *v.* Lutz, 8 Kan. App. 361 (1898), where a mercantile corporation had been organized and twenty-six shares of stock only were issued to supply a board of directors, but not paid for, the court held that a vendor of goods to the corporation might show that such an organization of the corporation was fraudulent and hence that the parties interested were liable as partners. A corporation may commence business before any stock is subscribed unless the charter forbids. Johnson *v.* Kessler, 76 Iowa, 411 (1888). Where, by the charter, a certain amount of the capital stock must be paid in before business is commenced, it is sufficient that that amount was paid in by a few stockholders paying their subscriptions in full. Lauder *v.* Logan, 123 Pa. St. 34 (1889). See also § 180, *supra*. A stockholder is not liable for the debts merely because the corporation did business before the full capital stock was subscribed. American, etc. Co. *v.* Bulkley, 107 Mich. 447 (1895). Even though a corporation incurs debts before any stock is subscribed for, and even though no stock is ever subscribed for, yet the incorporators are not liable for such debts. Singer, etc. Co. *v.* Peck, 9 S. Dak. 29 (1896). Where the proposed corporation is abandoned before being incorporated, the

certify that one-half of the capital stock has been paid in in cash, when in fact it has not been, yet the assignee of the corporation for the benefit of its creditors cannot hold them liable for the part not so paid in.[1]

parties who subscribe and then withdraw their money are not liable for subsequent debts. Gorman *v.* Davis, etc. Co., 118 N. C. 370 (1896). Subscribers for stock are not liable for such part of the capital stock as has not been subscribed for by any one, no fraud being involved. Sweney *v.* Talcott, 85 Iowa, 103 (1892). Stockholders are not liable as partners merely because the whole capital stock has not been subscribed. Thornton *v.* Balcom, 85 Iowa, 198 (1892); National Bank *v.* Texas Inv. Co., 74 Tex. 421 (1899). It is not actionable negligence in directors to proceed to business where only a small part of the capital is subscribed. *Re* Liverpool, etc. Assoc., 62 L. T. Rep. 873 (1890). Paying in half of the subscription with a view to incorporation, and then abandonment of incorporation, does not render a subscriber liable as a partner. Hudson *v.* Spaulding, 6 N. Y. Supp. 877 (1889). The directors are not liable for coporate debts merely because they commence business before the capital stock is subscribed. The incorporation was legal without it. Jefferson Nat. Bank *v.* Texas Inv. Co., 74 Tex. 421 (1889). A corporate creditor may hold the stockholders personally liable on the ground of fraud where they incorporate with a capital stock of $200,000, and subscribe for one share each, and then incur large debts. Detroit, etc. Works *v.* Riverside St. Ry., 29 S. W. Rep. 412 (Tex. 1895). Where, upon incorporation, the capital stock is fixed at $25,000, and is subscribed, but no part thereof is paid in, and business is commenced, the participators are liable as partners under the Pennsylvania statute. It is a fraud. Hill, etc. Co. *v.* Stetler, 127 Pa. St. 145 (1888). Where stockholders proceed to business before the minimum capital prescribed by statute is subscribed, they are liable to corporate creditors for such minimum capital. The creditors may sue them and the corporation in the same action. Burns *v.* Beck, etc. Co., 83 Ga. 471 (1889). In the case of State *v.* New Orleans, etc. Co., 51 La. Ann. 1827 (1899), the subscribers to the stock of a debenture company paid ninety-five per cent. of their subscription by borrowing that amount from the company on their notes, and thereupon full-paid stock was issued to them, although the statute prohibited the issue of stock until paid for. The state brought suit to set aside the charter and liquidate the company. The court held that under the constitution of Louisiana the incorporation was illegal. The court held also that the charter was illegal, in that the debentures issued were forfeited if deferred payments were not made, and that they provided for cancellation at fifty per cent. on the amount paid, and that they were redeemable in numerical order in six years, and that it would be impossible for the company to pay them. The same conclusion was reached in State *v.* Louisiana, etc. Co., 51 La. Ann. 1795 (1899). Where several persons organized a corporation with a capital stock of $100 to buy and sell oil lands, etc., and it incurred debts to the amount of nearly $20,000, the highest court in Kentucky held that it was not a complete corporation but a mere preliminary step and the promoters were liable as partners for the debts. Sanders, etc. *v.* Herndon, 108 S. W. Rep. 908 (Ky. 1908).

[1] Hequembourg *v.* Edwards, 155 Mo. 514 (1900). The assignee of a corporation cannot sue its incorporators for

In Illinois by statute the directors are personally liable for debts incurred before all "stock named in the articles of incorporation shall be subscribed in good faith." [1] Where articles of incorporation have been duly filed, but no capital stock is subscribed for, and the incorporation is practically abandoned, and a part of the incorporators go on and incur debts in the corporate name with the knowledge of the others, all are liable as partners.[2]

ten per cent. of the capital stock, on the ground that they had sworn that ten per cent. had been paid in in order to obtain the charter, when in fact it had not been paid in. Patterson *v.* Franklin, 176 Pa. St. 612 (1896). Even though a national bank transacts business before it is authorized to do so by the comptroller, the officers and stockholders are not liable therefor as partners, but the officers may be liable on an implied warranty of their authority to act for the corporation. Seeberger *v.* McCormick, 178 Ill. 404 (1899).

1 Kent *v.* Clark, 181 Ill. 237 (1899).

2 Wechselberg *v.* Flour City Nat. Bank, 64 Fed. Rep. 90 (1894). Where the incorporation is not completed but is abandoned and no property is conveyed to it, but it contracts debts, persons who hold themselves out as stockholders in it are liable for such debts. Schaub *v.* Coffin, 135 Mich. 435 (1904). If a corporation is abandoned and its stockholders move its assets into another state and there do business under a new name, they may be liable as partners. Robinson *v.* First Nat. Bank, 98 Tex. 184 (1904). Where the incorporators never organize and neither subscribe for nor pay for any capital stock, but merely do business in the corporate name, they may be held liable as partners. Brooke *v.* Day, 59 S. E. Rep. 769 (Ga. 1907). Where the alleged directors of an athletic association enter into contracts in its name after the charter is ackowledged and filed with the secretary of state, but no capital stock is subscribed and no steps taken to complete the organization or comply with the law, the directors are personally liable on such contracts. Walton *v.* Oliver, 49 Kan. 107 (1892). In Consolidated, etc. Co. *v.* Kansas City, etc. Co., 45 Fed. Rep. 7 (1891), the court said: "It is true, as contended by counsel, that the statute did not require that this increment of stock should be actually paid up. Yet the public deals with such concerns on the faith of such capital *in esse*, and it is that which chiefly gives it credit. It is to be imputed to these directors and stockholders that they pretended and claimed all along that the stock subscribed by them was paid up." Where no stock is subscribed for, but an organization meeting is held and officers elected and debts incurred, the officers are liable for such debts. Whetstone *v.* Crane, etc. Co., 1 Kan. App. 320 (1895), the ground of the decision being that such officers are merely promoters. Where a stock corporation has received no stock subscription and issued no stock it cannot maintain a suit. Aspen Water, etc. Co. *v.* Aspen, 5 Colo. App. 12 (1894). Where the directors commence business before ten per cent. of the capital is paid in, as required by statute, the directors are personally liable as agents transacting business without authority from the principal. Trust, etc. Co. *v.* Floyd, 47 Ohio St. 525 (1890). Where the articles of incorporation are signed and filed, but no organization is ever had, a part of the subscribers are not liable for debts contracted in the corporate name by another party. Rutherford *v.* Hill, 22 Oreg. 218 (1892). Although

Difficult questions of law arise where a person supposes he is dealing with a partnership, but afterwards finds he was dealing with a corporation. While it is clear that even though a partnership becomes incorporated, yet a party who has dealt with the partnership and supposes that he is still dealing with it may hold the partners liable for goods furnished after the incorporation,[1] yet it has

the corporation is apparently abandoned and an agreement as to contributions is signed, yet the courts are inclined to hold that the business is still that of the corporation. Rio Grande Cattle Co. *v.* Burns, 82 Tex. 50 (1891). A failure to commence the principal business does not invalidate the incorporation. Trowbridge *v.* Scudder, 65 Mass. 83 (1853). Nor does an *ultra vires* act or fraud of the corporation have that effect. Langan *v.* Iowa, etc. Constr. Co., 49 Iowa, 317 (1878); Second Nat. Bank *v.* Hall, 35 Ohio St. 158 (1878). Where a copartnership in Connecticut proceeds to incorporate in that state, but fails to file the certificate with the secretary of state, as required by charter, and it appears that the intent to incorporate was abandoned, one partner, upon the death of the other, may claim possession of the assets as against the corporation. Card *v.* Moore, 68 N. Y. App. Div. 327 (1902); aff'd, 173 N. Y. 598.

1 Reid *v.* Kreling's Sons' Co., 125 Cal. 117 (1899). Where an unincorporated association becomes incorporated, a person who does not know of that fact may hold the trustees personally liable on a note signed by them, although the word "trustees" precedes their signature. Vliet *v.* Simanton, 63 N. J. L. 458 (1899). Where a copartnership becomes incorporated, but does not notify parties with whom it has been dealing of that fact and does not record its charter as required by the statutes in the county where the business is done, a person selling goods, supposing that the partnership still continued, may hold the parties liable as partners, even though the goods were delivered to the corporation and even though the partnership name was R. A. Miller & Co., while the corporation name was R. A. Miller Company. Perkins *v.* Rouss, 78 Miss. 343 (1901). Where a person sells goods to a concern which is represented to him to be a partnership and he sues the members as partners, the defense that it is a corporation is not good, if it is shown that the incorporation was fraudulent in that the affidavits as to subscription were false and in that no property was ever conveyed to it, and no corporate functions ever performed, except to elect officers. Christian, etc. Co. *v.* Fruitdale, etc. Co., 121 Ala. 340 (1899). A person having notice of the change of a partnership into a corporation cannot hold the partners individually liable for debts thereafter created. Edwards *v.* Wheeler's Estate, 130 Mich. 219 (1902). See also § 15, *supra.*

Where a person deposits money in a concern which she supposes is a copartnership doing business under the name of "Dan Head & Co.," the defense that the concern is a corporation is not good if it be shown that the articles of incorporation were not recorded, as required by statute. The question of whether the depositor supposed that she was dealing with a corporation is to be submitted to a jury. Slocum *v.* Head, 105 Wis. 431 (1900). A creditor cannot maintain a bill for accounting against persons as copartners, where a corporation was doing the business, even though the books were kept as though they were partners. Nightingale *v.* Milwaukee Furn. Co., 71 Fed. Rep. 234

been held that the fact that the name signed to a bond begins with the word "The" and ends with the word "Company" raises a presumption and is notice that it is a corporation.[1] But it is to be borne in mind that at common law parties may carry on business under any name they may choose.[2]

In New York the logical rule has been laid down that a vendor of property to a concern which he supposed was a partnership, but turns out to be a corporation, may repudiate the contract on discovering that fact, inasmuch as the minds of the parties never met.[3] A suit against a supposed corporation, which is but merely a partnership, does not stop the running of the statute of limitations.[4]

Even though the organization meetings of the incorporators and directors are not held regularly or not held at all, yet, if the incorporation papers were duly executed and filed and the corporation proceeded to act as a corporation, the stockholders are not personally liable for its debts.[5]

(1895). A contractor, who has assigned his contract to a corporation, which latter then proceeds to carry it out, is not personally liable to the employees, even though the assignment was prohibited by law and the employees may not have known for whom they were working. Patton *v.* McDonald, 204 Pa. St. 517 (1903). A partnership cannot avoid liability on the ground that it subsequently became incorporated. Michael Bros. Co. *v.* Davidson, etc., 60 S. E. Rep. 362 (Ga. 1908). A person who has dealt with a copartnership is not chargeable with constructive notice that it has become incorporated, and hence he may hold the partners liable as partners. Rice *v.* Patterson, 46 S. Rep. 255 (Miss. 1908).

1 Allen *v.* Hopkins, 62 Kan. 175 (1900).

2 Lauferty *v.* Wheeler, 11 Abb. N. Cas. 223 (1882); Lindley, Partn., *182. The name "Walsh Boiler and Iron Works" may be used by a corporation, joint stock company, partnership or individual, in the transaction of business. Anderson *v.* Walsh, 189 N. Y. 159 (1907). It is legal for an unincorporated association to use what apparently is a corporate name. People *v.* Rose, 219 Ill. 46 (1905).

3 Consumers' Ice Co. *v.* Webster, etc. Co., 32 N. Y. App. Div. 592 (1898). In South Dakota it has been held that a party selling merchandise to what he supposed was a copartnership, but which actually was a corporation, may hold personally liable the individuals with whom he dealt. The fact that the vendor knew that the vendees were dealing in a name that indicated a corporation may not charge him with notice thereof. Rust-Owen L. Co. *v.* Wellman, 10 S. Dak. 122 (1897).

4 Geneva, etc. Co. *v.* Brown, 98 S. W. Rep. 279 (Ky. 1906). A judgment against a partnership sued as a corporation cannot be enforced against copartners. Pittsburg, etc. Co. *v.* Beale, 204 Pa. St. 85 (1902).

5 A failure to organize does not render the stockholders liable as partners, business having been carried on without organization after the filing of the papers. Cory *v.* Lee, 93 Ala. 468 (1891). Statutory provisions as to notice of the first meeting are directory. They need not be observed if the stockholders acquiesce. Braintree, etc. Co. *v.* Braintree, 146 Mass. 482 (1881). The incorporators are

The incorporators may be liable on a note indorsed in the name of the corporation prior to the certificate of incorporation being filed with the secretary of state in Missouri, but the allegations must be clear as to the exact dates.[1] An oral promise to pay corporate debts is void by the statute of frauds.[2] Partners, by becoming incorporated, do not thereby cease to be partners as to all the debts of the former partnership.[3] A stockholder is not liable as a partner by reason of misrepresentations that the corporation is solvent, though he may be liable in damages for false representations.[4] Upon the dissolution of the corporation the liability of the stockholder as to any further business ceases. If the business is carried on thereafter by the agents, no liability therefor attaches to the former stockholders,[5] unless they expressly authorize it.[6] Persons who purchase a railroad at an execution sale thereof cannot continue to run it in the name of the old railroad corporation, and thereby be protected from liability as partners.[7] They do not succeed to its corporate character, although they purchase its property. In some cases in which the

not liable for goods purchased after the incorporation papers are filed, but before the organization meeting, where the company accepted the goods. Badger Paper Co. *v.* Rose, 95 Wis. 145 (1897). A failure to notify each member of the meeting to organize is immaterial. McClinch *v.* Sturgis, 72 Me. 288 (1881). See also Judah *v.* America, etc. Co., 4 Ind. 333 (1853); Russell *v.* McLellan, 31 Mass. 63 (1833); Newcomb *v.* Reed, 94 Mass. 362 (1866). A failure to give the statutory notice of the first meeting is immaterial where all but one stockholder was present and he afterwards ratified all that was done. Babbitt *v.* East, etc. Co. (N. J. 1876), Stew. Dig., p. 208, § 13. See also §§ 590, 593, 599, *infra*. In People *v.* Selfridge, 52 Cal. 331 (1877), an action was brought on the ground that the certificate filed did not show, as required, that a majority of the stockholders were present at the meeting to organize. The defendant offered to prove that a majority were in fact present, but the court refused to receive the evidence and rendered judgment of ouster.

1 Ryland *v.* Hollinger, 117 Fed. Rep. 216 (1902). See also § 705, *infra*.

2 Andover Free Schools *v.* Flint, 54 Mass. 539 (1847). See also § 76, *supra*.

3 Broyles *v.* McCoy, 5 Sneed (Tenn.), 602 (1858). The case of Martin *v.* Fewell, 79 Mo. 401, 412 (1883), holds also that, "for the debts incurred after they become a corporation, their liability will depend upon the fact of actual notice of their incorporation to the plaintiffs at the time such debts were incurred." See also § 672, *infra*.

4 Searight *v.* Payne, 2 Tenn. Ch. 175 (1874); aff'd, 6 Lea (Tenn.) 283.

5 Central City Sav. Bank *v.* Walker, 66 N. Y. 424 (1876), aff'g 5 Hun, 34. A contract made by the officers after the charter has been forfeited does not bind the stockholders. Wilson *v.* Tesson, 12 Ind. 285 (1859). The stockholders are not individually liable for damages due to the negligence of the corporation, even though it has been dissolved. Hudson *v.* Limestone, etc. Co., 132 Fed. Rep. 410 (1904).

6 National Union Bank *v.* Landon, 45 N. Y. 410 (1871).

7 Chaffe *v.* Ludeling, 27 La. Ann. 607 (1875). See also § 823, *infra*.

members of an association might have been held liable as partners, the right of the creditor to enforce that liability may be barred by his bringing suit and obtaining judgment against the supposed corporation.[1] Solvent subscribers are not liable on the subscriptions of subscribers whom the former knew to be insolvent.[2] A subscription by various parties to a cheese factory to be incorporated, the number of shares being placed opposite the names, binds the subscribers only to the extent of the shares so placed opposite their names.[3] In Louisiana it is held that where a corporation organized to build railroads and carry on a plantation business carries on a store to supply its employees with merchandise, its stockholders are personally liable as to the merchandise business—that being *ultra vires*.[4] The directors of an amusement company are not personally liable, although they are a committee having charge of the construction of a grand stand that falls and injures a person.[5] A stockholder is not personally liable for a tort of the corporation in diverting water.[6] Where the corporation is conducting an illegal and *ultra vires* business, its stockholders are liable as partners for

1 Cresswell *v.* Oberly, 17 Ill. App. 281 (1885); Pochelu *v.* Kemper, 14 La. Ann. 308 (1859). The partners herein cannot bring an action at law against each other. Their remedy is in equity. Crow *v.* Green, 111 Pa. St. 637 (1886). See also ch. XXIX, *infra*, on Joint-stock Companies.

2 Wilson Cotton Mills *v.* C. C. Randleman, etc. Mills, 115 N. C. 475 (1894).

3 Davis, etc. Co. *v.* Jones, 66 Fed. Rep. 124 (1895). A subscription contract prior to incorporation may be such that the subscribers are liable severally to the amount of their subscriptions. Davis *v.* Ravenna Creamery Co., 48 Neb. 471 (1896). A subscription prior to incorporation will not be construed as rendering each subscriber liable for the whole, even though the subscriptions speak of a joint liability, it being clear that such was not the intent of the subscribers. Chicago, etc. Co. *v.* Graham, 78 Fed. Rep. 83 (1896). A subscriber who places opposite his signature the figures $1,000 is bound, although he does not write the number of shares taken. Columbus Land Co. *v.* McNally, 172 Pa. St. 158 (1895).

4 Lehman *v.* Knapp, 48 La. Ann. 1148 (1896). In the case of Medill *v.* Collier, 16 Ohio St. 599, 613 (1866), the court said: "Where the entire business carried on by persons in the name of a corporation is such as the corporation is prohibited by law from doing, they cannot interpose the corporate privileges between them and the liabilities which the law imposes upon individuals in the transaction of similar business without the use of the corporate name." But see § 682, *infra*. Stockholders are not personally liable on *ultra vires* acts. Tennessee, etc. Co. *v.* Massey, 56 S. W. Rep. 35 (Tenn. 1899).

5 Van Antwerp *v.* Linton, 89 Hun, 417 (1895); aff'd, 157 N. Y. [illegible].

6 Poley *v.* Lacert, 35 Oreg. 166 (1899). A majority stockholder who purchases property from a corporation is not liable on a claim that the corporation acquired such property by conversion, he having no knowledge of such conversion. Liebhardt *v.* Wilson, 38 Col. 1 (1906).

torts committed in such business.[1] Where a corporation organized to do a jewelry business is really a scheme to carry on an illegal and fraudulent investment business, a person defrauded may file a bill in equity to hold the corporation and its officers and stockholders personally liable and enjoin them from disposing of the assets and for discovery.[2] Even though the stockholders of a newspaper company may be held liable criminally for its publication of an illegal liquor advertisement, if they knew of the publication, yet it must be shown that they were stockholders at the time.[3] Even though a corporation purchases shares of its own stock, which are but partially paid, this does not render the remaining stockholders liable for the balance due on such unpaid shares so purchased.[4] Although the statute declares that the word "limited" shall be a part of the name, and that the stockholders should be liable if not used, yet a single instance of failure to use it does not render the stockholders liable.[5] The United States statute making every person interested in a still of liquors liable for the tax thereon renders the stockholders of the distilling corporation liable, and one who pays the tax may have contribution from the others.[6] Stockholders are not liable as partners on the ground that the stock was watered.[7] A person advancing money to an insolvent corporation to continue its business does not thereby become personally liable to a person furnishing material to the corporation.[8] In Kentucky it was held that, where a corporation changed its name and used the new name without complying with the statute, the stockholders were liable as partners,[9] and it was also held that, if a person buys all the stock of a company, the latter thereby becomes dormant, and he is liable for the debts incurred thereafter, except as to those debts which

1 Mandeville *v.* Courtwright, 142 Fed. Rep. 97 (1905), rev'g 126 Fed. Rep. 1007.

2 Edwards *v.* Michigan, etc. Co., 132 Mich. 1 (1902).

3 State *v.* Bass, 101 Me. 481 (1906).

4 Crawford *v.* Roney, 126 Ga. 763 (1906).

5 Staver, etc. Co. *v.* Blake, 111 Mich. 282 (1896). A statute may require the word "limited" to be a part of the corporate name, and may render the stockholders personally liable for omitting the same. Lehman *v.* Knapp, 48 La. Ann. 1148 (1896).

6 Richter *v.* Henningsan, 110 Cal. 530 (1895). A stockholder who is compelled to pay a tax levied by the government on liquor distilled by the corporation may have contribution from the other stockholders. Wolters *v.* Henningsan, 114 Cal. 433 (1896). A tax against the property of the company cannot be enforced against a stockholder. State *v.* Catron, 118 Mo. 280 (1893).

7 Louisville Bkg. Co. *v.* Eisenman, 94 Ky. 83 (1893).

8 Perkins *v.* Huntington, 19 N. Y. Supp. 71 (1892). See 96 Pac. Rep. 178.

9 Cincinnati Cooperage Co. *v.* Bate, 96 Ky. 356 (1894).

were incurred on the credit of the company only.[1] In Vermont at an early day it was held that where an incorporated society used all its funds to contest a debt, the members would be compelled to replace the money so used.[2] These decisions, however, can hardly be said to be sound law.

Although there are less stockholders and less directors than the statute or charter requires, yet the acts of these are sufficient to sustain obligations incurred by the corporation with third persons.[3]

Questions relative to the mode of organizing under a special charter are considered elsewhere.[4] Stockholders sometimes guarantee the liabilities of the company. This class of contracts is considered elsewhere.[5] Where a corporation is a mere "dummy," the courts will sometimes ignore its existence and reach the stockholders and officers. This class of cases also is considered elsewhere.[6] Where stockholders are sued on a corporate liability they need not plead the incorporation. They may merely deny liability.[7] Where the trustees are sued personally on a note which they claim is a note of the corporation, they must prove the taking of steps towards incorporation.[8] Where the defendant represented in a letter that it was a corporation, its incorporation need not be proved.[9] The subject of a waiver of liability in an incorporated association is considered elsewhere.[10]

1 Louisville, etc. Co. *v.* Eisenman, 94 Ky. 83 (1893).

2 Bigelow *v.* Congregational Soc., 11 Vt. 283 (1839).

3 Welch *v.* Importers', etc. Bank, 122 N. Y. 177 (1890).

4 See § 590, *infra.*

5 See § 76, *supra.*

6 See § 6, *supra,* and §§ 663, 664, *infra.*

7 Where suit is brought against stockholders to hold them liable as partners they may deny liability, and need not set up the affirmative defense that the corporation alone is liable. Demarest *v.* Flack, 128 N. Y. 205 (1891). In an action for damages the defense that the defendant is merely a stockholder in the party who really is liable should be set up by the general issue and not by a plea. Dade Coal Co. *v.* Haslett, 83 Ga. 549 (1889). Where persons sued as partners deny the partnership, the plaintiff may have an examination before trial in order to ascertain where they were incorporated. Clark *v.* Wilcklow, 75 Hun, 290 (1894).

8 The minutes of the first meeting are not sufficient. McKenney *v.* Bowie, 94 Me. 397 (1900).

9 Marx *v.* Raley & Co., 92 Pac. Rep. 519 (Cal. 1907).

10 See § 508, *infra,* and § 216, *supra.*

CHAPTER XIV.

LIABILITY OF PLEDGEES, TRUSTEES, EXECUTORS, AGENTS, ETC.

§ 244. The subject.
245, 246. The liability of trustees and *cestui que trust.*
247. The liability of a pledgee of shares—Pledge of stock by the corporation itself.
248. The liability of an executor or administrator and the estate.
249. The liability of principal and agent on stock standing in the agent's name.
250. Liability where stock is subscribed for or held by or in the names of infants and married women.
§ 251. The liability of the corporation itself as a stockholder.
252. The liability of legatees, assignees in insolvency, joint owners, and of a corporation owning stock in another corporation.
253. The use of "dummies" and transfers to nominal and fictitious persons.

§ 244. *The subject.*—Where the apparent owner of shares is not the real owner, the registered title to the stock being in one person and the equitable or real ownership being in another, various intricate questions have arisen involving the matter of liability for unpaid subscriptions and liability under the statute. The cases present every variety of ownership and every phase of liability, including many instances of transfer for the purpose of avoiding liability. The principles and rules of law governing this branch of the subject are somewhat numerous and complicated. Nevertheless they are comparatively well settled.

§§ 245, 246. *The liability of trustees and cestui que trust.*—A trustee of stock who is recorded on the corporate books as a stockholder is, at common law, liable on such stock as though he were the absolute owner of the same. This is the rule even though he is recorded on the corporate books not as an absolute owner, but as a trustee of the stock.[1] And the liability of the trustee is not lim-

1 Quoted and approved in Adams *v.* Clark, 36 Col. 65 (1906). Chapman's Case, L. R. 3 Eq. 361 (1866); Davis *v.* Essex Baptist Soc., 44 Conn. 582 (1877); *Ex parte* Bugg, 2 Dr. & Sm. 452 (1865); Muir *v.* City of Glasgow Bank, L. R. 4 App. Cas. 337 (1879); Holt's Case, 1 Sim. (N. S.) 389 (1851); Mitchell's Case, L. R. 9 Eq. 363 (1870); King's Case, L. R. 6 Ch. App. 196 (1871); Grew *v.* Breed, 51 Mass. 569 (1846); Leifchild's Case, L. R. 1 Eq. 231 (1865); Hemming *v.* Maddick, L. R. 9 Eq. 175 (1870); aff'd, L. R. 7 Ch. App. 395; *Re* National Fin. Co., L. R. 3 Ch. App. 791 (1868); Ind's Case, L. R. 7 Ch. App. 485 (1872). But see Sayles *v.* Bates, 15 R. I. 342 (1886); Saunders's Case, 2 De G., J. & S. 101 (1864). A person

ited by the amount of the trust property.[1] Each trustee is liable not merely for his proportion, but for the whole amount due upon the stock.[2] Sometimes by statute the trustee is liable only to the extent of the trust estate.[3] Under the National Banking Act a person holding stock as trustee is not liable on such stock, even though the *cestui que trust* is insolvent or a minor, where the trusteeship appears upon the bank books and the certificate of stock.[4] Where stock stands in the name of a person as "trustee," he is liable thereon, even though he is acting merely as the agent of another person.[5] A trustee is liable on stock issued to him individually, even though he actually held it as trustee, and the same rule applies even though stock is issued to him as trustee.[6] The trust estate cannot be reached by an action at law against the trustee.[7]

The *cestui que trust* is not liable on the stock held by the trustees. The corporation cannot hold him liable; neither can the corporate creditors. The *cestui que trust* cannot be held either on the unpaid

who subscribes for stock as trustee for another is liable on the subscription, although such other person is named in the subscription. Union, etc. Bank *v.* Willard, 88 Pac. Rep. 1098 (Cal. 1907). A trustee is liable on the statutory liability on national bank stock if the stock stands in his name personally. Kerr *v.* Urie, 86 Md. 72 (1897). A person who allows stock to stand in his name on the books of a national bank is liable on the statutory liability therefor, even though he held the stock as trustee for the bank itself. Lewis *v.* Switz, 74 Fed. Rep. 381 (1896). See also § 251, *infra*.. On this subject of the liability of trustees, see also § 503c, *infra*. Further, on the respective liabilities of promoters, see § 705; of officers of unincorporated associations, § 508; of committeemen, § 888; and of persons who sign their names and add an official title, § 724, *infra*. See 69 Atl. Rep. 765.

1 Hoare's Case, 2 John. & H. 229 (1862).

2 Cunninghame *v.* City of Glasgow Bank, L. R. 4 App. Cas. 607 (1879).

3 In New York, by statute, trustees holding stock in railroad or manufacturing corporations are exempt from liability. Laws of 1892, ch. 688, sec. 54. By the statutes of the United States a similar provision applies to national banks. R. S., § 5152. But this exemption does not protect the trustee unless the stock registered in his name is registered to him as "trustee." Davis *v.* Essex Baptist Soc., 44 Conn. 582 (1877).

4 Lucas *v.* Coe, 86 Fed. Rep. 972 (1898); Welles *v.* Larrabee, 36 Fed. Rep. 866 (1888).

5 Wadsworth *v.* Laurie, 164 Ill. 42 (1896). A corporation cannot subscribe for its own stock, even though such subscription is made in the name of a trustee for the corporation. The trustee is personally liable in such case to corporate creditors. Johnston *v.* Allis, 71 Conn. 207 (1898).

6 Sherwood *v.* Illinois, etc. Bank, 195 Ill. 112 (1902).

7 In a suit at law in Massachusetts by a bank receiver to hold a trustee liable on stock purchased by him as trustee, the trust estate cannot be held liable. The suit must be in equity. Hampton *v.* Foster, 127 Fed. Rep. 468 (1904).

subscription or on the statutory liability of the stock. He is a stranger to the corporation and its creditors.[1]

But here the exemption of the *cestui que trust* ceases. He does not entirely escape liability. His exemption from liability to the creditors of the trust does not protect him from liability to the trustee. He is bound to indemnify the trustee and to repay to him any debts which the latter may have paid in the administration of the trust.[2] The indemnity which the trustee may claim from him cannot be denied on the ground that the trustee is irresponsible,

1 Mitchell's Case, L. R. 9 Eq. 363 (1870); *Ex parte* Bugg, 2 Dr. & Sm. 452 (1865); Williams's Case, L. R. 1 Ch. D. 576 (1875); King's Case, L. R. 6 Ch. App. 196 (1871); Fenwick's Case, 1 De G. & Sm. 557 (1849); Newry, etc. Ry. *v.* Moss, 14 Beav. 64 (1851).

2 Butler *v.* Cumpston, L. R. 7 Eq. 16 (1868); James *v.* May, L. R. 6 H. L. 328 (1873); Chapman's Case, L. R. 3 Eq. 361 (1866); *Re* National Fin. Co., L. R. 3 Ch. App. 791 (1868); Perry, Trusts, §§ 485, 486. In the case of Jervis *v.* Wolferstan, L. R. 18 Eq. 18 (1874), the court said, in enforcing indemnity to the trustees of stock: "I take it to be a general rule that where persons accept a trust at the request of another, and that other is a *cestui que trust*, he is personally liable to indemnify the trustees for any loss accruing in the due execution of the trust; and under that doctrine I shall hold that the estate of the testator became liable to indemnify the trustees against the payment of this large sum of money." Hemming *v.* Maddick, L. R. 7 Ch. App. 395 (1872), aff'g L. R. 9 Eq. 175, where the court held also that the trustee might authorize the corporation to use the trustee's name and collect from the *cestui que trust*. In Hughes-Hallett *v.* Indian, etc. Co., L. R. 22 Ch. D. 561 (1882), it is held that the trustees cannot sue for indemnity before the corporation has demanded payment. See also Phene *v.* Gillan, 5 Hare, 1 (1845), where a mortgagor of stock was held liable to indemnify the mortgagee, who had been held liable on the stock. The court said the mortgagor was liable the same as a "trustee of leasehold property under covenants for the benefit of a *cestui que trust*." In Balsh *v.* Hyham, 2 P. Wms. 453 (1728), the lord chancellor said that "it is a rule that the *cestui que trust* ought to save the trustee harmless as to all damages relating to the trust," and consequently that the *cestui que trust* must repay to the trustees money borrowed by the latter and given to the *cestui que trust*, the trust consisting of stock which was pledged to secure the loan. Approved in *Ex parte* Chippendale, 4 De G., M. & G., 19, 54 (1854). Lindley, Partn. 373, 374 (Ewell's 2d Am. Ed.), says: "The right of a trustee to indemnity from his *cestui que trust* very closely resembles the right of an agent to indemnity from his principal. A trustee is clearly entitled to be indemnified out of the trust property against all costs, charges, and expenses properly incurred, and against all losses sustained by him in the execution of his trust; and if the trust property is not sufficient for the purpose of indemnifying him in respect of such matters, his *cestui que trust*, if under no disability, is personally liable to indemnify him, unless such liability is excluded by some special circumstance. . . . If there is an express covenant to indemnify, the obligation will be limited by the covenant."

and consequently that the corporation cannot get anything from him.[1] But until the trustee is actually called on by the corporation to pay, he cannot compel the *cestui que trust* to give indemnity.[2]

This liability, however, of the *cestui que trust* may be avoided. If the trustees are willing to provide in the trust instrument that the *cestui que trust* shall not be liable, such a provision is legal and effectual. The *cestui que trust* then escapes liability absolutely and completely.[3] This rule does not apply to a transaction where the registered stockholder is merely the nominal holder, or agent for another person.[4] A guardian is not liable on national bank stock, nor is his ward, but the estate only is liable under the acts of congress.[5]

§ 247. *The liability of a pledgee of shares—Pledge of stock by the corporation itself.*—A pledgee of stock, that is, one to whom the stock has been transferred in pledge or as collateral security, and who has had the stock transferred into his own name on the corporate books, is liable to the creditors of the corporation as though he were the absolute owner of the stock.[6] This rule has

1 *Re* National Fin. Co., L. R. 3 Ch. App. 791 (1868); Cruse *v.* Paine, L. R. 6 Eq. 641 (1868).

2 Hughes-Hallett *v.* Indian, etc. Co., L. R. 22 Ch. D. 561 (1882).

3 Thus, in *Ex parte* Chippendale, 4 De G., M. & G. 19, 52 (1854), the court says, in a dictum: "No doubt a company's deed, or any other deed, may be so framed as to deprive directors or trustees of the right to indemnity; and, if parties think proper to accept directorships or trusts under deeds so framed, they must abide by the consequences." See also Gillan *v.* Morrison, 1 De G. & Sm. 421 (1847), holding that an expres agreement that the *cestui que trust* shall be liable to the trustee to a certain extent and no more is binding on the trustee.

4 See §§ 249, 253, *infra*.

5 Clark *v.* Ogilvie, 111 Ky. 181 (1901).

6 Pauly *v.* State L. & T. Co., 165 U. S. 606 (1897); National Foundry, etc. Works *v.* Oconto Water Co., 68 Fed. Rep. 1006 (1895); Tuthill Spring Co. *v.* Smith, 90 Iowa, 331 (1894); Calumet Paper Co. *v.* Stotts Inv. Co., 96 Iowa, 147 (1895); Harper *v.* Carroll, 66 Minn. 487 (1896); State *v.* Bank, etc., 70 Minn. 398 (1897); Chatham Bank *v.* Brobston, 99 Ga. 801 (1896); Ball Elec. Light Co. *v.* Child, 68 Conn. 522 (1897); National Comm. Bank *v.* McDonnell, 92 Ala. 387 (1891); Moore *v.* Jones, 3 Woods, 53 (1877); s. c., 17 Fed. Cas. 690; Pullman *v.* Upton, 96 U. S. 328 (1877); Aultman's Appeal, 98 Pa. St. 505 (1881); Crease *v.* Babcock, 51 Mass. 525 (1846); Holyoke Bank *v.* Burnham, 65 Mass. 183 (1853); Sleeper *v.* Goodwin, 67 Wis. 577 (1887); Rosevelt *v.* Brown, 11 N. Y. 148 (1854); U. S. Trust Co. *v.* U. S. F. Ins. Co., 18 N. Y. 199 (1858); Grew *v.* Breed, 51 Mass. 569 (1846); Royal Bank of India's Case, L. R. 7 Eq. 91 (1868); s. c., L. R. 4 Ch. App. 252 (1869); Weikersheim's Case, L. R. 8 Ch. App. 831 (1873); Price & Brown's Case, 3 De G. & Sm. 146 (1850), in which the holders of shares taken as security, who had new shares issued in their own names in exchange for the old shares which had been called in, were declared to be contributories, though the directors knew the nature of their holding; Richardson *v.* Abendroth, 43

frequently been enforced in the case of a pledge of shares of stock in a national bank.[1] A pledgee of certificates of stock may legally cause the stock to be transferred on the corporate books into the name of an irresponsible agent or representative of the pledgee. When this is done the pledgee is not liable on the stock.[2] A pledgee of national bank stock is not liable thereon, the stock having been transferred into the name of an appointee of the pledgee, yet the question of whether the pledgee had become the absolute owner of the stock or had held itself out as the owner by a sale to itself, may be

Barb. 162 (1864). And the pledgee is liable upon the stock even after his debt has been paid and the certificate handed back to the pledgor, if the retransfer is not properly entered on the corporate books. Bowden [Bowdell] *v.* Farmers', etc. Nat. Bank, 25 Int. Rev. Rec. 405 (1877); s. c., 3 Fed. Cas. 1029; Johnson *v.* Somerville Dyeing, etc. Co., 81 Mass. 216 (1860); Adderly *v.* Storm, 6 Hill, 624 (1844). A pledgee who transfers the stock into his own name is liable on the unpaid subscription. People's, etc. Bank *v.* Rauer, 2 Cal. App. 445 (1906). A pledgee who has the stock transferred to himself absolutely on the books is liable thereon on the statutory liability. Hurlburt *v.* Arthur, 140 Cal. 103 (1903). A bank holding stock in its own name in another bank is liable thereon as a stockholder, even though in fact it held it only as a pledge. Adams *v.* Clark, 36 Col. 65 (1906). Where the pledgee has the stock transferred into his own name absolutely, he is liable to corporate creditors for the unpaid subscription price. Fisher *v.* Seligman, 75 Mo. 13 (1881), rev'g 7 Mo. App. 383. In this case the stock had been pledged by the corporation itself to the defendant. Even though stock stands in the name of a pledgee for a short time and is then transferred back to the owner, yet the pledgee is not liable on a statutory liability for subsequent debts, even though he has not given public notice of the transfer by him as required by statute. Brunswick Terminal Co. *v.* National Bank, 112 Fed. Rep. 813 (1901). A pledgee who causes the stock to be transferred to himself absolutely on the books is liable thereon for the subscription price. Fouche *v.* Merchants', etc. B'k, 110 Ga. 827 (1900), 69 Atl. Rep. 765.

[1] Pauly *v.* State L. & T. Co., 165 U. S. 606 (1897); Magruder *v.* Colston, 44 Md. 349 (1876); Wheelock *v.* Kost, 77 Ill. 296 (1875); Hale *v.* Walker, 31 Iowa, 344 (1871); Barre Nat. Bank *v.* Hingham Mfg. Co., 127 Mass. 563 (1879); National Bank *v.* Case, 99 U. S. 628 (1878).

[2] Quoted and approved in Adams *v.* Clark, 85 Pac. Rep. 642 (Col. 1906). Pauly *v.* State L. & T. Co., 165 U. S. 606 (1897); Henkle *v.* Salem Mfg. Co., 39 Ohio St. 547 (1883); Welles *v.* Larrabee, 36 Fed. Rep. 866 (1888). The pledgee is not liable when he causes the stock to be transferred into the name of a third person. Hayes *v.* Fidelity, etc. Co., 105 Fed. Rep. 160 (1900). A pledgee of stock in a national bank is not liable thereon where he has caused the stock to be placed in the name of an employee, even though the original pledge was stock in a national bank which was consolidated with another national bank and the pledgee took stock in the consolidated bank in the employee's name in place of the original stock. Wilson *v.* Merchants', etc. Co., 98 Fed. Rep. 688 (1900); aff'd, 183 U. S. 121. A trust company holding national bank stock as pledgee may have the stock transferred into the

for a jury.[1] A statute frequently relieves the pledgee from his liability.[2]

A pledgee of stock may protect his interest in the stock and may at the same time avoid liability as a stockholder by having the stock transferred into his name as "pledgee;" in other words, by having the certificate made out to him in his own name, adding thereto the word "pledgee." Where the transfer is made in this manner, the pledgee is not liable on the statutory or subscription

name of one of its employees, and the trust company is not liable on such stock on the failure of the bank, even though it paid an assessment levied on the stock by the comptroller. Higgins *v.* Fidelity, etc. Co., 108 Fed. Rep. 475 (1901); aff'd, 189 U. S. 242. Where the pledgee of national bank stock causes new certificates to be issued in the name of one of his employees, the former is not liable on the stock. National, etc. Bank *v.* Harmon, 79 Fed. Rep. 891 (1897). In Anderson *v.* Philadelphia Warehouse Co., 111 U. S. 479 (1884), it is held that a pledgee of shares of stock in a national bank, who takes the security for his benefit in the name of an irresponsible person, as trustee, for the avowed purpose of avoiding individual liability as a stockholder, incurs no liability which can be enforced by creditors of the bank in case of its failure. To same effect, Newry, etc. Ry. *v.* Moss, 14 Beav. 64 (1851). *Cf.* Addison's Case, L. R. 5 Ch. App. 294 (1870). A transfer of shares by one who holds them as collateral security, for the purpose of avoiding liability thereon, is not a conversion. Heath *v.* Griswold, 5 Fed. Rep. 573 (1881). See also §§ 466, 470, and *cf.* § 253, *infra*.

1 Rankin *v.* Fidelity, etc. Co., 189 U. S. 242 (1903). Where after the death of the pledgor the pledgee files a claim against his estate, and practically becomes the owner of the stock, the pledgee may be liable thereon, even though it caused the stock to be transferred into the name of one of its irresponsible employees, the stock in this case being national bank stock. Hulitt *v.* Ohio, etc. Bank, 137 Fed. Rep. 461 (1905); aff'd, 204 U. S. 162.

2 N. Y. Laws, 1892, ch. 688, § 54. See McMahon *v.* Macy, 51 N. Y. 155 (1872). A similar provision is found in the old New York Manufacturing Companies Act of 1848 (N. Y. Laws, 1848, ch. 40, § 16). See Stover *v.* Flack, 30 N. Y. 64 (1864); s. c., 41 Barb. 162. *Cf. Re* Reciprocity Bank, 22 N. Y. 9, 17 (1860). And a similar provision has been enacted in Maryland. Matthews *v.* Albert, 24 Md. 527 (1866). In the case Adams *v.* Clark, 36 Col. 65 (1906), the court held that the usual statute relieving a pledgee from the liability on stock applies only to cases where either the corporate books or the certificate of stock shows that the stock is held in pledge, and the court examined the various decisions on that subject and stated that the only decision to the contrary was McMahon *v.* Macy, 51 N. Y. 155, and that in that case it was a *dictum*. By statute in Iowa a pledgee of stock is not liable for assessments thereon. Iowa Nat. Bank *v.* Cooper, 101 N. W. Rep. 459 (Iowa 1904). In Burgess *v.* Seligman, 107 U. S. 20 (1882), the supreme court of the United States construed the Missouri statute and held that the pledgees were not liable to corporate creditors upon the shares so held by them, and such also is the the rule now in Missouri. Union Sav. Assoc. *v.* Seligman, 92 Mo. 635 (1887), overruling Griswold *v.* Seligman, 72 Mo. 110 (1880). See also Melvin *v.* Lamar Ins. Co., 80 Ill. 446 (1875). In England, Chapman's, etc. Case, L. R. 3 Eq. 361 (1867); *Re* Anglesea Col-

liability, even though the corporation becomes insolvent.[1] Where a bank has no power to hold stock in other banks, it seems that the former is not liable on stock of the latter, which the former holds

liery Co., L. R. 2 Eq. 379 (1866); Ind's Case, L. R. 7 Ch. 485 (1872), were under the Companies Act. In *Re* City Terminus Hotel Co., L. R. 14 Eq. 10 (1872), a hotel company borrowed £40,000 of a railroad company and gave it unissued shares as security, they being placed in the hands of a trustee, with power to sell, and thus reduce the debt. Afterwards the railway company bought the hotel, and the hotel company was wound up. *Held*, that the railway company were not stockholders, but creditors, and were entitled to deduct the amount of the loan from the purchase-money. See also Manchester, etc. Corp.'s Case, 22 W. R. 41 (1873); Nellis *v.* Coleman, 98 Pa. St. 465 (1881), where the corporation received subscriptions as a loan, to be repaid. It was held to be valid. In Massachusetts the pledgee is liable on the stock as owner only when the certificate fails to show that the shares are held merely as collateral. Barre Nat. Bank *v.* Hingham Mfg. Co., 127 Mass. 563 (1879). And so in Connecticut. Davis *v.* Essex Baptist Soc., 44 Con. 582 (1877).

1 Pauly *v.* State L. & T. Co., 165 U. S. 606 (1897). A pledgee of national bank stock is not liable on the statutory liability, where he is registered on the books of the bank as holding the stock as collateral. Beal *v.* Essex Sav. Bank, 67 Fed. Rep. 816 (1895). Where the receiver of a national bank proves by the certificate of stock book that a certificate of stock was issued to a pledgee as pledgee, and then canceled and issued to another person who in fact was only pledgee, but who appeared on the face of the certificate as though he were the absolute owner, the presumption is that the stock book would have shown the true facts, and hence a case is not made out against the latter, especially where the certificate book merely shows that the new certificate was issued in lieu of the old one. Tourtelot *v.* Stolteben, 101 Fed. Rep. 362 (1900). Where a pledgee directs its agent to cause the stock to be transferred into the name of the pledgee "as pledgee," but the agent takes a new certificate running to the pledgee as absolute owner, the pledgee is not liable on the stock to corporate creditors, it being shown that the pledgee did not know of such issue of the new certificate; and especially is this the case where the pledgee is a bank which had authority to take stock in pledge, but not to purchase it absolutely. May *v.* Genesee, etc. Bank, 120 Mich. 330 (1899). It is proper and legal for a corporation to add to the name appearing on the stock certificate the words "as pledgee," or "as collateral security," or similar words. See § 466 and ch. XXVII, *infra*. Where a pledgee requests the corporation to transfer the stock to him as pledgee and the corporation transfers it to him individually, but he immediately returns it and requests a new certificate to him as pledgee, he is not liable to a corporate creditor as the owner of the stock, even though the corporation delayed for four weeks in making the change. Welch *v.* Gillelen, 147 Cal. 571 (1905). A court will not at the instance of a pledgee order a transfer to be recorded on the books to the pledgee as pledgee, and giving the pledgor the right to vote the stock, inasmuch as this would complicate the title as between the corporation and its stockholders and interfere with the business of the corporation. American, etc. Co. *v.* Pacific, etc. Co., 34 Wash. 10 (1904).

as pledgee, but apparently as owner.[1] However that may be, the law is clear that a person to whom stock is issued by a bank "as cashier," but who really is only pledgee, is not liable on the statutory liability.[2]

A pledgee of stock who holds the certificates, but who does not appear on the corporate books as a stockholder, is not liable as a stockholder.[3] It has even been held that a pledgee of national bank stock who has sold the same at public sale and purchased the stock himself is nevertheless not liable on the stock to corporate creditors, if the stock has not been transferred into his name on the books of the bank.[4] In a suit to enforce the liability of a stockholder in a national bank, both the pledgee and the pledgor may be joined, and the decree may compel the pledgor to indemnify the pledgee where the latter is held liable.[5] Where the corporation pledges its unissued stock in order to secure a corporate debt, the pledgee is not liable to other corporate creditors on such stock.[6]

1 See § 252, *infra*. In the case of Robinson *v.* Southern, etc. Bank, 180 U. S. 295 (1901), the court declined to pass upon the question of whether a national bank would be liable on stock which it held as collateral security where the stock stands on the books in the name of the bank.

2 Frater *v.* Old Nat. Bank, etc., 101 Fed. Rep. 391 (1900). In the case of Robinson *v.* Southern, etc. Bank, 180 U. S. 295 (1901), the court approved the decisions in Baker *v.* Old National Bank, 86 Fed. Rep. 1006, and 101 Fed. Rep. 391, holding that where stock in one national bank stands in the name of a person as cashier of another national bank, the latter may show that it held the stock only as collateral security, and hence is not liable thereon.

In the case of Baker *v.* Old Nat. Bank, 86 Fed. Rep. 1006 (1898), the court held that where national bank stock stands on the books in the name of the cashier of another national bank as cashier, this in itself is sufficient notice that the latter holds the stock as pledgee, and hence neither the cashier personally, nor the pledgee bank as a bank, is liable on the statutory liability; the basis of this decision being that the liability of the pledgee in such case is based on estoppel only, and that there was sufficient notice on the corporate books of the fact that the stock was held in pledge, especially as a national bank has no power to buy such stock or take the same in payment of a debt, except a bad debt.

3 Prouty *v.* Prouty, etc. Co., 155 Pa. St. 112 (1893). An unrecorded pledgee is, of course, not liable on the statutory liability. Henkle *v.* Salem, etc. Co., 39 Ohio St. 547 (1883). See also § 258, *infra*.

4 Even though a national bank, as pledgee of a national bank stock which stands on the books of the latter bank in the name of the pledgor, sells the stock on notice and buys it in at a nominal figure, yet if the pledgee does not have the stock transferred to himself on the books of the bank he cannot be held liable thereon, the pledgee having soon after the sale waived its rights as a purchaser at such sale. Robinson *v.* Southern, etc. Bank, 180 U. S. 295 (1901).

5 Baker *v.* Old Nat. Bank, 91 Fed. Rep. 449 (1899).

6 Stock issued by the corporation to a person to insure the carrying out by another person of the latter's contract to underwrite the bonds, does

§ 248. *The liability of an executor or administrator and the estate.*—The estate of a deceased person is liable upon stock held and owned by the decedent in the same way and to the same ex-

not render such a person so holding the stock liable thereon. Colonial T. Co. *v.* McMillan, 188 Mo. 547 (1905). Pledgees of stock from the corporation itself are not liable on the stock under the Maine statute, where the entries on the stock ledger showed that the stock was issued as collateral. *In re* Noyes Bros., 136 Fed. Rep. 977 (1905). It may be shown by parol evidence whether the issue of stock to an individual by the corporation was a sale of the same or was as collateral security. *In re* McLean-Bowman Co., 138 Fed. Rep. 181 (1905). In the case Beattie *v.* Ebury, L. R. 7 H. of L. 102 (1874), where unissued stock had been issued as collateral security for a loan to the company the court held that even though the stock stood in the names of nominees of the pledgee, yet such nominees were not liable on the stock. In the case *In re* City Terminus Hotel Co., L. R. 14 Eq. 10 (1872), on the winding up of a solvent company, stock issued as collateral security to a creditor of the company was held not to make the creditor a stockholder and he was entitled to full payment of his debt upon the return of the stock. Even though a corporation issues stock in pledge to one of its bondholders, yet the bondholder is not liable thereon, though the corporation becomes insolvent. Deavitt *v.* Eldridge, 73 Vt. 332 (1901). Although stock pledged by the corporation to one of its creditors is stock which has been surrendered by a subscriber who had never paid therefor, yet the pledgee is not liable on said stock, even though the subscriber was to be entitled to the equity of redemption. Sturtevant *v.* National, etc. Works, 88 Fed. Rep. 613 (1898). Where a Wisconsin corporation pledges its own stock to one of its own creditors, such creditor is not liable thereon to corporate creditors as a stockholder. Andrews *v.* National Foundry, etc. Works, 77 Fed. Rep. 774 (1897). Where the pledgees of stock from the corporation foreclose by sale, they do not thereby become liable on the stock either to the corporation or its creditors. Andrews *v.* National Foundry, etc. Works, 76 Fed. Rep. 166, 175 (1896), holding also that under the Wisconsin statute, if an issue of stock as collateral for a debt of the company is illegal, the stock is void, and the holder thereof is not liable to corporate creditors who were not especially misled by his conduct; and that persons holding stock by direct issue as collateral security for a debt of the company to them are not liable to creditors of the company as subscribers, unless they allow themselves to be represented as stockholders to the creditors, who gave credit on the faith of that liability. Where the corporation pledges its unissued stock to one of its creditors as collateral security, he is not liable to corporate creditors who were such before the issue was made. Gilman *v.* Gross, 97 Wis. 224 (1897). Unissued stock may be issued by the corporation as a pledge to secure a loan, and the corporation cannot set up that it was issued at less than par in violation of the constitution. The issue is good in the hands of the pledgee to the extent of the loan. Gasquet *v.* Crescent City Brewing Co., 49 Fed. Rep. 496 (1892); aff'd, 148 U. S. 31. Even though stock is issued by the corporation as security for its debts, yet if it is issued to a third person and the certificates transferred by that person to the creditors, and the debt is afterwards paid and the stock is still held by the first named person for many years, he is liable there-

tent that the stockholder was liable in his life-time. Accordingly, an executor or administrator of the estate of a deceased stockholder is chargeable upon the shares of the decedent to the extent of the property that comes into his hands as the personal representative of the deceased, he not having been discharged.[1] The cause of action

on to corporate creditors. Hecht, etc. Co. *v.* Phenix, etc. Co., 121 Fed. Rep. 188 (1903). A person who subscribes for stock and receives it and becomes a director and takes part in declaring illegal dividends cannot claim as against creditors that he merely loaned the money to the corporation and held the stock as collateral. American, etc. Co. *v.* Eddy, 138 Mich. 403 (1904).

A constitutional provision against the issue of bonds, except for money, labor or property, does not prevent the corporation from pledging its bonds. Illinois, etc. Bank *v.* Pacific Ry., 117 Cal. 332 (1897). Where a corporation pledges its stock as security for a debt due from the corporation to the pledgee, and the certificates of stock state upon their face that they are full paid, the pledgee cannot be held liable on said stock, even though the company has become insolvent. Bloomenthal *v.* Ford, [1897] A. C. 156, rev'g *Re* Veuve Monnier, etc. Co., [1896] 2 Ch. 525. But Furness *v.* Cynthiana, etc. Co., [1893] 21 R. 239, holds otherwise where the pledgee knew that they were not paid up. A depositor in a bank who has been induced to take from the bank its stock as security may show by parol evidence that she took such stock as collateral security and not in liquidation of her deposit. Williams *v.* American Nat. Bank, 85 Fed. Rep. 376 (1898). Even though bank books include the name of a person as a stockholder, and even though such person, after the bank became insolvent, referred to herself as a stockholder, yet if she was not aware of the entries, and understood that she had the stock as collateral security, she can enforce her claim against the bank as a debt. American Nat. Bank, etc. *v.* Williams, 101 Fed. Rep. 943 (1900). Where the pledgee has the stock transferred into his own name absolutely, he is liable to corporate creditors for the unpaid subscription price. Fisher *v.* Seligman, 75 Mo. 13 (1881), rev'g 7 Mo. App. 383. In this case the stock had been pledged by the corporation itself to the defendant.

[1] An estate is liable on the statutory liability of the deceased as a stockholder in a Kansas corporation. Mechanics' Sav. Bank *v.* Fidelity, etc. Co., 87 Fed. Rep. 113 (1898). An estate is liable on an unpaid subscription made by the deceased. Fitzgerald's Estate *v.* Union Sav. Bank, 65 Neb. 97 (1902). The estate of a deceased stockholder is liable on the statutory liability in Wisconsin, even though the stock still stands in the name of the deceased person. The executors are not liable except to the extent of the estate. Gianella *v.* Bigelow, 96 Wis. 185 (1897). An estate is liable on the statutory liability of a deceased stockholder in a national bank. Wickham *v.* Hull, 60 Fed. Rep. 326 (1894). See also, in general, Thomas's Case, 1 De G. & Sm. 579 (1849); Baird's Case, L. R. 5 Ch. App. 725 (1870), holding that the presumption is that executors of a deceased stockholder succeed to his full liability; Thomas *v.* Evans, 9 Sc. Ct. of Sess. Cas. (3d ser.) 810 (1871); Evans *v.* Coventry, 25 L. J. (Ch.) 489 (1856), holding the executor liable only to the extent of the estate funds. To same effect, Blakeley's Case, 13 Beav. 133 (1850); *Ex parte* Gouthwaite, 3 Mac. & G. 187 (1851); *Ex*

against a stockholder, arising from his statutory liability, is not defeated by his death. The action may proceed against his estate.[1] The executor or administrator becomes personally liable upon the stock, if he pay away the assets of the estate in legacies without making provision to meet the liability on the stock.[2] Where, however, the stock goes to a legatee or life tenant,[3] the estate may not be liable. An estate is liable for stock which the deceased owned in a national bank, and such liability may be enforced in the federal court,

parte Doyle, 2 Hall & T. 221 (1850); *Ex parte* Hall, 1 Mac. & G. 307 (1849); Hamer's Case, 2 De G., M. & G. 366 (1852); Robinson's Case, 6 De G., M. & G. 572 (1856); Ness *v.* Armstrong, 3 De G. & Sm. 38, n. (1849); Straffon's Case, 1 De G., M. & G. 576 (1852); Bulmer's Case, 33 Beav. 435 (1864); Gouthwaite's Case, 3 De G. & Sm. 258 (1850); Taylor *v.* Taylor, L. R. 10 Eq. 477 (1870); Alexander's Case, 15 Sol. Jour. 788 (1871); Hamer's Case, 3 De G. & Sm. 279 (1850); New England Comm. Bank *v.* Newport Steam Factory, 6 R. I. 154 (1859); Crandall *v.* Lincoln, 52 Conn. 73 (1884); Bailey *v.* Hollister, 26 N. Y. 112 (1862); Chase *v.* Lord, 77 N. Y. 1 (1879); Witters *v.* Sowles, 25 Fed. Rep. 168 (1885); s. c., 32 Fed. Rep. 130 (1887), relative to the liability of an executor under the federal statute governing national banks; also Davis *v.* Weed (U. S. D. C.), 44 Conn. 569 (1877); s. c., 7 Fed. Cas. 186; Schouler, Executors, § 380. An administrator is not liable on national bank stock even though he is the residuary distributee of the estate. *Re* Bingham, 127 N. Y. 296 (1891). Some of the earlier Massachusetts cases are in apparent conflict with the rule declared in the text. Child *v.* Coffin, 17 Mass. 64 (1820); Gray *v.* Coffin, 63 Mass. 200 (1852); Ripley *v.* Sampson, 27 Mass. 371 (1830); Andrews *v.* Callender, 30 Mass. 484 (1833); Dane *v.* Dane Mfg. Co., 80 Mass. 489 (1860); Grew *v.* Breed, 51 Mass. 569 (1846). See also *Re* Cheshire Banking Co., L. R. 32 Ch. D. 301 (1886). A residuary legatee is not a proper party defendant to a suit to enforce the deceased's liability as a stockholder. Starkweather, etc. *v.* Brown, 25 R. I. 142 (1903).

[1] Richmond *v.* Irons, 121 U. S. 27 (1887); Chase *v.* Lord, 77 N. Y. 1 (1879). But see Dane *v.* Dane Mfg. Co., 80 Mass. 488 (1860). A statutory liability in reference to illegal dividends may not survive the death of a director who is liable. Boston, etc. R. R. *v.* Graves, 80 Fed. Rep. 588 (1897).

[2] Taylor *v.* Taylor, L. R. 10 Eq. 477 (1870); Jefferys *v.* Jefferys, 24 L. T. Rep. 177 (1871); Thomas's Case, 1 De G. & Sm. 579 (1849), where the debts had exhausted the estate. In Stewart *v.* Evans, 9 S. Ct. Sess. Cas. (3d ser.) 810 (1871), it is held that where executors pay away the estate *bona fide*, they are not, after a lapse of sixteen years, liable personally for a deficit on shares. *Cf.* Witters *v.* Sowles, 25 Fed. Rep. 168 (1885).

[3] The estate is not liable on the statutory liability where the stock is transferred to the life tenant. Blackmore *v.* Woodward, 71 Fed. Rep. 321 (1895). See §§ 252, 560, *infra*. Even though executors transfer to themselves as trustees certain national bank stock, and pay the dividends to a legatee of a share in the estate, yet if the will did not set aside such stock for such legatee, the estate, and not the legatee's interest, is liable for an assessment on such stock. Earle *v.* Rogers, 105 Fed. Rep. 208 (1900).

although the estate is still in the probate court and the time for filing claims against the estate in the probate court has expired.[1] But where claims against estates must be presented to the court within two years, a subscription liability presented after that time is barred.[2] An unpaid subscription due from the estate of a deceased stockholder is a claim which should be presented to the probate court.[3] An executor is no longer liable for an assessment on stock after he has been finally discharged and distribution ordered.[4] Even though a national bank becomes insolvent after a stockholder has died, yet, if the stock still stands in his name, his estate is liable for the assessment on such stock, and if the estate has been distributed the distributees must refund to the extent of such liability.[5] A statutory

1 Zimmerman *v.* Carpenter, 84 Fed. Rep. 747 (1898). An estate is liable on national bank stock where such estate is still unsettled, even though the sole legatee, who is also the executor, has paid all other claims and taken the assets. Tourtelot *v.* Finke, 87 Fed. Rep. 840 (1898). Suit may be brought to enforce the liability of a stockholder in a national bank, although such stockholder is dead and his estate is being administered in a state probate court. Brown *v.* Ellis, 86 Fed. Rep. 357 (1898).

2 Morse *v.* Pacific Ry., 191 Ill. 356 (1901). See s. c., 191 Ill. 371. A statute limiting claims against estates to such claims as are presented within a year applies to a statutory liability of a deceased stockholder. Barto *v.* Stewart, 21 Wash. 605 (1899). The statutory liability of a Maine stockholder in a Minnesota corporation cannot be enforced in Maine, where the stockholder has died and his estate been distributed, and the suit was not instituted until three years after the decree of insolvency in Minnesota, and the one-year statute of limitations in Maine in suits against estates had run. Hale *v.* Coffin, 114 Fed. Rep. 567 (1902). An executor has no power to waive a short statute of limitations applicable to the statutory liability on stock in a Kansas corporation. Stebbins *v.* Scott, 172 Mass. 356 (1899).

3 State *v.* Probate Court, 66 Minn. 246 (1896).

4 Childs *v.* De Laveaga, 89 Pac. Rep. 82 (Cal. 1907); Union etc. Bank *v.* De Laveaga, 89 Pac. Rep. 84 (Cal. 1907). The executors may distribute the entire estate, although it includes stock which has not been fully paid for. *Re* Mary King. 95 L. T. Rep. 724 (1906). If an executor distributes the assets knowing that there is a liability on the stock, he is personally liable therefor, if it cannot be collected from the distributees. Potter *v.* Mortimer, 114 Ill. App. Rep. 422 (1904); aff'd 213 Ill. 178.

5 Matteson *v.* Dent., 176 U. S. 521 (1900); s. c., 70 Minn. 519 (1897), and 75 N. W. Rep. 1041. A distributee may be held liable on a statutory liability of the decedent in a corporation to the extent of the assets received by him. Hale *v.* Coffin, 114 Fed. Rep. 567 (1902), aff'd, 120 Fed. Rep. 470. Where an estate has been distributed, calls on stock standing in the name of the testator may be collected from the distributees. The statute of limitations applicable to claims against any estate does not apply, inasmuch as, the corporation being solvent, the claim is contingent and hence could not be allowed by the probate court anyway. South Milwaukee Co., *v.* Murphy, 112 Wis. 614 (1902). Where the commissioners of the estate of a deceased stockholder

limitation as to the time within which claims against an estate shall be presented, does not apply to the statutory liability on national bank stock, inasmuch as the United States statutes regulate that.[1] Where the estate has been administered and distributed and the administrators discharged, the property of the estate may be followed into the hands of distributees for the purpose of paying an unpaid subscription.[2] An executor is not released from a statutory liability, even though his accounts have been judicially settled.[3] Executors who have inventoried national bank stock as part of the assets of the estate are liable thereon as executors.[4] An assessment levied under the national bank act on stock held by an administrator has no preference over other debts of the estate.[5] Where the executor settles the estate without probate proceedings, the property of the estate may be followed to answer to the statutory liability on national bank stock standing in the name of the deceased.[6] When the executors accept a transfer in their own names they make themselves personally liable on the stock.[7] An executor who takes new shares for

have no power to pass on a claim arising from a statutory liability on stock, the six-months statute of limitations applicable to claims against estates is not applicable to such liability. If the estate has been distributed the assets may be followed into the hands of the heirs and legatees. Barton, etc. Bank *v.* Atkins, 72 Vt. 33 (1899). Where, pending a suit to enforce stockholders' liability, one of the stockholders dies and his executors distribute the estate and are discharged, the distributees may be brought in as parties defendant. Willoughby *v.* St. Paul, etc. Co., 80 Minn. 432 (1900).

1 Mortimer *v.* Potter, 213 Ill. 178 (1904).

2 Lake, etc. Co. *v.* Lindeke, 66 Minn. 209 (1896). A national bank receiver may maintain a bill in equity against the trustees and distributees of the estate of a deceased stockholder in the bank to collect an assessment on the stock. Mortimer *v.* Potter, 213 Ill. 178 (1904).

3 Mahoney *v.* Bernhard, 45 N. Y. App. Div. 499 (1899); aff'd, 169 N. Y. 589.

4 Parker *v.* Robinson, 71 Fed. Rep. 256 (1895). A decree that shares of stock in a national bank do not belong to an estate does not prevent another suit against another person as the owner, even though such other person was a party defendant to the first suit, being a daughter and heir of the decedent. Ricaud *v.* Tyson, 78 Fed. Rep. 561 (1897).

5 *In re* Beard's Estate, 7 Wyo. 104 (1897).

6 Baker *v.* Beach, 85 Fed. Rep. 836 (1898).

7 Alexander's Case, 15 Sol. Jour. 788 (1871). An executrix is liable on stock standing in the name of the estate instead of in the name of the deceased or of the executrix, it being shown that the stock formerly stood in the name of the deceased. Brown *v.* Ellis, 103 Fed. Rep. 834 (1900). In New York it is held that an action to charge an executor on the stock of the estate need not be joined with an action to enforce an individual subscription by the executor, Erie etc. R. R. *v.* Patrick, 2 Keyes, 256 (1865). A special statute of limitations applicable to executors will apply to an executor's liability on stock. Sayles *v.* Bates, 15 R. I. 342 (1886). In

the estate is personally liable thereon.[1] A partnership association under the statutes of Pennsylvania is not a corporation to the extent that the estate of a stockholder is liable on a claim arising after the death of such stockholder.[2] Statutes are often found relieving executors and administrators from this liability.[3] A foreign executor or administrator has no absolute right to transfer the stock of the estate.[4]

§ 249. *The liability of principal and agent on stock standing in the agent's name.*—Sometimes a subscription for stock is made by one person as the agent of another, and the stock is entered on the corporate books in the name of the agent. In such a case it is the rule that corporate creditors may hold either the principal or the agent responsible on the stock.[5] An agent who is compelled to assume and pay charges on the stock may recover from his principal the amount so paid.[6] Where a transfer is made, not to the principal him-

England an executor is liable personally on stock if he transfers it to himself; otherwise not, the title to the stock being left in the name of the testator. Healey, Company Law and Pr., p. 90; Buchan's Case, L. R. 4 App. Cas. 549 (1879).

1 Fearnside's Case L. R. 1 Ch. App. 231 (1866); Spence's Case, 17 Beav. 203 (1853); Jackson *v.* Turquand, L. R. 4 H. L. 305 (1869); Mallorie's Case, L. R. 2 Ch. App. 181 (1866). *Cf.* Russell's Case, 15 Sol. Jour. 790 (1871).

2 Bodey *v.* Cooper, 82 Md. 625 (1896).

3 Where the executor causes stock held by the decedent to be transferred into the executor's name as executor, the estate is liable. If the estate is not good the executor is not liable personally under the statutes of Minnesota. Markell *v.* Ray, 75 Minn. 138 (1898).

4 See § 330, *infra*.

5 Burr *v.* Wilcox, 22 N. Y. 551 (1860). See also §§ 68, 69, 245, *supra*, and § 253, *infra*. *Cf.* Grangers' Market Co. *v.* Vinson, 6 Oreg. 172 (1876); Barrett's Case, 4 De G., J. & S. 416 (1864), where one who allowed another to use his name in registering stock as a favor, and under agreement that he should incur no liability, was held to be a contributory. A broker who has the stock transferred into his own name is liable as though he were the full owner. McKim *v.* Glenn, 66 Md. 479 (1887). An unregistered transfer to one as agent to sell does not render such agent liable for the unpaid subscription. Powell *v.* Willamette Valley R. R., 15 Oreg. 393 (1887); Mann *v.* Currie, 2 Barb. 294 (1848), where one who held stock in his own name, but really as an agent or broker for its sale, was held to be a stockholder at the suit of creditors. One to whom stock is issued, and in whose name it appears on the books of the corporation, is liable to the creditors of the corporation for the unpaid subscription, although he is not the owner of such stock. Baines V. Babcock, 95 Cal. 581 (1891). A person, who by writing has subscribed for stock, cannot set up that he agreed with the president that he was acting merely as agent for others. American, etc. Co. *v.* Bean, 125 Fed. Rep. 823 (1903); rev'd on another point in 134 Fed. Rep. 57.

6 Orr *v.* Bigelow, 14 N. Y. 556

self, but to an agent, the latter is but a nominal holder, and is subject to the rules applicable to such.

The transferee of an agent, when suit is brought by corporate creditors to enforce a demand against the stock, cannot set up that the agent had no power to transfer the stock to him. If he has received the certificates and appears as a stockholder on the books of the corporation, he is, as between himself and creditors of the corporation, a stockholder.[1]

It is a serious question whether so-called "dummies"—that is, persons holding in their own names stock which belongs to others, in order to enable the latter to avoid liability thereon—are not to be regarded as agents rather than trustees. This question, however, is considered elsewhere.[2]

§ 250. *Liability where stock is subscribed for or held by or in the names of infants and married women.*—It has already been shown that an infant cannot be held liable upon a subscription to stock,[3] and any person subscribing for shares in the name of an infant renders himself personally liable thereon. A person buying stock in a national bank in the names of his minor children himself becomes liable to assessment as a stockholder, for minors are incapable of assenting to become stockholders so as to bind themselves to the liabilities thereof.[4] The father is liable even though the child becomes of age after the assessment has been made and ratifies the purchase of the stock.[5] So, likewise, when shares are assigned or transferred to infants as a contrivance to escape liability, the transferrer remains liable.[6] And this is the rule as to an infant

(1856); aff'g s. c., 20 Barb. 21 (1854); Stover *v.* Flack, 30 N. Y. 64 (1864).

1 Wakefield *v.* Fargo, 90 N. Y. 213 (1882). Upon the liability of agents or trustees in these cases, see also Crandall *v.* Lincoln, 52 Conn. 73 (1884).

2 See § 253, *infra*.

3 See § 67, *supra*, and § 318, *infra*.

4 Foster *v.* Chase, 75 Fed. Rep. 797 (1896). But if a father buys shares in the name and for the benefit of his son, who is a minor, and when the transfer is made informs the broker of the vendor of the minority of the transferee, the father, upon the winding up, is not liable on the stock, but, the transferee continuing a minor when the right of action accrues, the corporate creditors may look to the transferrer. Maitland's Case, 38 L. J. (Ch.) 554 (1869). And a director in an incorporated company, who induces his minor children to take stock in the company in their own names, is liable upon the winding up for a breach of trust, in case the children are still minors. *Ex parte* Wilson, L. R. 8 Ch. App. 45 (1872). A transferrer of national bank stock to his infant children is not relieved from liability. Aldrich *v.* Bingham, 131 Fed. Rep. 363 (1904).

5 Foster *v.* Wilson, 75 Fed. Rep. 797 (1896).

6 Capper's Case, L. R. 3 Ch. App. 458 (1868); Mann's Case, L. R. 3 Ch. App. 459, n. (1867); Weston's Case, L. R. 5 Ch. App. 614 (1870); Rich-

transferee, although the transfer was *bona fide,* and even in ignorance of the infancy of the transferee.[1] Even though stock, the subscription price of which has not been paid, is transferred after winding up has been commenced, to an infant with the consent of the liquidator, yet stock brokers who brought about the transaction are not liable on the stock.[2]

An infant who has subscribed for and paid money on stock may repudiate and recover back the money so paid, if no benefit has been received.[3] The infant may, however, upon attaining his majority, ratify or acquiesce in a transfer of shares to him during his infancy, and thereby render himself liable on the stock.[4] The plea of infancy

ardson's Case, L. R. 19 Eq. 588 (1875); Roman *v.* Fry, 5 J. J. Marsh. (Ky.) 634 (1831); Castleman *v.* Holmes 4 J. J. Marsh. (Ky.) 1 (1830). But see Parsons's case, L. R. 8 Eq. 656 (1869), where the action of the company in continuing an infant's name, and not notifying his vendor of his infancy, was held to be such laches as to estop the official liquidator from substituting the vendor's name for that of the infant. Curtis's Case, L. R. 6 Eq. 455 (1868); Reid's Case, 24 Beav. 318 (1857); and see cases in the succeeding notes herein.

1 Weston's Case, L. R. 5 Ch. App. 614 (1870); Mann's Case, L. R. 3 Ch. App. 459, n. (1867). Thus, a broker purchasing shares for the account of an infant was held liable as holder of the stock, not even his broker's agency availing to protect him. Ruchizky *v.* De Haven, 97 Pa. St. 202 (1881). In Nickalls *v.* Merry, L. R. 7 H. L. 530 (1875), a stock-jobber was held liable where, in a suit to recover calls on stock sold by him for the Stock Exchange, it turned out that the ultimate transferee of the shares was a minor, and his transferrer had, in consequence, been compelled to pay the calls. If three persons buy fifteen shares and take title in an infant's name, each is liable on five shares and no more. Brown *v.* Black L. R. 8 Ch. App. 939 (1873). Where a party subscribes for stock in the name of his son, even without the consent or knowledge of the son, the party so subscribing is not liable himself thereon. *Re* Britannia, etc. Assoc., [1891] 1 Ch. 202. If a father transfers shares of stock to his minor son, though in good faith, he is, upon the winding up, liable upon the stock, as though no transfer had been attempted, if the son repudiates the transaction. Litchfield's Case, 3 De G. & Sm. 141 (1850); Weston's Case, L. R. 5 Ch. App. 614 (1870). *Cf.* Roman *v.* Fry, 5 J. J. Marsh. (Ky.) 634 (1831). So also where the vendor of shares allows the certificate to be made to the minor son of his vendee, and the son upon attaining his majority repudiates the transaction, the vendor and not the vendee is liable upon the winding up. Hennessey's Case, 3 De G. & Sm. 191 (1850). But where a stockholder transferred to an infant, and this infant to another infant, who in his turn transferred to an adult capable of responding upon the stock, all the transfers having been duly registered, it was held that the last vendee was a contributory, and that the immediate transfers could not be avoided. Gooch's Case, L. R. 8 Ch. App. 266 (1872).

2 *Re* National Bank, etc. Ltd., 96 L. T. Rep. 493 (1907).

3 Hamilton *v.* Vaughan-Sherrin, etc. Co., [1894] 3 Ch. 589.

4 Lumsden's Case, L. R. 4 Ch. App. 31 (1868), where an infant held

in these cases must allege repudiation within a reasonable time after attaining majority.[1]

What is a reasonable time within which the infant must repudiate the contract in order to escape chargeability is, in general, a question of law, and it will vary with the particular circumstances of each individual case. In general it is the rule that the transferee, on coming of age, must disaffirm promptly. Laches will bar his right to repudiate.[2]

stock for six months. Accordingly, where an infant, after becoming of age, permits his name to remain on the registry as a stockholder, he is held to have ratified the antecedent transfer to him during his minority. Cork, etc. Ry. *v.* Cazenove, 10 Q. B. 935 (1847). An infant may be an incorporator, at least until he repudiates the transaction. All rights acquired prior to such repudiation are protected. *Re* Laxon, [1892] 3 Ch. 555.

1 Dublin, etc. Ry. *v.* Black, 8 Exch. 181 (1852). *Cf.* Birkenhead, etc. Ry. *v.* Pilcher, 5 Exch. 24 (1850). Where an infant transferee became of age fourteen months before the winding up, he was held liable as a contributory by acquiescence. Ebbetts's Case, L. R. 5 Ch. App. 302 (1870); s. c., 18 W. R. 202 (1869). But in a case where the winding up came just before an infant transferee became of age, it was held that no affirmative repudiation was necessary, but that some distinct act of affirmation alone would avail to render him liable after majority. Wilson's Case, L. R. 8 Eq. 240 (1869). Where the winding up occurs just before or just after the infant transferee becomes of age, it is said that he need not expressly repudiate in order to escape liability, "because he cannot tell whether the company intends to enforce their claim against him, and therefore he is not bound, till some steps are taken, to resist his being a stockholder in the company." Mitchell's Case, L. R. 9 Eq. 363 (1870). It seems, also, that a repudiation during infancy may, under certain circumstances, avail to discharge an infant stockholder from liability to pay calls which are made after he attained the age of twenty-one years. Newry, etc. Ry. *v.* Coombe, 3 Exch. 565, 578 (1849). The court said: "He became a shareholder by contract during infancy, and during infancy he disaffirmed the contract; therefore, in my opinion, he ceased to be a shareholder liable to be sued for calls." Where the infant transferee, coming of age after the winding up had been commenced, offered to affirm the contract, it was held that the liquidators might, in the interest of the creditors, refuse to accept the offer, and might instead hold the transferrer liable. Symon's Case, L. R. 5 Ch. App. 298 (1870); Castello's Case, L. R. 8 Eq. 504 (1869).

2 In one English case we find it held that two years' delay after coming of age is a ratification of the contract. Mitchell's Case, L. R. 9 Eq. 363 (1870). In another case fourteen months was held sufficient. Ebbetts's Case, L. R. 5 Ch. App. 302 (1870). In a third case a lapse of three years was held not to amount to an affirmance of the contract. Hart's case, L. R. 6 Eq. 512 (1868). In this case the infant stockholder came of age six months after the proceedings to wind up the company had been commenced. She was served with notice of these proceedings shortly before her majority. Two years after, a list of stockholders liable as contributors, which included her name, was filed, and a year later a notice of a call was

No general rule can be laid down as regards the effect of a transfer of stock to a married woman. By the law of most of the states she may contract as a *feme sole* in respect to her separate estate, and may become a transferee of stock, and hence is liable on such stock the same as any other stockholder.[1] In such cases she would also have

served on her. She resisted the collection of the amount of that call; and although her resistance was made three years after she came of age, the court held that she was not liable. After a repudiation of the contract on attaining majority, it is held that rendering aid in holding the transferrer liable is not a waiver by the infant of his formal repudiation of the transfer to him of which the corporate creditors can take advantage, when for any reason they fail to make their claim against the vendor of the infant. Baker's Case, L. R. 7 Ch. App. 115 (1871). After a winding up is commenced, a person in whose name, while an infant, stock had been placed, but who had, with knowledge, allowed the subscription to continue after he came of age, cannot repudiate. *Re* Yeoland Consols, 58 L. T. Rep. 922 (1888).

1 See § 66, *supra*, and § 319, *infra*. A woman to whom stock is transferred in the corporate books is liable on the statutory liability if she approves or acquiesces in it in any way, as by signing an application to change the charter of the bank, or by indorsing checks which are made out to her for dividends. She is estopped from denying that she knew what she was signing. It is immaterial whether new certificates were issued to her, and also whether the transfer to her was by the husband in order to conceal his property. A married woman may be a stockholder in a bank in the District of Columbia, and be liable on the statutory liability. The court refused to pass on the question as to what property might be reached as against her. Keyser *v.* Hitz, 133 U. S. 138 (1890). A married woman may be an incorporator. Good Land Co. *v.* Cole, 131 Wis. 467 (1907). A married woman who becomes a director and president is liable on the statutory liability of her stock. Arkansas Stables *v.* Samstag, 78 Ark. 517 (1906). A married woman who is a stockholder is subject to the statutory liability. Dickinson *v.* Traphagan, 147 Ala. 442 (1906). A married woman may become a transferee of stock, and as such is liable on such stock the same as though she were unmarried. Kerr *v.* Urie, 86 Md. 72 (1897); Hobart *v.* Johnson, 8 Fed. Rep. 493 (1881). See also Johnson *v.* Gallagher, 3 De G., F. & J. 494 (1861); Matthewman's Case, L. R. 3 Eq. 781 (1866); Luard's Case, 1 De G., F. & J. 533 (1860); Reg. *v.* Carnatic Ry., L. R. 8 Q. B. 299 (1873). In Angas's Case, 1 De G. & Sm. 560 (1849), the constitution of the corporation prevented such a transfer. See also *Re* Reciprocity Bank, 22 N. Y. 9 (1860). In England the husband is liable on stock owned by his wife when he married her. Burlinson's Case, 3 De G. & Sm. 18 (1849); Sadler's Case, 3 De G. & Sm. 36 (1849); White's Case, 3 De G. & Sm. 157 (1850). But he is liable only for subsequent liabilities of the company. Kluht's Case, 3 De G. & Sm. 210 (1850). See also Butler *v.* Cumpston, L. R. 7 Eq. 16 (1868), where the wife was a *cestui que trust*. A husband has been held liable on stock which was given to his wife after their marriage by way of legacy, and was accepted by her. Thomas *v.* City of Glasgow Bank, 6 Sc. Ct. of Sess. Cas. (4th ser.) 607 (1879). One who subscribes to corporate stock for his wife, in the wife's name, is not liable on the subscription, because a married woman cannot make such a sub-

power to transfer her stock without the consent of her husband. Although a husband indorses a certificate of stock to his wife and keeps it among his papers, yet, if she was informed that the stock was hers and received dividend checks and indorsed them, and received the money, she is liable on the statutory liability.[1] A married woman is liable on national bank stock even though she purchased the stock without the consent of her husband, and the statutes of the state provided that a married woman should not be liable on a contract without such written consent.[2] A married woman in Florida who is a stockholder in a national bank is liable on the statutory liability, even though by the laws of Florida a married woman cannot enter into a contract.[3] Where a person subscribes for stock in the name of his wife, but she repudiates the subscription,

scription; but if the subscription is for himself, although in the wife's name, it is otherwise. The fact that the husband took part of the stock in his own name and participated in the business of the company tends to show that the subscription was for his benefit. Shields *v.* Casey, 155 Pa. St. 253 (1893). Where the husband subscribes for stock in his wife's name, and she is incompetent to respond, he is liable on the stock. National Com'l Bank *v.* McDonnell, 92 Ala. 387 (1891). When a director enters stock in his wife's name, but she knows nothing of it, and he receives all dividends and votes it, she cannot be charged as a stockholder. Longdale Iron Co. *v.* Pomeroy Iron Co., 34 Fed. Rep. 448 (1888). A married woman is herself liable for the statutory liability on stock, where she has power to be a stockholder. Sayles *v.* Bates, 15 R. I. 342 (1886); Bundy *v.* Cocke, 128 U. S. 185 (1888). A wife in whose name stock is placed without her knowledge is not liable thereon. Washington Sav. Bank *v.* Butchers', etc. Bank, 130 Mo. 155 (1895). The husband is personally liable on stock subscribed for by him in the name of his wife. Kampmann *v.* Tarver, 29 S. W. Rep. 1144 (Tex. 1895). The case of Simmons *v.* Dent, 16 Mo. App. 288 (1884), holds that under a statute whereby a married woman may become a stockholder, a transfer of stock from the husband to the wife is valid, and relieves him from liability on the stock, the same as though he had transferred to any other person. A married woman may give away or pledge her stock. Walker *v.* Joseph, etc. Co., 47 N. J. Eq. 342 (1890). Married women are liable on the statutory liability. Dreisbach *v.* Price, 133 Pa. St. 560 (1890). A married woman is not at common law qualified to act as an incorporator nor as treasurer. Op. Atty. Gen. (Pa.), 9 Ry. & Corp. L. J. 197 (1891).

[1] Michigan T. Co. *v.* Comstock, 123 Mich. 689 (1900).

[2] Robinson *v.* Turrentine, 59 Fed. Rep. 554 (1894). See also Witters *v.* Sowles, 32 Fed. Rep. 767 (1887); s. c., 35 Fed. Rep. 640 (1888); 38 Fed. Rep. 700; Anderson *v.* Line, 14 Fed. Rep. 405 (1880). A married woman living in Maryland, and being a stockholder in a national bank in Texas, is liable on the statutory liability, irrespective of the statutes of Texas. Kerr *v.* Urie, 86 Md. 72 (1897). The law of the state wherein the company is incorporated seems to govern. Hobart *v.* Johnson, 8 Fed. Rep. 493 (1881).

[3] Christopher *v.* Norvell, 201 U. S. 216 (1906).

and he keeps the stock, he is liable thereon.[1] Where the corporation has allowed the stockholder to transfer his stock to his wife, it cannot, as against a *bona fide* pledgee from the wife, claim that the transfer was colorable, and that the husband was still the real owner and that the corporation has a lien on the stock for the husband's debts.[2]

§ 251. *The liability of the corporation itself as a stockholder.*— When the corporation becomes the purchaser of its own stock, and the stock, as is generally the case, is transferred into the name of a trustee for the corporation, it is the rule, both here and in England, that the trustee is personally liable in respect of all the stock so standing in his name.[3]

1 Hunt *v.* Reardon, 93 Minn. 375 (1904).

2 Just *v.* State Sav. Bank, 132 Mich. 600 (1903).

3 U. S. Trust Co. *v.* U. S. F. Ins. Co., 18 N. Y. 199, 226 (1858); Allibone *v.* Hager, 46 Pa. St. 48 (1863); Crandall *v.* Lincoln, 52 Conn. 73 (1884). *Cf.* Sanger *v.* Upton, 91 U. S. 56, 60 (1875). To the same effect are the English cases. *Re* St. Marylebone Banking Co., 3 De G. & Sm. 21 (1849); *Re* National Fin. Co., L. R. 3 Ch. App. 791 (1868), in which one who held shares in one company as trustee for another company was declared to be a creditor of the company for which he held the shares to the amount of the calls made upon and paid by him on account of the other company. A person who allows stock to stand in his name on the books of a national bank is liable on the statutory liability therefor, even though he held the stock as trustee for the bank itself. Lewis *v.* Switz, 74 Fed. Rep. 381 (1896); Ind's Case, L. R. 7 Ch. App. 485 (1872); Eyre's Case, 31 Beav. 177 (1862); Munt's Case, 22 Beav. 55 (1856); Richmond's Case, 3 De G. & Sm. 96 (1849); Walters's Second Case, 3 De G. & Sm. 244 (1850). The last four cases are instances of attempted transfers to trustees for the benefit of the corporation being declared void as illegal, and the original holders being declared liable. See also §§ 282, 313, *infra*. Chapman's Case, L. R. 3 Eq. 361 (1866), holding also that the trustee might have a right to be idemnified by the company of which he was merely a trustee. The trustee for the corporation has recourse against it for calls paid by him. Goodson's Claim, 28 W. R. 760 (1880). Where the company issues its stock as collateral security to notes given to it by its subscribers in payment for such stock, and then sells the notes, the stock follows the notes and may be subjected to the payment of judgment on the notes. If the corporation has issued the stock to others it must pay the judgments. Houston, etc. Ry. *v.* Bremond, 66 Tex. 159 (1886). Concerning a pledge of its own stock by a corporation, see § 465, *infra*, and § 247, *supra*. A person who receives a certificate of stock from a company in order to enable it to organize, and immediately transfers it back to the company, is not liable on such stock as an offset to claims which he has as a creditor of the corporation. Parberry *v.* Woodson Sheep Co., 18 Mont. 317 (1896). Where a bank illegally holds its own stock and induces a person to take it and give his own note therefor, on the understanding that such note is merely for the accommodation of the bank and is not to be collected, a receiver of the bank cannot enforce the note, unless it is shown that the bank is insolvent or that debts exist.

The transferrer, also, if he knew that the transferee took as trustee for the corporation, is liable upon the stock.[1] But when this knowledge is not imputable to the transferrer, he is not liable.[2] Nor, of course, is he liable when the corporation has power, by charter or otherwise, to deal in its own shares.[3] Where the owner of stock transfers it directly to the corporation itself, without the intervention of a trustee, the transferrer is not released from his liability on the stock, but remains as fully chargeable as though no transfer had been attempted.[4] Where some of the stock is held by the corporation itself, this will not compel the other stockholders to bear the statutory liability as to the stock so held by the corporation.[5] A corporation can-

Shuey *v.* Holmes, 20 Wash. 13 (1898), s. c., 22 Wash. 193. A corporation cannot subscribe for its own stock. See § 64, *supra.*

1 Lawes's Case, 1 De G., M. & G., 421 (1852); Walters's Second Case, 3 De G. & Sm. 244 (1850); Daniell's Case, 22 Beav. 43 (1856). *Cf.* Johnson *v.* Laflin, 5 Dill. 65 (1878); s. c., 13 Fed. Cas. 758; aff'd, 103 U. S. 800 (1880); and particularly Crandall *v.* Lincoln, 52 Conn. 73 (1884). See also § 309, *infra.*

2 Hollwey's Case, 1 De G. & Sm. 777 (1849); Nicol's Case, 3 De G. & J. 387 (1859); Johnston *v.* Laflin, 103 U. S. 800 (1880).

3 Grady's Case, 1 De G., J. & S. 488 (1863); Lane's Case, 1 De G., J. & S. 504 (1863).

4 *Re* Reciprocity Bank, 22 N. Y. 9 (1860); Currier *v.* Lebanon Slate Co., 56 N. H. 262 (1875); Walters's Second Case, 3 De G. & Sm. 244 (1850); Glenn *v.* Scott, 28 Fed. Rep. 804 (1886). Compare Zulueta's Claim, L. R. 5 Ch. App. 444 (1870); Addison's Case, L. R. 5 Ch. App. 294 (1870). Subscribers whose stock is taken back by the corporation may be liable thereon at common law or by statute relative to transfers. Alling *v.* Wenzel, 133 Ill. 264 (1890). See §§ 167–171, *supra.*

Sometimes, by agreement between discontented stockholders and the directors of the corporation, transfers are made by such shareholders as desire to be released from their obligation as stockholders to nominees of the corporation, with the intent thereby to relieve themselves from liability upon the stock. In such cases it is held that the action of the directors in permitting or sanctioning such a transfer was *ultra vires*, and that in consequence the transferrer is still liable. Morgan's Case, 1 De G. & Sm. 750 (1849); Bennett's Case, 5 De G., M. & G. 284 (1854); Addison's Case, L. R. 5 Ch. App. 294 (1870); Nathan *v.* Whitlock, 9 Paige, 152 (1841). See also §§ 253, 309, 310, *infra.*

5 Crease *v.* Babcock, 51 Mass. 525, 556 (1846). Where a corporation uses its profits to buy its own stock, the remaining stockholders are not liable on the statutory liability attaching to the stock so purchased by the corporation. Moon, etc. Co. *v.* Waxahachie, etc. Co., 13 Tex. Civ. App. 103 (1896); aff'd, 89 Tex. 511 (1896). In *Re* Republic Ins. Co., 3 Biss. 452 (1873); s. c., 20 Fed. Cas. 544, where the insolvent corporation had, some three years previously, when the corporation was solvent, purchased stock of various stockholders and still held it, the court held that these old stockholders were not liable for the unpaid subscription price thereof. Even though a corporation purchases shares of its own stock, which are but partially paid, this does not render the remaining stockholders liable for the balance due on such un-

not subscribe for its own stock, even though such subscription is made in the name of a trustee for the corporation. The trustee is personally liable in such case to corporate creditors.[1] A stockholder in an insolvent national bank cannot avoid the statutory liability on the ground that he purchased the stock from the bank and that the bank prior to that time had purchased it *ultra vires*.[2]

§ 252. *The liability of legatees, assignees in insolvency, joint owners, and of a corporation owning stock in another corporation.*—A legatee of shares of stock may, of course, if he thinks proper, decline to receive his testator's gift. But if he accepts the legacy, it is well settled that, as specific legatee, he is bound to pay all calls made upon the stock after the death of the testator.[3] He must also pay all calls voted before, but not due and payable in the regular course of business until after, the testator's death.[4] The estate is not liable on a statutory liability where the stock is transferred to the life tenant.[5] Where only the dividends are specifically bequeathed, the legatee is not liable on the stock itself.[6] Where stock is still in the name of the estate a general legatee may be liable to the extent of personal assets received by him. If such assets have been fully administered he is liable as devisee of real estate.[7]

It has been held that an assignee of the estate of a bankrupt is not liable, personally or as assignee, upon the bankrupt's shares of stock, unless he accepts the same. He is not bound, as assignee, to accept as part of the estate property of this nature, when it is of an onerous or unprofitable character.[8]

paid shares so purchased. Crawford *v.* Roney, 126 Ga. 763 (1906).

1 Johnston *v.* Allis, 71 Conn. 207 (1898). See also § 64, *supra*.

2 Lantry *v.* Wallace, 182 U. S. 536 (1901).

3 If the testator owns the stock at the time of his death the specific legatee thereof must pay future calls, but if he did not own it completely the general estate must pay the calls. Day *v.* Day, 1 Dr. & Sm. 261 (1860). *Cf.* Witters *v.* Sowles, 25 Fed. Rep. 168 (1885). See also § 248, *supra*.

4 Addams *v.* Ferick, 26 Beav. 384 (1859). For a more complete statement of the law relative to legacies of stock, see ch. XVIII, *infra*.

5 Blackmore *v.* Woodward, 71 Fed. Rep. 321 (1895). See also § 248, *supra*.

6 Potter *v.* Mortimer, 114 Ill. App. Rep. 422 (1904); aff'd 213 Ill. 178.

7 *Re* St. Georges Steam Packet Co. Hamer's Case, 2 De G., M. & G. 366 (1852), rev'g 3 De G. & Sm. 279. See also § 248, *supra*.

8 American File Co. *v.* Garrett, 110 U. S. 288 (1883); Amory *v.* Lawrence, 3 Cliff. 523 (1872); s. c., 1 Fed. Cas. 778; and see Rugely *v.* Robinson, 19 Ala. 404 (1851); Streeter *v.* Sumner, 31 N. H. 542 (1855); *Ex parte* Davis, L. R. 3 Ch. D. 463 (1876); Furdoonjee's Case, L. R. 3 Ch. D. 268 (1876), holding that the liability upon shares, not being a debt provable in insolvency proceedings, is not barred by the order of discharge. As to this, *cf.* note 2, p. 498, *supra*. An assignee for the benefit of creditors of a stockholder in a national bank

Upon the death of one who is joint owner with another or others of shares of stock, the liability thereon attaches only to the surviving owners, and the estate of the deceased owner cannot be charged.[1] Where stock stands in the name of two persons they are presumed to be tenants in common, each holding one-half and each is liable for one-half of the statutory liability attached to such stock.[2] Where a firm holds stock and the corporation becomes insolvent, the statutory liability on the stock is a claim against the partnership assets.[3]

Where a national bank invests its money in the stock of a savings bank the investment is *ultra vires*, and even though the savings bank becomes insolvent, the national bank is not liable on the statutory liability attached to such savings bank stock, notwithstanding the national bank received dividends on the stock.[4] So also where a national bank invests its money in the stock of another national bank the investment is *ultra vires* and the former bank is not liable on such stock, even though the latter bank becomes insolvent.[5] Where a national bank as pledgee of national bank stock takes over the stock

may be liable for an assessment levied upon such stock, the bank having become insolvent. Graham *v.* Platt, 28 Colo. 421 (1901). An assignee for the benefit of creditors is not liable where the stock has not been transferred to him, but the estate may be liable. Hill *v.* Graham, 11 Colo. App. 536 (1898). Where a stockholder makes an assignment for the benefit of creditors and the stock is assigned to the assignee, and afterwards the corporation becomes insolvent, the assignee is not liable on the statutory liability on the stock, but any claims which the assignee holds against the corporation will be offset against such liability. Markell *v.* Ray, 75 Minn. 138 (1898). Where a corporation itself assigned shares of its own stock to an assignee for the benefit of corporate creditors, it was held that the assignee was not liable, personally or as assignee, thereon. *Re* City Terminus Hotel Co., L. R. 14 Eq. 10 (1872). In Rhode Island one who makes an assignment for the benefit of creditors is thereby released from liability on stock, even though the transfer has not been recorded in the corporate books. Sayles *v.* Bates, 15 R. I. 342 (1886).

[1] *Re* Maria Anna, etc. Co., 44 L. J. (Ch.) 423 (1875); Hill's Case, L. R. 20 Eq. 585 (1875).

[2] Markell *v.* Ray, 75 Minn. 138 (1898).

[3] Barton, etc. Bank *v.* Atkins, 72 Vt. 33 (1899).

[4] California Bank *v.* Kennedy, 167 U. S. 362 (1897). It is illegal for a national bank to purchase stock in a savings bank, and hence a national bank is not liable by reason of the statutory liability attached to such stock in the savings bank. Chemical Nat. Bank *v.* Havermale, 120 Cal. 601 (1898).

[5] Concord First National Bank *v.* Hawkins, 174 U. S. 364 (1899), rev'g First National Bank *v.* Hawkins, 79 Fed. Rep. 51, and 82 Fed. Rep. 301. Prior to this decision the following decisions were made by lower courts. A state bank may be held liable on the statutory liability on national bank stock which the former has purchased, even though the purchase is *ultra vires*. Citizens' State Bank *v.* Hawkins, 71 Fed. Rep. 369 (1896),

at a fixed price agreed upon with the pledgor, and credits the amount on the note, such bank is liable on the statutory liability attached to the stock, even though it continues to stand in the name of a dummy.[1] A national bank, which is a creditor of an insolvent manufacturing company, has no power to join in a reorganization plan by which it turns over its claim to a new corporation and takes stock of the new corporation in payment therefor, and hence if the new corporation fails, the bank is not liable as a stockholder on a statutory double liability attaching to such stock.[2] A national bank which has taken as security for a debt and then acquired shares of stock in an unincorporated association, formed for speculative purposes, is not liable on said stock, its acquisition having been *ultra vires*.[3] A stockholder in a national bank who is sued on the statutory liability cannot set up the defense that the money is to be used to pay a liability of such bank, as a stockholder in another insolvent national bank.[4] The general rule is that where one corporation owns stock in another corporation, and the latter becomes insolvent, the former is liable on the stock so held by it.[5]

qualified in 92 Fed. Rep. 744. So also as to an insurance company holding such stock. Cooper Ins. Co. *v.* Hawkins, 71 Fed. Rep. 372 (1896). A state bank has no power to purchase stock in a national bank as an investment, and hence is not liable on such stock in case the national bank becomes insolvent. Schofield *v.* Goodrich, etc. Co., 98 Fed. Rep. 271 (1899). In the case of Robinson *v.* Southern, etc. Bank, 180 U. S. 295 (1901), the court approved the decisions in Baker *v.* Old National Bank, 86 Fed. Rep. 1006, and 101 Fed. Rep. 391, holding that where stock in one national bank stands in the name of a person as cashier of another national bank, the latter may show that it held the stock only as collateral security, and hence is not liable thereon.

1 Ohio, etc. Bank *v.* Hulitt, 204 U. S. 162 (1907).

2 First National Bank *v.* Converse, 200 U. S. 425 (1906).

3 Merchants' National Bank *v.* Wehrmann, 202 U. S. 295 (1906).

4 Martin *v.* Wilson, 120 Fed. Rep. 202 (1903).

5 A bank holding stock in its own name in another bank is liable thereon as a stockholder, even though in fact it held it only as a pledge. Adams *v.* Clark, 36 Col. 65 (1906). A manufacturing company which buys bank stock and for several years receives dividends thereon with the knowledge of all its stockholders, is liable on a statutory liability attached to such stock. Hunt *v.* Hauser, etc. Co., 90 Minn. 282; aff'd, 95 Minn. 206 (1903). A malting company is liable on the statutory liability on bank stock which it has purchased and held for some time, especially where it took part in the reorganization. Hunt *v.* Hauser, etc. Co., 95 Minn. 206; aff'g s. c., 90 Minn. 282 (1905). A corporation which owns all the stock of another corporation is liable on the statutory liability attached to such stock. Gamewell, etc. Co. *v.* Fire, etc. Co., 116 Ky. 759 (1903). Even though a real estate corporation purchases bank stock and receives dividends thereon yet if it was prohibited by its charter from so doing it is not liable on the statutory liability on the stock. White *v.* Com., etc. Bank, 66 S. C. 491 (1903). A religious corporation which

§ 253. *The use of "dummies" and transfers to nominal and fictitious persons.*—Frequently it happens that persons purchasing or subscribing for stock do not wish to take the stock in their own names, inasmuch as they thereby incur liability, or make known to the public the fact that they are stockholders. Accordingly, it is the custom in such cases to have the stock taken or purchased in the names of other persons. These latter are called "dummies."[1] The law is well settled that such a "dummy" is liable on the stock to the corporation and corporate creditors to the same extent that he would be if he were the real owner of the stock.[2] Where stock stands in the name of a person as "trustee," he is liable thereon

has subscribed for stock in a building and loan association and given a mortgage in connection therewith, cannot maintain a suit to have the mortgage canceled, even though it is *ultra vires*. United States, etc. Co. *v.* Convent of St. Rose, 133 Fed. Rep. 354 (1904). A national bank is liable on stock of a corporation organized for improving real estate. Western Imp. Co. *v.* Des Moines Nat. Bank, 103 Iowa, 455 (1897). A jewelry corporation that has sold goods and taken in payment stock of a park corporation cannot avoid liability on said stock on the ground that it had no power to acquire it. White *v.* Marquardt, 70 N. W. Rep. 193 (Iowa, 1897). A company organized to deal in jewelry and which takes stock of another company in exchange for its merchandise and then sells the stock cannot avoid liability on such stock by the plea of *ultra vires*. White *v.* Marquardt & Sons, 105 Iowa, 145 (1898). A bank may buy the stock of another bank under the express power of the former to discount securities, and as a stockholder is liable on the stock. Latimer *v.* Citizens' State Bank, 102 Iowa, 162 (1897). Where a corporation owning land becomes a stockholder in a building association and gives a mortgage in connection therewith, the mortgage is valid, even though the corporation was not authorized to subscribe for stock. Meares *v.* Monroe, etc. Co., 126 N. C. 662 (1900); s. c., 127 N. C. 580. The secretary and treasurer of a cotton trading company has no power to subscribe in the name of the company for stock in a cotton manufacturing company. Wells Co. *v.* Avon Mills, 118 Fed. Rep. 190 (1902); s. c., 198 U. S. 177.

[1] The cases in this section refer to the use of "dummies" without the real owner appearing at all on the corporate books as a stockholder. These cases differ from those where stock is transferred by a stockholder from himself to a "dummy" or to an irresponsible person. See §§ 263–266, *infra*.

[2] Wakefield *v.* Fargo, 90 N. Y. 213 (1882); *Re* Reciprocity Bank, 22 N. Y. 9 (1860); Barrett's Case, 4 De G., J. & S. 416 (1864); Bugg's Case, 2 Dr. & Sm. 452 (1865). *Cf.* Fox *v.* Clifton, 6 Bing. 776 (1830). A new trial was granted in 9 Bing. 115. A transfer of stock on the books to a director renders him liable on the statutory liability, even though the transfer was to render him eligible for office, and he was unaware of the transfer, and had paid the dividends to the transferrer. As director he was bound to know. Brown *v.* Finn, 34 Fed. Rep. 124 (1888); aff'd, 142 U. S. 56. A dummy into whose name national bank stock is transferred is liable. Kenyon *v.* Fowler, 155 Fed. Rep. 107 (1907).

even though he is acting merely as the agent of another person.[1] Where a person buys certificates of stock in a national bank, the certificates being indorsed in blank, and the bank makes a memorandum in the certificate of stock book that it had been transferred to him, and sends him dividends, he is liable thereon, although no transfer of the certificate is made on the corporate books, and although he bought the stock for the cashier of the bank and was merely a nominal holder. He is not such a trustee as is exempt from liability under the national bank act.[2]

Although stock stands in the name of a person who is not the real owner, yet, where judgment has been taken against the real owner, the nominal holder cannot be held liable.[3] Both the real owner of stock and the nominal holder of record of stock, or either of them, may be held liable, however, on the unpaid subscription price of such stock.[4] A broker may be compelled to disclose the name of his customer for whom he purchased stock and put the stock in the name of a clerk. A receiver of the corporation may file a bill of discovery for that purpose in order that an assessment may be levied on the stock for the unpaid subscription price.[5] A receiver may maintain a bill of discovery against a broker to compel him to divulge the names of the real owners of stock which stands in the name of the broker's clerk, such stock being unpaid.[6] A promoter or agent who causes stock belonging to others to be placed in the name of a dummy is not liable for the unpaid subscription price of such stock, even though he did not state the names of the persons for whom he was acting.[7] A broker buying for a customer is not liable on the

1 Wadsworth *v.* Laurie, 164 Ill. 42 (1896). See also § 249, *supra*.

2 Horton *v.* Mercer, 71 Fed. Rep. 153 (1895). Where the statute prescribes that only *bona fide* stockholders shall vote, a stockholder of record who is really a dummy for the real owner, in order to enable the latter to avoid the statutory liability, cannot vote. Smith *v.* San Francisco, etc. Ry., 115 Cal. 584 (1897).

3 Yardley *v.* Wilgus, 56 Fed. Rep. 965 (1893).

4 Dunn *v.* Howe, 107 Fed. Rep. 849 (1901).

5 Brown *v.* Palmer, 157 Fed. Rep. 797 (1907).

6 Kurtz *v.* Brown, 152 Fed. Rep. 372 (1906). A receiver may by bill of discovery compel a broker to state who is the real owner of stock purchased by the broker, on which stock an assessment has been made. Brown *v.* Magee, 146 Fed. Rep. 765 (1906). A receiver may file a bill in equity against a clerk in the employ of stock brokers to compel the clerk to disclose who is the real owner of stock standing in his name, in order that the receiver may collect the unpaid part of the subscription price therefor. Brown *v.* McDonald, 133 Fed. Rep. 897 (1905); rev'g 130 Fed. Rep. 964.

7 American, etc. Co. *v.* Kurtz, 138 Fed. Rep. 392 (1905). The real owner of stock standing in the name of a dummy is liable on his subscription or statutory liability even though the stock has never been in his name, but

statutory liability, even though he did not give up the name of the customer, the broker's name not having appeared on the corporate books.[1] The real owner of stock is liable to repay to his "dummy" any sum of money which the latter has paid to the corporation or the corporate creditors.[2] An attachment against the "dummy" may take the stock in those states where an attachment takes precedence over an unregistered transfer of the certificate of stock;[3] but the prevailing rule in most of the states is to the contrary.[4] The law relative to the use of dummies is in many respects similar to the law where stock stands in the name of an agent—a subject considered elsewhere.[5]

A difficult question arises when an attempt is made to hold the real owner of the stock liable to the corporation or corporate creditors.

a broker who subscribes for stock and pays the first assessment, is not liable on the stock, even though he transferred it to his clerk, the real owners being his customers and no request having been made of him to give their names. American Alkali Co. *v.* Kurtz, 134 Fed. Rep. 663 (1905); aff'd, 138 Fed. Rep. 392. Even though brokers subscribe for stock in their own name, yet if they direct the certificates to be made out in the name of a clerk, which is done, they are not liable for a call made subsequently to the issue of the stock, even though the clerk was merely a nominal holder for the customers of the broker. Bean *v.* American, etc. Co., 134 Fed. Rep. 57 (1905); rev'g, 125 Fed. Rep. 823. In ordering a receiver to collect a portion of unpaid subscriptions the court must determine judicially how much will be needed to pay the debts, and the application of the receiver for an order will be denied if the assets have not yet been exhausted, and if the real owners of stock held in the name of dummies might be ascertained but have not been. Kirkpatrick *v.* American, etc. Co., 135 Fed. Rep. 230 (1905).

1 Joecken *v.* Cuyahoga, etc. Co., Ohio Circuits (1903), p. 605.

2 This is the rule whether the relation of the real owner be considered that of a principal towards an agent (see § 249, *supra*), or that of a *cestui que trust* towards a trustee (see § 245, *supra*). Where the "dummy" dies, and his representatives claim the stock, and they pay the real owner a small sum in settlement, the compromise will be upheld. Antoine *v.* Smith, 40 La. Ann. 560 (1888). Where the "dummy" dies and is insolvent, the stock cannot be reclaimed by the real owner. Hirsch *v.* Norton, 115 Ind. 341 (1888). Stock held in the name of a "dummy" is subject to his debts, even though he notified the secretary of the company that he held it in trust. *Ex parte* Ord, 2 Mont. & A. 724 (1835); *Ex parte* Watkins, 2 Mont. & A. 348 (1835), reversing 1 Mont. & A. 689

3 White *v.* Rankin, 90 Ala. 541 (1890). *Cf.* Mowry *v.* Hawkins, 57 Conn. 453 (1899). See also § 490, *infra*. Where the real owner of stock turns it over to his agent or trustee to look after the stock, the stock itself being put in the name of the agent or trustee as absolute owner, and the stock is subsequently attached for a debt of such agent or trustee and sold thereunder, the real owner of the stock may hold the agent or trustee liable for the value of the stock. Long delay is not a bar so long as the agent does not deny the agency or trusteeship. Hovey *v.* Bradbury, 112 Cal. 620 (1896).

4 See ch. XXVII, *infra*.

5 See § 249, *supra*.

It is established law, however, that where a person purchases stock in a national bank, but has it transferred, not to himself, but to another person, a "dummy," the real owner of the stock is liable thereon, although he never appears on the corporate books as a stockholder.[1]

[1] Where the real owner of stock in a national bank transfers it to another person, or causes it to be placed in the name of another person to avoid the liability to creditors under the national bank act, such real owner may be held liable on such stock. Pauly *v.* State, etc. Co., 165 U. S. 606 (1897); Dunn *v.* Howe, 107 Fed. Rep. 849 (1901). Where a national bank as pledgee of national bank stock takes over the stock at a fixed price agreed upon with the pledgor, and credits the amount on the note, such bank is liable on the statutory liability attached to the stock, even though it continues to stand in the name of a dummy. Ohio, etc. Bank *v.* Hulitt, 204 U. S. 162 (1907). A stockholder in a national bank is liable on his stock, even though it is in the name of his agent. McDonald *v.* Dewey, 202 U. S. 510 (1906). The real owner of stock in a national bank is liable thereon, although the stock has never stood in his name on the books of the bank, but has stood in the name of a dummy for him. Houghton *v.* Hubbell, 91 Fed. Rep. 453 (1899); Davis *v.* Stevens, 17 Blatchf. 259 (1879); s. c., 7 Fed. Cas. 177, where the question was "whether, in an action at law by a receiver of the bank, the real owner of stock in a national bank, standing by his procurement in the name of another, and *never having been in his own name on the books*, can be charged as a shareholder with the statutory liability for debts." *Held*, that the real owner is liable. "Every principal is responsible for the obligations of his agency. The debt of the agent is the debt of the principal, and always recoverable from the principal." See also, to same effect, Case *v.* Small, 10 Fed. Rep. 722 (1881), and cases in note 5, p. 681, *supra*. Where a subscription is by "C. F. White, as trustee," he being merely an agent, the undisclosed principals may be held liable thereon. Cole *v.* Satsop, etc. Co., 9 Wash. 487 (1894). A person obtaining stock through another and paying calls on it is liable on the subscription. Kriger *v.* Hanover Nat. Bank, 72 Miss. 462 (1894). The real owner of stock is likewise liable where he transfers it from his own name to that of an irresponsible person. §§ 263–266, *infra*. An undisclosed owner of stock, standing in the name of another as trustee, is liable on the statutory liability. Borland *v.* Haven, 37 Fed. Rep. 394 (1888); Castleman *v.* Holmes, 4 J. J. Marsh (Ky.) 1 (1830), holding that one who subscribed for stock in the name of an infant for the purpose of avoiding responsibility, and who enjoyed the benefits of the stock, was individually responsible as a stockholder for debts of the corporation. A person subscribing for stock in the name of another, without the knowledge of the latter, is liable himself thereon. Barron *v.* Burrill, 86 Me. 72 (1893). A corporate creditor, after obtaining a judgment against the corporation and having execution returned unsatisfied, may hold liable the stockholders who received the stock of another corporation which took over all the assets of the former corporation, even though such stockholders were not stockholders of record. Each stockholder is liable for the entire amount received by him to the amount of the claim, and it is not necessary to join all the stockholders. Williams *v.* Commercial Nat. Bank, 90 Pac. Rep. 1012 (Ore. 1907).

In England a directly contrary rule prevails.[1]

In America the relation of the real owner to the "dummy" is held to be that of principal and agent, and the principal is held liable, on the ground that an undisclosed principal is liable on the contracts of his agent. In England the real owner of the stock is looked upon as a *cestui que trust,* and hence is not liable. Where the real owner of all the stock of a company, none of which has been paid up, holds the same in the name of a person who is practically a dummy, and the real owner holds the stock as "pledgee," he is liable on the subscription price, even though the stock stands in his name on the corporate books as "pledgee." "A stockholder cannot escape liability by the use of the name of a dummy."[2] Under the Ohio statute the word "stockholders" applies to persons owning stock in the name of another, as well as to persons appearing on the corporate books as stockholders.[3]

A transfer to a fictitious person is void, and leaves all parties as they were.[4] An unauthorized signature of a name to a subscription list may be forgery.[5]

1 King's Case, L. R. 6 Ch. App. 196 (1871), where the court says it does not know upon what ground a court, "setting aside a transaction as fraudulent, is able to make a new contract for persons which they have never made themselves." Cox's Case, 4 De G., J. & S. 53 (1863), s. c., 33 L. J. (Ch.) 145, is distinguished on the ground that Cox had agreed to take certain shares, and the decision was in the nature of specific performance. In Cox's Case, also, he had, by the use of "dummies," entrapped the public into believing that many persons were investing. In Williams's Case, L. R. 1 Ch. D. 576 (1875), where a purchaser of shares had them transferred to one of his employees, the real owner was held not liable thereon. In the case *Ex parte* Bugg, 2 Dr. & Sm. 452 (1865), a similar conclusion was arrived at, the court saying that the relation between the real owner and the "dummy" was that of *cestui que trust* and trustee. Such, also, is the rule laid down in Fenwick's Case, 1 De G. & Sm. 557 (1849), where the purchaser had the stock transferred into the name of the "dummy" as "trustee." A person who subscribes for stock in a Canadian corporation in the name of another, a "dummy," is not liable for the unpaid subscription. Molson's Bank *v.* Boardman, 47 Hun (N. Y.), 135 (1888). That a *cestui que trust* is not liable on stock held by his trustee, see §§ 245, 246, *supra.* See also cases in note 2, p. 672.

2 National Foundry, etc. Works *v.* Oconto Water Co., 68 Fed. Rep. 1006 (1895). See also § 249, *supra.* The owner of a certificate of stock not paid up is liable thereon to corporate creditors although such owner never appeared as such on the corporate books. White *v.* Marquardt & Sons, 105 Iowa, 145 (1898).

3 Lloyd *v.* Preston, 146 U. S. 630 (1892); White *v.* Marquardt & Sons, 105 Iowa, 145 (1898).

4 Arthur *v.* Midland Ry., 3 Kay & J. 204 (1857). See Pugh & Sharman's Case, L. R. 13 Eq. 566 (1872), where the transfer was to a married woman,

5 State *v.* Hazzard, 80 N. E. Rep. 149 (Ind. 1907).

Where the real owner was formerly the registered stockholder, but has transferred his stock to an irresponsible person, a class of cases is found which is considered elsewhere.[1]

but the court treated it as a transfer to a fictitious person. In Muskingum, etc. Co. *v.* Ward, 13 Ohio, 120 (1844), where the transfer was made to a fictitious person, the court held that the transaction was a mere nullity, and that it could not be regarded as an abandonment of the stock. So where one purchased, or assumed to purchase, shares for an infant, and gave the name of the infant but did not disclose the infancy, it was held that by such a transaction the purchaser did not become liable upon the shares, nor was the vendor released. Maitland's Case, 38 L. J. (Ch.) 554 (1869). See also Richardson's Case, L. R. 19 Eq. 588 (1875).

[1] See §§ 263–266, *infra*.

CHAPTER XV.

LIABILITY AS AFFECTED BY TRANSFERS.

§ 254. The subject herein.
255. Liability of the transferrer on unpaid subscriptions after registry.
256. Liability of the transferee on unpaid subscriptions after registry.
257. Knowledge that the shares are not fully paid up, how far imputable to a transferee.
258. Liability on subscription after transfer but before registry—Irregular and attempted transfers.
259. Does the statutory liability attach when the corporate debt is contracted, or is due, or is sued upon?
260. Transferrer's statutory liability after transfer but before registry.
261. The transferee's statutory liability.
262. Liability of transferee to transferrer.
263–266. A transfer to a "dummy" or to an insolvent person in order to escape liability.

§ 254. *The subject herein.*—When shares of stock are transferred from one owner to another, it at once becomes an important matter to determine who is liable upon unpaid subscriptions, and who is liable on a liability imposed by statute. The difficulty is increased by the rule of law that no transfer is complete until it is duly entered or recorded on the books of the corporation. The complication is usually greatest in cases involving the question of statutory liability, since generally each case turns more or less upon the particular words of the statute by which the liability is imposed. There are, however, many rules which are general in their character and application, governing the liability of stockholders as affected by transfer, and these are the subject of this chapter.

§ 255. *Liability of the transferrer on unpaid subscriptions after registry.*—Transfers of shares may be made at any time after the contract of subscription is made, and before any part or after a part or the whole of the subscription price has been paid. The well-established and general rule of law is, that where a stockholder makes an absolute transfer of his stock in good faith, and the transfer is duly recorded on the corporate books, the transferrer is thereby wholly discharged from all further liability upon the uncalled subscription price of the stock.[1]

1 Huddersfield Canal Co. *v.* Buckley, 7 T. R. 36 (1796), by Lord Kenyon; Gilmore *v.* Bank of Cincinnati, 8 Ohio, 62, 71 (1837); Efird *v.* Piedmont, etc. Co., 55 S. C. 78 (1899); Cole *v.* Adams, 19 Tex. Civ. App. 507 (1898). After transfer on the books the transferrer is no longer liable for the subscription

A stockholder has a right to sell his stock and have it transferred on the corporate books, although there are unpaid calls due on the

price even though the corporation has a lien on the stock by statute, the transfer having been allowed by the officers of the corporation. Rochester, etc. Co. *v.* Raymond, 158 N. Y. 576 (1899). A transferrer is not liable on an unpaid subscription. "A transfer of stock made in good faith, and at a time when the corporation is a going and solvent concern, and which is entered upon the books, would certainly relieve the transferrer from all of the responsibilities which attached to him as a stockholder." Tucker *v.* Gilman, 121 N. Y. 189 (1890); Billings *v.* Robinson, 94 N. Y. 415 (1884), affirming s. c., 28 Hun, 122 (1882); Wakefield *v.* Fargo, 90 N. Y. 213 (1882); Cowles *v.* Cromwell, 25 Barb. 413 (1857); Cole *v.* Ryan, 52 Barb. 168 (1868); Isham *v.* Buckingham, 49 N. Y. 216 (1872); Stewart *v.* Walla Walla, etc. Co., 1 Wash. St. 521 (1889); Miller *v.* Great Republic Ins. Co. 50 Mo. 55 (1872); Allen *v.* Montgomery R. R., 11 Ala. 437, 451 (1847); Haynes *v.* Palmer, 13 La. Ann. 240 (1858); Weston's Case, L. R. 4 Ch. 20 (1868); McKinzie *v.* Kittridge, 24 U. C. (C. P.) 1 (1874). The mere fact that the transferrer, after the registry, paid a call, does not estop him from denying his liability for subsequent calls. Provincial Ins. Co. *v.* Shaw, 19 U. C. (Q. B.) 533 (1860). It is not necessary to the validity of the transfer that there should be a consideration moving from transferee to transferrer; and so, where one gives his share away absolutely and in good faith, the same rule as to liability prevails. *Re* European Bank, Master's Case, 41 L. J. (Ch.) 501 (1872). Neither does it alter the rule that no certificates of stock have been issued. In such a case the transferee becomes liable on the stock, and the transferrer's liability is at an end. Burke *v.* Smith, 16 Wall. 390 (1872); Brigham *v.* Mead, 92 Mass. 245 (1865). See also First Nat. Bank *v.* Gifford, 47 Iowa, 575, 583 (1877); Isham *v.* Buckingham, 49 N. Y. 216 (1872). As regards the rule where the transfer is made before the corporation is organized, see § 62, *supra*. After a transfer and registry the transferrer is not liable on the subscription. Libby *v.* Tobey, 82 Me. 397 (1890). In California railroad stock cannot be issued until it is fully paid up. Brewster *v.* Hartley, 37 Cal. 15 (1869). Upon a valid transfer the transferrer is released, not only upon his liability for unpaid subscriptions, but also as to all the existing debts of the corporation. Jackson *v.* Sligo Mfg. Co., 1 Lea (Tenn.), 210 (1878); Allen *v.* Montgomery R. R., 11 Ala. 437 (1847). A transfer to a solvent transferee while the corporation is solvent releases the transferrer from the subscription price and renders liable the transferee, the transfer having been recorded, and even though the transfer was not recorded within fifteen days after the transfer of the certificates as required by the statute, this does not change the rule so far as corporate creditors are concerned. Henderson *v.* Mayfield, etc. Mills, 45 S. Rep. 211 (Ala. 1907). A Nebraska receiver of a Nebraska corporation will not be allowed to bring suit in the Iowa courts to enforce the subscription liability of citizens of Iowa to the stock of a Nebraska corporation, where there is no equity in the claim, the fact being that payment for the stock had been made by notes, and afterwards upon a transfer of the stock these notes had been canceled and notes of the transferee taken in exchange therefor. Wyman *v.* Eaton, 107 Iowa, 214 (1899). A person to whom stock is issued for property and who transfers the same while the corporation is solvent cannot be held lia-

stock at the time of transfer, and for refusal to transfer he may sue for conversion.[1] A transferrer may be released, although the corporate officers enter the transfer against a protest.[2] The transferrer, however, is liable for calls payable before the registry is made,[3] and for calls made before, but payable after, the registry.[4] Frequently the statutes of the state change these common-law rules and provide that both the transferrer and transferee shall be liable.[5] In

ble on such stock, even though the property was taken on an overvaluation. Cole *v.* Adams, 19 Tex. Civ. App. 507 (1898). But see § 49, *supra.*

1 Craig *v.* Hesperia, etc. Co., 113 Cal. 7 (1896). On this subject, see also §§ 520, 521, *infra.*

2 London, etc. Ry. *v.* Fairclough, 2 Man. & G. 674, 706 (1841); Upton *v.* Burnham, 3 Biss. 520 (1873); s. c., 28 Fed. Cas. 833; Webster *v.* Upton, 91 U. S. 65 (1875). In a proceeding in equity a transferee will be compelled to pay calls made after transfer of the certificate and before registry of the same. Webster *v.* Upton, 91 U. S. 65 (1875).

3 Vicksburg, etc. R. R. *v.* McKeen, 14 La. Ann. 724 (1859). The transferrer is liable where the transfer was made on the books after the assessment on the stock had been made. Visalia, etc. R. R. *v.* Hyde, 110 Cal. 632 (1895), and cases in this section generally, and § 258, *infra.*

4 A transfer after a call, but before it is due, does not relieve the vendor from liability thereon, even though the stock is actually transferred on the books. American Alkali Co. *v.* Campbell, 113 Fed. Rep. 398 (1902). Where the resolution of the directors specifies that the call shall be made on September 16th following, and shall be payable in instalments at specified times thereafter, the date of the call is September 16th, and a stockholder who transfers his stock after September 16th but before the instalments are payable, is liable for such instalments. Campbell *v.* American, etc. Co., 125 Fed. Rep. 207 (1903). North American, etc. Assoc. *v.* Bentley, 19 L. J. (Q. B.) 427 (1850); Schenectady, etc. Co. *v.* Thatcher, 11 N. Y. 102, 113 (1854). *Contra*, West Philadelphia Canal Co. *v.* Innes, 3 Whart. (Pa.) 198 (1838). But this case was decided on the ground that the transferee had not accepted the stock, and could not be held liable by the corporation. *Cf.* Aylesbury Ry. *v.* Mount, 4 Man. & G. 651 (1842), reversing 5 Scott, N. R. 127; *Re* Hoylake Ry., L. R. 9 Ch. 257 (1874).

5 Under the Nebraska constitution both the transferrer and transferee are liable for the unpaid subscription price to corporate creditors. Com'l Nat. Bank *v.* Gibson, 37 Neb. 750 (1893). A provision in the Nebraska constitution rendering subscribers liable to creditors to the extent of their unpaid subscriptions, makes them liable, even though they have transferred their stock, and may be enforced by a receiver. This is the rule, even though the transferee gave his notes to the corporation in substitution for notes of the transferrer which the corporation gave up. Wyman *v.* Bowman, 127 Fed. Rep. 257 (1904). Under the Illinois statute making both transferrer and transferee liable for the unpaid subscription, a corporate creditor's suit need not join all the parties who are liable. Meyer *v.* Ruby, etc. Co., 192 Mo. 162 (1905). Where both transferrer and transferee are liable by statute, one may be sued after the other has been. Glenn *v.* Hunt, 120 Mo. 330 (1894). In Virginia, see Glenn *v.* Scott, 28 Fed. Rep. 804 (1866); McKim *v.* Glenn, 66 Md. 479 (1887); Glen *v.* Foote, 36 Fed. Rep. 824

England the company may allow a transfer of stock after liquidation proceedings have been commenced, and then the transferee is liable.[1] An agreement between the transferrer and transferee of stock that the former will pay a certain call on the stock, when made by the corporation, cannot be enforced by the corporation itself.[2] Where stock has been issued for property or contract work fraudulently overvalued, the person so receiving the stock may be liable thereon, even though he has transferred it to others.[3]

§ 256. *Liability of the transferee on unpaid subscriptions after registry.*—When a transfer of stock is made, and the transfer is duly recorded in the corporate stock-book, the transferee thereupon becomes liable for any balance of the subscription price uncalled and unpaid at the time of the transfer. The transfer releases the transferrer and charges the transferee.[4] Where a person makes an

(1888); Priest *v.* Glenn, 51 Fed. Rep. 400 (1892); Hamilton *v.* Glenn, 85 Va. 901 (1889). Subscribers to stock are liable according to the law of the state incorporating the company, and not according to the law of the state where the subscribers reside. A subscriber to stock in a Virginia corporation is liable by statute although he has transferred his stock. Morris *v.* Glenn, 87 Ala. 628 (1888). In Maryland the ordinary statutory provision holding stockholders liable until the capital stock is fully paid in is held to render the stockholder liable, even though he has transferred his shares. Hager *v.* Cleveland, 36 Md. 476 (1872). Where the statute makes the transferrer liable for the unpaid subscription in case the transfer is to defraud corporate creditors, another statute making transferrers liable if the transferees do not pay is construed to apply only to cases of fraudulent transfer. *Re* People's Live-stock Ins. Co. 56 Minn. 180 (1894). Under the statutes of Iowa the transferrer of stock continues to be liable on the subscription price to creditors who were such at the time of the transfer. White *v.* Green, 105 Iowa, 176 (1898).

1 After a winding up has been commenced and a receiver been appointed, the court may allow transfers of the stock, but in case calls have to be made subsequently on said stock a transferrer is liable in case the transferee does not pay. *Re* National Bank of Wales, [1897] 1 Ch. 298.

2 Crown, etc. Co. *v.* Allen, 199 Pa. St. 239 (1901).

3 See §§ 45–50, *supra*. A subscriber for stock who has not paid therefor, except by turning in worthless property, and who afterwards then transfers his stock to another person after the company becomes insolvent, is still liable on the stock. McConey *v.* Belton, etc. Co., 97 Minn. 190 (1906).

4 Quoted and approved in Sigua, etc. Co. *v.* Brown, 171 N. Y. 488 (1902), the court holding also that no express contract by the transferee to pay is necessary. Webster *v.* Upton, 91 U. S. 65 (1875); Pullman *v.* Upton, 96 U. S. 328 (1877); Upton *v.* Hansbrough, 3 Biss. 417 (1873); s. c., 28 Fed. Cas. 839; Hall *v.* U. S. Ins. Co., 5 Gill (Md.), 484 (1847); Visalia, etc. R. R. *v.* Hyde, 110 Cal. 632 (1895); Bend *v.* Susquehanna Bridge Co., 6 Har. & J. (Md.) 128 (1823); Merrimac Min. Co. *v.* Bagley, 14 Mich. 501 (1866); Brigham *v.* Mead, 92 Mass. 245 (1865); Hartford, etc. R. R. *v.* Boorman, 12 Conn. 530 (1838); Moore *v.* Jones, 3

executory agreement to purchase a certain amount of stock when it is issued to the vendor, the subscription price being unpaid to the corporation, and the vendor transfers the stock on the books of the corporation, and the vendee acquiesce therein, the latter is liable on the subscription.[1]

A person who buys stock at an execution sale thereof and takes the

Woods, 53 (1838); s. c., 17 Fed. Cas. 690; Merrimac Min. Co. *v.* Levy, 54 Pa. St. 227 (1867); Huddersfield Canal Co. *v.* Buckley, 7 T. R. 36 (1796). A transferee is liable on an unpaid subscription where the transfer has been recorded on the books, even though the transferee did not comply with the by-law requiring the name of transferees to be submitted to the board of directors and the approval of such board and requiring transferees to sign the by-laws. The corporation may waive such requirements. People's, etc. Bank *v.* Rickard, 139 Cal. 285 (1903). A purchaser of a certificate of stock which recites on its face that it is only one-third paid up, is liable for the other two-thirds on call of the directors. People's, etc. Bank *v.* Sadler, 1 Cal. App. 189 (1905). Where an assessment is made on the same day that a purchaser of stock takes his certificate, he is liable to the company for the assessment. San Gabriel, etc. Water Co. *v.* Dennis, 34 Pac. Rep. 441 (Cal. 1893). A person who acquiesces in a transfer of stock to him is liable, even though originally he was ignorant of the transfer. Sigua Iron Co. *v.* Greene, 88 Fed. Rep. 207 (1898). A transferee is liable although he took the stock as a gift, and did not know why it was given him, and never agreed to pay for it. Tuthill Spring Co. *v.* Smith, 90 Iowa, 331 (1894). A duly recorded transferee is liable on the unpaid subscription, even to a creditor who was a creditor before the transfer of the stock was made. Calumet Paper Co. *v.* Stotts Inv. Co., 96 Iowa, 147 (1895). It is no defense that the obligation for which the assessment is made was incurred before the stockholder purchased his stock. Visalia, etc. R. R. *v.* Hyde, 110 Cal. 632 (1895). In Gray's Case, L. R. 1 Ch. D. 664 (1876), where an owner of iron-works sold them to a corporation for its stock, and guaranteed that the net dividends should not be less than ten per cent. on the paid-up capital, for which purpose the shares given as consideration were vested in trustees, but were not to be registered in their names except by their own direction, it was held that they were not liable as stockholders because they had not elected to be registered as stockholders. When a person purchases shares of a company, he, as between himself and other stockholders, takes those shares with all the rights and liabilities attaching to them, so that his co-stockholders have a perfect right to insist upon his contributing with them towards the liquidation of debts contracted before he joined the company. Taylor *v.* Ifill, 1 N. R. 566 (1863), V.-C. W.; Cape's Case, 2 De G., M. & G. 562 (1852); Mayhew's Case, 5 De G., M. & G. 837 (1854). See, too, Horsley *v.* Bell, Ambl. 769 (1778), cited in 1 Bro. Ch. 101, n. Sanderson's Case, 3 De G. & S. 66 (1849), cannot be regarded as correct on this point. See Henderson *v.* Sanderson, 3 H. L. Cas. 698 (1852).

1 The question of whether the vendee acquiesced may be a question for the jury. The mere fact that his name appeared on the books as a stockholder is not sufficient. Greene *v.* Sigua, etc. Co., 88 Fed. Rep. 207 (1898).

sheriff's certificate therefor, and presents the same to a corporation for transfer, thereby becomes a stockholder to the extent at least of being liable for any unpaid part of the subscription price of such stock.[1]

In some of the states the liability of the transferee is regulated by statute, and where, by statute or a by-law of the corporation, no valid transfer can be made while there are calls due and unpaid, it is held that a transfer without such payment will not render the transferee liable thereon.[2] In Pennsylvania, after considerable doubt and conflict, it has been clearly stated by the supreme court that the transferee of stock is liable on the unpaid subscription.[3]

§ 257. *Knowledge that the stock is not fully paid up, how far imputable to a transferee.*—The question whether the purchaser of stock is bound to take notice that the stock he purchases is not fully paid for is a serious and complicated one. The better opinion, and the one most in accord with the usages and demands of trade, is that,

1 Basting *v.* Northern Trust Co., 61 Minn. 307 (1895). And is also liable on the statutory liability attaching to such stock. Oswald *v.* Minneapolis Times Co., 65 Minn. 249 (1896). A dictum in Sturges *v.* Stetson, 1 Biss. 246 (1858); s. c., 23 Fed. Cas. 311, says that the purchaser at execution sale is liable on an unpaid subscription the same as his debtor was. A person who buys stock at an execution sale, after it has already been pledged for its full value to others and a transfer to them made, is not liable for calls on the stock, even though such pledgees transferred it to him without his knowledge. Simmons *v.* Hill, 96 Mo. 679 (1898).

2 Watson *v.* Eales, 23 Beav. 294 (1856); McCready *v.* Rumsey, 6 Duer, 574 (N. Y. Super. Ct., 1857), was a case under a prohibition against transfer in a bank organized under the New York General Banking Act of 1838. *Re* Bachman, 12 Nat. Bankr. Reg. 223 (1876); s. c., 2 Fed. Cas. 310, was a case where the corporation had a lien on the stock.

3 Bell's Appeal, 115 Pa. St. 88 (1887); Citizens', etc. Co. *v.* Gillespie, 115 Pa. St. 564 (1887), where, however, the transferee directly contracted to pay. Compare West Philadelphia Canal Co. *v.* Innes, 3 Whart. (Pa. 198) (1838); Aultman's Appeal, 98 Pa. St. 505 (1881); Bunn's Appeal, 105 Pa. St. 49 (1884); Palmer *v.* Ridge Min. Co., 34 Pa. St. 288 (1859); Pittsburgh, etc. Co. *v.* Otterson, 4 W. N. Cas. 545 (1877); Delaware Canal Co. *v.* Sansom, 1 Binn. (Pa.) 70 (1803); Merrimac Min. Co. *v.* Levy, 54 Pa. St. 227 (1867). And, in general, as regards the Pennsylvania General Railroad Act of Feb. 19, 1849, see Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857); Graff *v.* Pittsburgh, etc. R. R., 31 Pa. St. 489 (1858). *Cf.* Franks Oil Co. *v.* McCleary, 63 Pa. St. 317 (1869), holding that the transferee in a mining company is not liable. Messersmith *v.* Sharon Savings Bank, 96 Pa. St. 440 (1880), to same effect; and see Aultman's Appeal, 98 Pa. St. 505 (1881), involving an Ohio corporation; Pittsburgh, etc. Co. *v.* Otterson, 4 W. N. Cas. 545 (1878); Provincial, etc. Co. *v.* Shaw, 19 U. C. (Q. B.) 533 (1860); Miller *v.* Peabody Bank, 15 W. N. Cas. 76 (1883); Reimer, etc. Co. *v.* Rosenberger, 40 Leg. Int. 381 (1883); Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 153 (1857).

where one buys stock in open market, in good faith, and without notice that the subscription price thereof has not been paid up, such a purchaser cannot be held liable to pay the unpaid balance of subscription.[1] But where a person, to whom stock is issued for property at a fraudulent overvaluation, purchases other stock of the same kind, he is liable not only on the stock originally issued to him but also on the stock so purchased by him, even though the stock on its face states that it is "full-paid and non-assessable."[2]

§ 258. *Liability on subscription after transfer but before registry—Irregular and attempted transfers.*—Until a transfer is recorded in the transfer book of the corporation, the transferee, not being duly recognized as a stockholder, is not chargeable either with corporate debts or unpaid balances of the subscription. He is bound

1 Certificates of stock have become such important factors in trade and credit, and general investment by all classes, that the law is steadily tending towards the complete protection of a *bona fide* purchaser of them in open market, and without notice of facts which will decrease the apparent value of the stock. The constant tendency of the courts to increase the negotiability of certificates of stock will probably establish the rule that the purchaser in good faith of a certificate of stock is not liable on any unpaid subscription price thereof, unless such liability is stated on the face of the certificate itself. Indeed, even now this may be said to be the established rule. See § 50, *supra*. Where a member has not paid for his stock in full and sells it as though it was full paid, he must refund to the transferee the balance which the transferee is obliged to pay. Jamison *v.* Harbert, 87 Iowa, 186 (1893). But where a subscription is not paid, and the stock is transferred to the corporation as "treasury stock" and then sold below par, the purchaser is liable for the unpaid par value. Alling *v.* Wenzel, 133 Ill. 264 (1890). A contract by a corporation that it will issue its stock for one-fifth of its par value is void under the Alabama constitutional prohibition. The subscriber having sold his contract to another person cannot collect on such sale. Williams *v.* Evans, 87 Ala. 725 (1889). A transferee of stock, the certificates reciting on the face thereof that a certain amount is still due, is liable therefor. Glenn *v.* Porter, 73 Fed. Rep. 275 (1896).

2 Higgins *v.* Illinois, etc. Bank, 193 Ill. 394 (1901). In Illinois the transferrer of stock is liable secondarily on stock issued for property taken at a fraudulent overvaluation, the transferee being primarily liable. Florsheim *v.* Illinois, etc. Bank, 93 Ill. App. 297 (1901); aff'd, 192 Ill. 382; Rogan *v.* Illinois, etc. Bank, 93 Ill. App. 39 (1900). Even a *bona fide* purchaser of what purports to be full-paid stock in a corporation is liable on the double liability attached to the stock, under the New York statute, where the stock was issued for property taken at an overvaluation and no certificate of payment has been filed, as required by the statute. If, however, after the issue of the stock, further sums of money were paid in by the stockholders equal to the difference between the par value of the stock and the value of the property, the liability ceases as to subsequent creditors. White, Corbin & Co. *v.* Jones, 167 N. Y. 158 (1901).

to protect and indemnify his transferrer, but he is not liable to the corporation or corporate creditors or other stockholders.[1]

The general rule is that the transferrer is not released from liability until the transfer is duly registered in the corporate books.[2]

1 Quoted and approved in People's, etc. Bank *v.* Stadtmuller, 150 Cal. 106 (1906). Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579 (1818); Topeka Mfg. Co. *v.* Hale, 39 Kan. 23 (1888); Midland, etc. Ry. *v.* Gordon, 16 M. & W. 804 (1847). *Cf.* McDowell *v.* Sheehan, 129 N. Y. 200, 207 (1891). The agreement of the purchaser of the majority of the stock that he will indemnify and save harmless the vendors from the liabilities of the company does not render the vendee liable to the creditors of the company. Traders', etc. Bank *v.* Washington, etc. Co., 22 Wash. 467 (1900). Even though a national bank, as pledgee of national bank stock which stands on the books of the latter bank in the name of the pledgor, sells the stock on notice and buys it in at a nominal figure, yet if the pledgee does not have the stock transferred to itself on the books of the bank it cannot be held liable thereon, the pledgee having soon after the sale waived its rights as a purchaser at such sale. Robinson *v.* Southern, etc. Bank, 180 U. S. 295 (1901). In Indiana it has been held that a statute will not be construed so as to make both transferrer and transferee liable directly for the same indebtedness. Williams *v.* Hanna, 40 Ind. 535 (1872).

2 Quoted and approved in Bracken *v.* Nicol, 99 S. W. Rep. 920 (Ky. 1907). Shellington *v.* Howland, 53 N. Y. 371 (1873); Barron *v.* Burrill, 86 Me. 72 (1893); Worrall *v.* Judson, 5 Barb. 210 (1849); Louisiana Ins. Co. *v.* Gordon, 8 La. Rep. 174 (1835); Dane *v.* Young, 61 Me. 160 (1872); Fowler *v.* Ludwig, 34 Me. 455 (1852); Davis *v.* Essex Bapt. Soc., 44 Conn. 582 (1877); Kellogg *v.* Stockwell, 75 Ill. 68 (1874); Bowden *v.* Farmers', etc. Bank, 1 Hughes, 307; s. c., 3 Fed. Cas. 1029 (1877); London, etc. Ry. *v.* Fairclough, 2 Man. & G. 674 (1841). To the same effect, McEuen *v.* West London Wharves, etc. Co., L. R. 6 Ch. 655 (1871), in which it was held that the sale and transfer by delivery of scrip certificates allotted and issued to a subscriber, entitling the bearer to exchange them for share certificates, would not exonerate the vendor from liability for calls, even though the vendee had paid some calls; Midland, etc. Ry. *v.* Gordon, 16 M. & W. 804 (1847); Sayles *v.* Blane, 19 L. J. (Q. B.) 19 (1849). See also Hawkins *v.* Glenn, 131 U. S. 319 (1889). The registered stockholder is liable on the subscription. Baines *v.* Babcock, 95 Cal. 581 (1892). An original subscriber for stock is not released from his obligation although he sells and transfers the certificate of stock, such transfer not having been recorded on the corporate books. Hood *v.* McNaughton, 51 N. J. L. 425 (1892). A person sued as a subscriber cannot set up that he subscribed at the solicitation of another person who agreed to take the subscription off his hands at once. Stutz *v.* Handley, 41 Fed. Rep. 531 (1890); reversed on other grounds, 139 U. S. 417. A transferrer is liable until the transfer is made on the books. Abbott *v.* Jack, 136 Cal. 510 (1902). The transferrer of stock not fully paid up is liable to a corporate creditor who became such before the transfer was recorded on the corporate books. Hawkins *v.* Citizens', etc. Co., 38 Oreg. 544 (1901). The registered owner is liable on the unpaid subscription, even though he has actually transferred the certificate. Sherwood *v.* Illinois, etc. Bank, 195 Ill. 112 (1902). In a suit to collect a subscription the corporation need not

This rule, however, is subject to an important exception, namely: that where the corporation accepts the transferee as a stockholder and pays dividends to him, or where, through the negligence or fault of the corporation, no transfer on the books is made, in such cases the transferrer is released, and the transferee only is liable on the stock, although the stock still stands on the corporate books in the name of the transferrer.[1]

Thus where the transferrer signs the transfer on the back and delivers the same to his broker, who sells the stock and then presents the certificate to the corporation for transfer, and the corporation agrees so to do, but neglects to for a year, the transferrer is not liable

allege that the stock has not been transferred by the subscriber. South Milwaukee Co. *v.* Murphy, 112 Wis. 614 (1902).

1 Isham *v.* Buckingham, 49 N. Y. 216 (1872); Cutting *v.* Damarel, 88 N. Y. 410 (1882); Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120 (1849); Murray *v.* Bush, L. R. 6 H. L. 37 (1873); Upton *v.* Burnham, 3 Biss. 431, 520 (1873); s. c., 28 Fed. Cas. 831, 833. Where a stockholder in a national bank sells his stock three weeks before the bank goes into a receiver's hands and in the meantime has done all he could to have a transfer made, he is not liable on the stock, even though the transfer has not actually been made on the books of the bank. Earle *v.* Carson, 188 U. S. 42 (1903). In this case the vendor delivered the certificate of stock to the corporation duly transferred to another person and requested a transfer, and the officer of the corporation stated that the transfer would be made, but failed to make it and the vendor, being ignorant of the fact of such failure, was held no longer liable on the stock. But where a stockholder transfers to an employee certain stock on the agreement that in case the employee continues in the employ of the company more than a year the stock should belong to the employee, and thereafter the employee endeavors to re-transfer the stock, but the company, at the instance of the first named stockholder, refuses to make the transfer, the employee is liable on the stock to the receiver for unpaid subscriptions. Russell *v.* Easterbrook, 71 Conn. 50 (1898). Where an English corporation requires the payment of a small fee on transfer of stock, and the English statutes require a stamp to be affixed, and an American stockholder presents his stock for transfer without paying the fee or affixing the stamp, he remains liable on the stock, no transfer of the stock on the books having been made. Giesen *v.* London, etc. Co., 102 Fed. Rep. 584 (1900). A mere oral notice by a third party that a stockholder had transferred his stock to a designated person does not relieve the former from his liability on the subscription, no formal transfer having been made, the stock having been issued at twenty cents on the dollar. Vermont, etc. Co. *v.* Declez, etc. Co., 135 Cal. 579 (1902). Even though a Colorado corporation is organized for the issue of stock in exchange for stock in a Kansas corporation and a stockholder in the latter assigns his Kansas certificate to another person and causes the Colorado corporation to issue its stock to such other person, yet if he fails to have the transfer recorded in the books of the Kansas corporation he is liable on such Kansas stock. Pine *v.* Western, etc. Bank, 63 Kan. 462 (1901). Where the transferrer re-

on the stock.[1] The transferrer of stock in a national bank is released from liability when he goes with the transferee to the bank, delivers the old certificate duly transferred, and leaves the same for registry, even though no registry is made.[2] But a delivery of certificates of stock to the president as vendee, and not as president, is not such an attempt to transfer the stock on the books as relieves the transferrer from liability.[3] Where a stockholder in a national bank indorses his certificate in blank, and causes it to be sold at public auction, and the auctioneer sells it to the cashier of the bank, and takes it to the bank, and presents it to such cashier for transfer, and for four years dividends thereon are paid to the cashier, the vendor is no longer liable, even though the stock was not transferred on the bank books, and even though a by-law of the bank prohibited any officer from holding stock in the bank except by permission of the board of directors.[4] Where there is no transfer book, but certificates are merely canceled and new ones issued, this is sufficient to effect a transfer on the corporate books.[5] So also where no certifi-

quests the corporation to make a transfer, and it fails to do so, he is released from the statutory liability on the stock. Hunt *v.* Seeger, 91 Minn. 264 (1904). Under the New Jersey incorporating act which allows special provisions to be inserted, there may be a provision that stockholders of record shall be liable for calls. Under such a provision a stockholder of record is liable, although he has sold his certificate and notified the company of the sale, but no transfer had been made on the books. Brown *v.* Morton, 71 N. J. L. 26 (1904). The transferrer is liable up to the time that the transfer is recorded unless he sees that the certificate is delivered to the corporation with the proper power of attorney and data for the transfer. M'Donald *v.* Dewey, 134 Fed. Rep. 528 (1905); modified on another point in 202 U. S. 510.

1 Quoted and approved in Bracken *v.* Nicol, 99 S. W. Rep. 920 (Ky. 1907). Young *v.* M'Kay, 50 Fed. Rep. 394 (1892).

2 Hayes *v.* Shoemaker, 39 Fed. Rep. 319 (1889). See also §§ 490, 523–525, 532, *infra*. *Cf.* §§ 382, 383, *infra*.

3 Richmond *v.* Irons, 121 U. S. 27 (1887). Even though the stockholder sells his stock to a director and delivers the certificates to him and receives payment, yet if the stock is not transferred on the books the transferrer is liable on the statutory liability. Schofield *v.* Twining, 127 Fed. Rep. 486 (1904).

4 Earle *v.* Coyle, 97 Fed. Rep. 410 (1899). It has been held, that where a stockholder in a bank sells his stock to the cashier and assigns to him the certificate, he ceases to be liable on such stock to corporate creditors, even though the cashier does not transfer the stock on the bank books. Foster *v.* Row, 120 Mich. 1 (1899). Where a bank director sold his stock and directed the cashier to have it transferred, he is no longer liable on the stock, even though it was not regularly transferred on the books. Bracken *v.* Nicol, 99 S. W. Rep. 920 (Ky. 1907). Even though the stockholder in a bank sells his stock to the cashier with instructions to transfer the same on the books, yet if the cashier fails to do so the transferrer is liable. White *v.* Commercial, etc. Bank, 66 S. C. 491 (1903).

5 Plumb *v.* Bank of Enterprise, 48

cates have ever been issued, a transfer may be made orally or in writing.[1] A stockholder who has transferred his stock on the books of the company cannot be held liable under a statutory liability for debts subsequently incurred, even though he has not published notice of such transfer as required by statute.[2] Where the transferee does not know that the transfer has been made and never agreed to be a stockholder he is not liable as such, even though the transfer has been made on the books of the corporation.[3] Even though by reason of the transfer books being closed for a short period of time, a vendor of stock is unable to have it transferred on the books, and the com-

Kan. 484 (1892). Where there is practically no book except the certificate-of-stock book, and a purchaser of stock at execution sale sends the certificate to the company for transfer, which is refused by reason of an unpaid call, the purchaser is liable on the unpaid subscription, the corporation having subsequently recognized him as owner of the stock. Basting *v.* Northern Trust Co., 61 Minn. 307 (1895). Where no stock or transfer books are kept, although the statute requires them, and the certificate-of-stock book is so kept that upon a transfer the old certificates of stock are so pasted back on to the stubs corresponding thereto, the transferrer may be liable for subsequent debts, even though a new certificate was issued to the transferee and the stub opposite thereto stated from whom the stock was transferred. Herrick *v.* Wardwell, 58 Ohio St. 294 (1898). Under the New York statute a holder of unpaid stock is not relieved from liability by a transfer of the same, unless such transfer is registered in a stock book; and it is held that even though no stock book is kept by the corporation, yet if the transferrer was an officer of the company and partially responsible for not having such book kept, he cannot set up the defense that no such book was kept, especially where there is evidence of bad faith in the transfer. Beals *v.* Buffalo, etc. Co., 49 N. Y. App. Div. 589 (1900). See also § 382, *infra*.

1 A subscription of stock may be assigned, even though only a part of the subscription has been called for and paid, and even though no certificate of stock had ever been issued. Such assignment may be oral. Manchester St. Ry. *v.* Williams, 71 N. H. 312 (1902). Where the certificates for unpaid stock are never issued, and the stockholder disposes of his interest to another person and the corporation recognizes that person as such stockholder, the original subscriber is no longer liable. Dain, etc. Co. *v.* Trumbull, etc. Co., 95 Mo. App. 144 (1902).

2 Brunswick T. Co. *v.* Natl. Bank etc., 192 U. S. 386 (1904). A transfer to a solvent transferee while the corporation is solvent releases the transferrer from the subscription price and renders liable the transferee, the transfer having been recorded, and even though the transfer was not recorded within fifteen days after the transfer of the certificates as required by the statute, this does not change the rule so far as corporate creditors are concerned. Henderson *v.* Mayfield, etc. Mills, 45 S. Rep. 211 (Ala. 1907). Where by statute no transfer of stock on the corporate books shall be legal until a statement of such transfer has been filed with the secretary of state, the transferrer remains liable on the stock until such statement is filed with the secretary of state. Henley *v.* Myers, 93 Pac. Rep. 168 (Kan. 1907).

3 Manor *v.* Aldrich, 126 Fed. Rep. 934 (1903).

pany fails before the books are opened, he is liable on the unpaid subscriptions.[1] Various other illustrations of irregular or unauthorized transfers and of the liability of the various parties thereto are given in the notes below.[2]

1 Cook *v.* Carpenter, 212 Pa. St. 177 (1905).

2 A substitution of stockholders after organization by canceling some subscriptions and filling in others is illegal. There should be a transfer. Cartwright *v.* Dickinson, 88 Tenn. 476 (1890). Where a party buys stock through a broker, and the broker, without authority, causes the stock to be transferred on the books to the purchaser, but the latter, upon receiving the certificates, returns them and repudiates the transfer and orders a sale and transfer, and the company fails before such resale is made, the purchaser is not liable to corporate creditors on the subscription price of the stock. Glenn *v.* Garth, 133 N. Y. 18 (1892). Where a person subscribes to the proposed increased capital stock, but the increase is not made, and the officers surreptitiously transfer some of their old stock to him, he is not liable on the statutory liability thereon, even though he accepted the stock, if he accepted in ignorance of the fraud practiced upon him. Stephens *v.* Follett, 43 Fed. Rep. 842 (1890). A stockholder is liable by statute on stock where he has merely transferred the certificate, and no effort has been made to complete the transfer on the corporate books. Where a person agrees to accept a transfer of stock, and acts as director, he is liable on the unpaid subscription, though no formal transfer is made. Weinman *v.* Wilkinsburg, etc. Ry., 118 Pa. St. 192 (1888); Bernard's Case, 5 De G. & Sm. 283 (1852). See also § 260, *infra*. Where an executory sale of stock is made, with a forfeit in case it is not completed, and the vendor, without the knowledge of the vendee, causes the stock to be transferred to the vendee on the books of the company, and the company fails, and the next day the parties, without knowledge of the failure, close the transaction, the vendor may be held liable on the statutory liability on such stock. May *v.* McQuillan, 129 Mich. 392 (1902). Even though a person's name appears on a certificate of stock on the transfer on the back thereof, yet if a line is drawn through it and the certificate is canceled and a new one issued to the original owner, the person whose name is canceled is presumed not to have been the owner. Gillett *v.* Chicago Title & T. Co., 82 N. E. Rep. 891 (Ill. 1907). A person to whom stock is transferred on the corporate books is liable on the statutory liability, if he approves or acquiesces in it in any way, as by signing an application to change the charter of the bank, or by indorsing checks which are made out to him for dividends. He is estopped from denying that he knew what he was signing. It is immaterial whether a new certificate was issued to him or not. Keyser *v.* Hitz, 133 U. S. 138 (1890). *Cf. Ex parte* Hall, 1 Macn. & G. 307 (1849), holding that an unregistered transferee is not liable merely because he accepts dividends; Shipman's Case, L. R. 5 Eq. 219 (1868), in which a purchaser offered a name to which he wished the shares transferred on the register, but which was rejected by the directors. The vendor, in whose name they stood, was held liable for calls, and the court refused to remove his name; Sheffield, etc. Ry. *v.* Woodcock, 7 M. & W. 574 (1841), holding that where, by law, transfers of stock were to be made by deed, a transfer in blank, and stating the consideration untruly, made to a purchaser who afterwards signed and sent to the company a

Where a person buys certificates of stock in a national bank, the certificates being indorsed in blank, and the bank makes a memoran-

proxy, in which he described himself as the proprietor of the shares, constituted him a stockholder for the purpose of requiring him to respond to calls for assessments; Taylor *v.* Hughes, 2 Jones & Lat. (Ir. Ch.) 24 (1844), in which the court refused to hold liable as a stockholder of a bank one who had transferred his stock seven years before, though not by a proper method, and whose name had not appeared on the books during that time, but had been re-entered by a committee after the failure of the bank. Burnes *v.* Pennell, 2 H. L. Cas. 497 (1849), held that where certain forms were to be observed by a transferee of shares in a Scotch joint-stock company, the required acts were for the benefit of the company, and therefore the leaving of one of such acts unexecuted by a purchaser was not allowed to enable him to retire from his contract. Maguire's Case, 3 De G. & Sm. 31 (1849). In this case a stockholder in a steam packet company transferred two shares to his son without his knowledge. The son did not receive dividends nor do any act as proprietor; but for the purpose of obtaining free passages upon the boats of the company, he obtained from the company certificates that he was a proprietor. It was held that the son was a contributory in respect of the two shares.

A receiver cannot apply to have a transferee's name put on the list of contributories on ground of undue delay of the company in registering the transfer. Only the transferrer can complain. Sichell's Case, L. R. 3 Ch. 119 (1867). See Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579 (1818), holding that a mere entry on the corporate books crediting the shares to the transferee is insufficient; and see also Dane *v.* Young, 61 Me. 160 (1872), holding that the failure to have the registry properly witnessed invalidates it. A vendee of stock who is to be entitled to it only upon payment is not liable for the subscription price if he never pays for the stock and his name never appears on the books. Cormac *v.* Western, etc. Co., 77 Iowa 32 (1889). For other cases holding the transferee liable, although all the formalities of registry were not complied with, see *Ex parte* Dixon, 1 Dr. & Sm. 225 (1860); Gordon's Case, 3 De G. & Sm. 249 (1850); Straffon's Case, 1 De G., M. & G. 576 (1852); Walters's Case, 3 De G. & Sm. 149 (1850); London, etc. Ry. *v.* Fairclough, 2 Man. & G. 674 (1841); London, etc. Ry. *v.* Freeman, 2 Man. & G. 606 (1841); Birmingham, etc. Ry. *v.* Locke, 1 Q. B. 256 (1841). For a case holding that the transferrer is liable, see Keene's Case, 3 De G., M. & G. 272 (1853). For cases to the effect that the transferrer is, in general, discharged only when the transfer is actually recorded, and duly recorded in the stock-book, and when all the prescribed conditions of a valid transfer have been duly complied with, see Cartmell's Case, L. R. 9 Ch. 691 (1874); Heritage's Case, L. R. 9 Eq. 5 (1869); Henessey's Case, 3 De G. & Sm. 191 (1850); *Ex parte* Henderson, 19 Beav. 107 (1854). Where the consent of the board of directors is necessary to a transfer, no transfer is complete without it, and the transferrer remains liable. Bosanquet *v.* Shortridge, 4 Exch. 699 (1850). But this case at law was enjoined by Bargate *v.* Shortridge, 5 H. L. Cas. 297 (1855), in equity, and it was held that the transferrer was not liable. To same effect, see Taylor *v.* Hughes, 2 Jones & Lat. (Ir. Ch.) 24 (1844), where the registry was not regularly made, but the transferee was treated as a stockholder. *Cf.* Murray *v.* Bush, L. R. 6 H. L. 37 (1873), affirming

dum in the certificate-of-stock book that it had been transferred to him and sends him dividends, he is liable thereon, although no transfer of the certificate is made on the corporate books, and although he bought the stock for the cashier of the bank and was merely a nominal holder. He is not such a trustee as is exempt from liability under the national bank act.[1]

It is immaterial that no certificate of stock is issued to the transferee. The registry is complete without it.[2] When the transferrer has done all in his power to complete the transfer and is guilty of no laches, his liability to corporate creditors is thereby determined; and accordingly he is discharged, as though the registry had been made.[3] A stockholder who received his certificate and dividends for

Bush's Case, L. R. 6 Ch. App. 246. In this case the deed of settlement, among other things, required a transferee to covenant by deed to abide by the rules of the company. A director who failed to comply with that requirement was held to be a stockholder as to the shares, because he had been recognized as a stockholder by the directors at a meeting of stockholders and had been at that meeting elected a director. The transferrer was held not liable. *Contra*, Keene's Case, 3 De G., M. & G. 272 (1853); Mayhew's Case, 5 De G., M. & G. 837 (1854), where the parties went together to the proper officer of the company and deposited a transfer, but no notice in writing was given to the officer as required by the company's rules. The transferee was held to be properly placed on the list of contributories. See also notes below.

1 Horton *v.* Mercer, 71 Fed. Rep. 153 (1895). Where a vendor of stock in a national bank transfers the certificates indorsed by him on the back to the vendee, the vendee being the cashier and the bank being solvent, and for five years dividends are paid to such cashier, the vendor is not liable, even though the stock was never transferred on the corporate books. Snyder *v.* Foster, 73 Fed. Rep. 136 (1896). Where the vendor of stock in a national bank transfers the certificate to the vendee and delivers it to the president of the bank, who promises to transfer the same on the books, but does not do so, and the bank thereafter treats the vendee as the owner, the vendor is not liable on the statutory liability. Cox *v.* Elmendorf, 97 Tenn. 518 (1896).

2 First Nat. Bank *v.* Gifford, 47 Iowa, 575, 583 (1877); Brigham *v.* Mead, 92 Mass. 245 (1865); Straffon's Case, 1 De G., M. & G. 576 (1852); Chouteau Spring Co. *v.* Harris, 20 Mo. 382 (1855), holding that an assignment upon the books of the company, without having a new certificate issued, is a sufficient transfer to exonerate the assignor from liability for assessments; and that any transfer in writing is valid against a company which, having notice, refuses to allow it to be made. The stockholder cannot set up for defense, to an action by a corporate creditor, that some third person had contracted to purchase his shares, or a portion of them, but that with the consent of the corporate authorities it had been agreed that, until that third person had paid the notes given for the purchase price of the stock, the transfer should not be made on the corporate stock-book. Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294 (1876), affirming s. c., 6 Hun, 293 (1875). See 85 N. E. Rep. 91.

3 Quoted and approved in Bracken *v.* Nicol, 99 S. W. Rep. 920 (Ky. 1907). Whitney *v.* Butler, 118 U. S. 655

several years cannot avoid the statutory liability on the ground that the original subscriber, from whom he purchased, never made a

(1886). See also § 383, *infra*. *Ex parte* Henderson, 19 Beav. 107 (1854); Shortridge *v.* Bosanquet, 16 Beav. 84 (1852), overruling s. c., *sub nom.* Bosanquet *v.* Shortridge, 4 Exch. 699 (1850). A person who sells his stock in a bank and delivers the certificate to the bank duly assigned for transfer, and the bank states that it will issue the new certificates, is not liable on such stock thereafter, even though the transfer is not made by the bank. Foster *v.* Row, 120 Mich. 1 (1899). In White's Case, L. R. 3 Eq. 86 (1866), a transferrer was held not discharged because of laches; Fyfe's Case, L. R. 4 Ch. App. 768 (1869), where there was an improper delay on the part of the company in registering a transfer; Lowe's Case, L. R. 9 Eq. 589 (1870), on similar facts and to same effect; Nation's Case, L. R. 3 Eq. 77 (1866), in which the directors did not confirm a transfer at their next meeting after it was left for that purpose, thereby causing an unnecessary delay; Hill's Case, L. R. 4 Ch. App. 769 (1867), note, to same effect as Fyfe's Case, L. R. 4 Ch. App. 768 (1869), Ward and Garfit's Case, L. R. 4 Eq. 189 (1867), in which the court rectified the register by completing a transfer which was duly executed and left for registry the day before the corporation stopped business, but was not registered on that account; Ward's Case, L. R. 2 Eq. 226 (1866), in which the names of purchasers of shares had not been placed on the register in place of that of the vendor in consequence of disputes among themselves; *Ex parte* Hall, 5 Ry. & Canal Cas. 624 (1849), holding that where a transferee whose name has not been actually entered on the registry has so acted—as being a trustee for his wife—and his acts have been so far adopted that a waiver of the necessary forms may be inferred, he will be held a contributory in winding-up proceedings. De Pass's Case, 4 De G. & J. 544 (1859). In this case the certificates were transferable by delivery; and in winding-up proceedings the holders were adjudged to be contributories, though it appeared that as to some shares they were not delivered until after the winding-up order was made, and, as to others, that they were delivered to a clerk for a nominal consideration in order to escape liability. Marino's Case, L. R. 2 Ch. Ap. 596 (1867), in which the transferee, who lived in Smyrna, and had not sufficient time to execute and forward the deed required of him by the rules and usage of the company to effect a valid transfer, was held not to be contributory; Skowhegan Bank *v.* Cutler, 49 Me. 315 (1872), holding that, in order to hold a transferee liable, it must be shown that statutory provisions relating to transfer have been observed; Laing *v.* Burley, 101 Ill. 591 (1882), holding that, where there was no transfer on the books of a national bank as required by law, but new certificates had been issued to the transferee, who was also recognized as a stockholder on the bank's ledger, the transferee was liable; Midland, etc. Ry. *v.* Gordon, 16 M. & W. 804 (1847), holding that a holder of scrip certificates for shares to be allotted at a future time, having sold them in the market, was liable for calls until the name of the vendee was registered as the holder of them. See also Harpold *v.* Stobart, 46 Ohio St. 397 (1889). That the failure to record the transfer is the fault of the corporation itself, or of the officer thereof whose duty it is to make the entries in the stock-book, is not sufficient to relieve the stockholder who, having transferred his shares, fails to see to it that the proper entry is actually and duly made. *Re* Bach-

formal transfer.[1] The corporation cannot hold liable on the unpaid subscription for stock a person who purchased and held the certificates of stock, but sold them without appearing on the corporate books as a stockholder.[2]

Where the transferee of the certificate has repeatedly demanded a transfer of the company, but been refused, a subsequent attachment by a creditor of the transferrer does not take precedence, even though the statutes require a registry within sixty days.[3] A person who accepted a transfer of stock in order to make a quorum is liable to creditors, although he at once signed a retransfer and supposed it was recorded.[4]

§ 259. *Does the statutory liability attach to him who is the registered stockholder when the corporate debt is contracted, or is due, or is sued upon?*—When the question of statutory liability is considered there is more difficulty, as between transferrer and transferee, in determining who is to be charged. Frequently the statute itself prescribes when the liability is to attach. The important question which arises herein is whether the corporate debt raises a liability against him who was the registered stockholder when the corporation entered into the contract leading to the debt, or against him who was the registered stockholder when the debt itself became due and payable to the corporate creditor, or against him who was the registered stockholder when suit is brought by the corporate creditor against the corporation to collect the debt, or against him who was

man, 12 Nat. Bankr. Reg. 223 (1876); s. c., 2 Fed. Cas. 310. *Cf.* Russell *v.* Easterbrook, 71 Conn. 50 (1898).

1 Bissell *v.* Heath, 98 Mich. 472 (1894). The holders of stock cannot escape the statutory liability thereon, even though, when the transfer of the stock to them was made, the old certificates were not canceled, but were abstracted by a corporate officer and hypothecated by him, thereby creating an overissue. Burt *v.* Bailey, 73 Fed. Rep. 693 (1896). The stockholder of record is not relieved from liability on his subscription by the fact that at the request of the treasurer he transfers his certificate of stock in blank on the back and leaves the certificates with the treasurer, even though the motive of the treasurer was the fact that the subscriber had not paid past-due calls. Burt *v.* Real Estate, etc., 175 Pa. St. 619 (1896). Where, by statute, the transferrer is liable on the subscription for a year after transfer, and transfer shall be on the books, he is liable for a year after such transfer on the books. Kriger *v.* Hanover Nat. Bank, 72 Miss. 462 (1894). But where the company recognizes a transfer as having been made, the transferee then becomes liable and the transferrer's time begins to run. Kriger *v.* Hanover Nat. Bank, 16 S. Rep. 353 (1894).

2 Vale Mills *v.* Spalding, 62 N. H. 605 (1883). *Cf.* § 253, *supra*, and § 261, *infra*.

3 Weber *v.* Bullock, 19 Colo. 214 (1893). See also ch. XXVII, *infra*.

4 Ontario, etc. Assoc. *v.* Leys, 23 Ont. Rep. (Can.) 496 (1893).

the registered stockholder when suit was brought against the stockholder.

Under certain statutes to that effect, those stockholders are liable who are such at the time when the execution against the corporation is returned *nulla bona*.[1]

As to whether, under the usual statute making the stockholders liable, to a greater or less extent, for the debts of the corporation, a registered stockholder is liable for debts contracted before he became such, as well as for those contracted while he was such, although he subsequently transfers his stock, the words of the statute control, and decisions on various statutes are given in the notes below.[2]

1 Nixon *v.* Green, 11 Exch. 550 (1856); Dodgson *v.* Scott, 2 Exch. 457 (1848); Longley *v.* Little, 26 Me. 162 (1846); Bond *v.* Appleton, 8 Mass. 472 (1812). In this case, under a statute making the original stockholders, their successors, assigns, and the members of the corporation liable for the debts of the corporation, it was held that only such persons as were members at the time payment was refused were intended; McClaren *v.* Franciscus, 43 Mo. 452 (1869); Dauchy *v.* Brown, 24 Vt. 197 (1852). *Cf.* Deming *v.* Bull, 10 Conn. 409 (1835). Under the provision of a charter that stockholders should "at all times be liable for all debts due by said corporation," it was held that those who were members when the debt was contracted, but had transferred their stock absolutely and in good faith before the commencement of the suit against the corporation, are not to be held liable under the statute. Middletown Bank *v.* Magill, 5 Conn. 28 (1823), following Bond *v.* Appleton, 8 Mass. 472 (1812); Child *v.* Coffin, 17 Mass. 64 (1820), holding that where there is a statutory provision "that a creditor, in a certain case, may levy his execution upon the body or estate of any member of the corporation, this must be understood of such as were members at the time of the commencement of the action, and of those only." It does not authorize an execution upon the estate of a corporator who died before the commencement of the action.

Under the statute making all the members of a company liable in certain cases for its debts, the liability extends to all who were members when it was sought to be enforced, and is not confined to such persons as were members when the debt was contracted. Curtis *v.* Harlow, 53 Mass. 3 (1846).

2 Under the Maryland statute making stockholders in banks or trust companies liable to depositors and creditors for double their stock, a stockholder is not liable for debts due to depositors and creditors before he became a stockholder. Murphy *v.* Wheatley, 102 Md. 501 (1906). A statutory liability of stockholders proportionately for the debts applies only to those who are stockholders at the time suits are brought against the company by its creditors. Wheatley *v.* Glover, 125 Ga. 710 (1906). A stockholder is not liable to a corporate creditor, under the New York statute, on stock issued to him at less than par, unless such stockholder's liability existed when the creditor recovered judgment against the company. Dyer *v.* Drucker, 108 N. Y. App. Div. 238 (1905). The statutory liability of a stockholder in a Minnesota corporation when it once attaches is not released by a transfer of the stock. Tiffany *v.* Giesen, 96 Minn. 488 (1905). See also Chesley *v.* Pierce, 32 N. H.

In Kansas "a *bona fide* transfer terminates the liability of the transferrer either to the company or to creditors," and where by statute execution may be issued to enforce a statutory liability, the

388 (1855), holding that, under a statute making stockholders liable for the debts of a corporation, the individual stockholders are not liable for debts contracted before they became such; Castleman *v.* Holmes, 4 J. J. Marsh. (Ky.) 1 (1839), but here a statute made them liable for debts, etc., contracted "during the time he or they held stock;" Mill-dam Foundery *v.* Hovey, 38 Mass. 417, 453 (1834), where the question arose on an objection to a witness in a suit against a corporation on the ground that he was liable for its debts; Holyoke Bank *v.* Burnham, 65 Mass. 183 (1853), a case where, under a statute making liable "all members" of a corporation, a shareholder was held for all debts contracted while he was a member, although he ceased to be a member before they were payable, and not liable for debts contracted before he became a member if his membership expired before they became payable and action brought; Southmayd *v.* Russ, 3 Conn. 52 (1819), holding that the judgment creditor cannot proceed against stockholders by *scire facias*, but must sue them upon their liability; Williams *v.* Hanna, 40 Ind. 535 (1872), holding that owners of stock at the time corporate debts are contracted are intended, in a statute making stockholders liable for all debts of the company, etc.; Larrabee *v.* Baldwin, 35 Cal. 155 (1868); Moss *v.* Oakley, 2 Hill, 265 (1842), holding that a charter declaring stockholders jointly and severally liable for the debts of the company makes liable only such as were members when the debt was contracted and not those persons who became members afterwards; Judson *v.* Rossie Galena Co., 9 Paige, 598 (1842), to the same effect; McCullough *v.* Moss, 5 Denio, 567, 573, 585 (1846), to same effect; Adderly *v.* Storm, 6 Hill, 624 (1844), holding that they are considered liable whose names appear on the books of the company as stockholders when the debt was contracted. But see McMaster *v.* Davidson, 29 Hun, 542 (1883), varying this rule as applicable to New York manufacturing corporations; and *cf.* Tracy *v.* Yates, 18 Barb. 152 (1854); Phillips *v.* Therasson, 11 Hun, 141 (1877); King *v.* Duncan, 38 Hun, 461 (1886); Davidson *v.* Rankin, 34 Cal. 503 (1868), holding that the cause of action against a stockholder of a mining corporation, under the laws of California accrues at the same time as against the corporation. Even though a stockholder transfers his stock to a solvent purchaser, the statutory liability on debts then existing remains against him. Gunnison *v.* United States Inv. Co., 70 Minn. 292 (1897). The Iowa statute that a transferrer shall be liable on existing debts applies to a bonded debt, although not yet due, and includes a liability on the unpaid subscription. White *v.* Greene, 70 N. W. Rep. 182 (Iowa, 1897); aff'd, 105 Iowa, 176 (1898). Upon the transfer of stock the transferrer ceases to be liable to corporate creditors, under the statute of Ohio, except that in case the company becomes insolvent and the total amount collectible from the stockholders at the date of insolvency is insufficient to pay the debts, the old stockholders are liable for the deficiency, so far as the same is due to those who were creditors at the time of such transfer. Wick Nat. Bank *v.* Union Nat. Bank, 62 Ohio St. 446 (1900). Under the Ohio statutes a stockholder who transfers his stock is liable for a debt existing at the time of the transfer, and a subsequent renewal of such debt by the corporation does not re-

liability attaches to the "persons only who are stockholders at the time the execution against the property or effects of the corporation is found to be ineffectual."[1]

lease him. Boice *v.* Hodge, 51 Ohio St. 236 (1894). In Ohio those who own the stock at the time the corporation creditor commences his suit against stockholders to enforce their statutory liability are liable under the statute. It is immaterial that some of the stock was issued after the debt itself was incurred by the corporation. See Barrick *v.* Gifford, 47 Ohio St. 180 (1890). Stockholders are liable under the Ohio statute for debts incurred before they became stockholders, but the equities between them and the transferrers of the stock may be adjusted in the same suit. Railroad Co. *v.* Smith, 48 Ohio St. 219 (1891). Under the Ohio statute the transferees are liable for precedent debts. See Brown *v.* Hitchcock, 36 Ohio St. 667 (1881); Mason *v.* Alexander, 44 Ohio St. 318 (1886); Wheeler *v.* Faurot, 37 Ohio St. 26 (1881); Brown *v.* Hitchcock, 36 Ohio St. 667 (1881), holding also that the liability is not discharged by a subsequent transfer of the stock; that in such cases there is an implied undertaking by the assignee to indemnify the assignor from the liability for debts contracted while he was a stockholder. Under the old constitutional provision in Ohio rendering stockholders doubly liable on their stock, a stockholder who has transferred his stock in good faith is not liable, even on a debt then existing, until after the full liability of solvent stockholders within the jurisdiction at the time of corporate insolvency has been exhausted, and then he is liable only for his part of the deficiency, even though the transferee afterwards became insolvent. Poston *v.* Hull, 80 N. E. Rep. 11 (Ohio 1907). Hager *v.* Cleveland, etc., 36 Md. 476 (1872), holds that, by virtue of the statute of Maryland, the transfer of stock does not exonerate the transferrer from liability for a corporate debt contracted while he was a stockholder and before the capital stock was paid in. His liability is in the nature of a contract with the company, and is not affected by a transfer of his stock. The statutory liability in an insolvent Michigan bank attaches to the stockholders then of record irrespective of when the deposits in the bank were made. Foster *v.* Row, 120 Mich. 1 (1899), the court referring to various statutes in different states varying this rule. Where a guarantor pays a corporate note, his recourse on the statutory liability of stockholders is to those who were stockholders when he paid the note. Yule *v.* Bishop, 133 Cal. 574 (1901).

[1] Van Denmark *v.* Barous, 52 Kan. 779 (1894). A person who is a stockholder in a Kansas corporation at the time when judgment is obtained against it is liable, although he was not a stockholder when the debt accrued. Rhode Island, etc. Co. *v.* Moulton, 82 Fed. Rep. 979 (1897). Under the Kansas statute all persons who are stockholders when an execution is returned unsatisfied are liable to the judgment creditor. Brown *v.* Trail, 89 Fed. Rep. 641 (1898).

The statutory liability in Michigan for labor performed does not render a stockholder liable for labor performed before he became a stockholder. Kamp *v.* Wintermute, 107 Mich. 635 (1895). A creditor who was such before the stock was sold may enforce the statutory liability against the transferrer. Voight *v.* Dregge, 97 Mich. 322 (1893). In Illinois suit may be brought against him who is a stockholder at the time suit is brought. "The liability being because of the ownership of stock, it follows the stock, into whosesoever hands it

§ 260. *Transferrer's statutory liability after transfer but before registry.*—The previous section treated of the statutory liability of a transferrer in cases where the transfer is recorded on the corporate books at the same time that the sale and transfer of the cer-

may go, and whoever purchases it does so at the risk of this liability." Root *v.* Sinnock, 120 Ill. 350 (1887). Individual liability continues, even after the death of the stockholder, until a transfer is made. Davis *v.* Weed (U. S. D. C.), 44 Conn. 569 (1877); s. c., 7 Fed. Cas. 186. See also Witters *v.* Sowles, 32 Fed. Rep. 130 (1887); Phillips *v.* Therasson, 11 Hun, 141 (1877); Tracy *v.* Yates, 18 Barb. 152 (1854), holding that, under the New York statute of 1848, a stockholder was not liable for debts contracted before he was such. But see McMaster *v.* Davidson, 29 Hun, 542 (1883). *Cf.* Rosevelt *v.* Brown, 11 N. Y. 148 (1854); Cutting *v.* Damerel, 88 N. Y. 410 (1882). See also § 261, *infra*. A stockholder does not, by transfer, avoid a statutory liability to creditors who were such at the time of the transfer. Jackson *v.* Meek, 87 Tenn. 69 (1888). Under the Minnesota statute, where stockholders in banks are liable for a year after they transfer their stock, execution is first issued against the transferee. The liability cannot be enforced twice, once against the transferee and once against the transferrer, on the same stock. The liability is enforced irrespective of the liability of transferrers of other stock. The transferrer is liable only for his proper share of the debts existing at the time of the transfer and which still remain unpaid, excepting so far as they have been paid by other stockholders. The distribution from corporate assets is for the benefit of transferees as well as the stockholders of record. The money paid by the transferees goes into the common fund and is not applied to any particular debts. As to extensions of debts he is liable unless he shows that he did not consent thereto. Harper *v.* Carroll, 66 Minn. 487 (1896). In Minnesota it is held that the stockholder's statutory liability attaches to debts due from the corporation before as well as after the stockholder bought his stock. Olson *v.* Cook, 57 Minn. 552 (1894). All who are stockholders at the time the action is commenced are liable under the Minnesota statute, irrespective of when the debt was incurred. First Nat. Bank *v.* Winona Plow Co., 58 Minn. 167 (1894). Where the transferrer is liable for one year after a transfer, this liability applies only to debts created before the transfer. An action to enforce a liability against him may be brought within six years after the debt against the corporation matures. Harper *v.* Carroll, 62 Minn. 152 (1895). It is not always clear precisely when a given indebtedness may be held to have been "contracted." When a corporate note has been renewed, it is doubtful whether the renewal operates to create a new indebtedness or to continue and perpetuate that indebtedness for which the original note was given. In Ohio it is held that a renewal which is a payment or extinguishment of the debt discharges the stockholders who were bound under the old note. Wheeler *v.* Faurot, 37 Ohio St. 26 (1881). In Maine the date of the second or renewal note is taken as the time when the indebtedness accrued. Milliken *v.* Whitehouse, 49 Me. 527 (1860). In Massachusetts the debt is said to be contracted when the corporation accepts a bill of exchange. Byers *v.* Franklin Coal Co., 106 Mass. 131 (1870). *Cf.* Freeland *v.* McCullough, 1 Denio, 414, 426 (1845), holding that, in a suit upon a note given by the corporation for a debt on a simple contract, the stock-

tificates are made. But frequently there is some delay in registering the transfer in the corporate books, and in such cases the further complication arises as to who is liable for corporate debts and liabilities incurred during that interim. The rule in such cases, however, is clear. The law is well settled that the transferrer of stock is liable to corporate creditors on his statutory liability, up to the time of a registry of the transfer, to the same extent that he would be if no sale and transfer of the certificate had been made until the date of the registry. Until registry is made corporate creditors may hold the transferrer liable, as though he had not sold his stock. As to them the transfer will be deemed to have been made only at the date of the record thereof in the corporate books.[1] Such, also, is the

holders at the time the debt was contracted are the ones to be held liable. See also, in New York, Parrott *v.* Colby, 6 Hun, 55; affirmed, 71 N. Y. 597 (1877); Jagger Iron Co. *v.* Walker, 76 N. Y. 521 (1879), overruling Fisher *v.* Marvin, 47 Barb. 159 (1866); Moss *v.* Oakley, 2 Hill, 265 (1842), holding that, where stockholders at the time the debt was contracted are liable, a note given for a debt will be presumed to have been made when the debt was contracted. It has been held that the debt does not accrue, as against the stockholder, at the time judgment thereon is recovered against the corporation. See § 225 (*f*), *supra.* And as to the effect of renewals of notes on a stockholder's liability, see § 225 (*a*), *supra.* Larrabee *v.* Baldwin, 35 Cal. 155, 168 (1868). In this case Sawyer, C. J., said: "The claim of the respondent, that the judgment is itself a contract creating a new debt, within the meaning of the statute, for which all who were stockholders at the date of the rendition of the judgment are personally liable, is too absurd to require argument to refute it." Registered transferees are liable the same as their transferrers, even though before the transfer the statutory liability was decreased by statute. The liability of old creditors follows the stock. National Com. Bank *v.* McDonnell, 92 Ala. 387 (1891). *Cf.* Tracy *v.* Yates, 18 Barb. 152 (1854), holding that the transferee is not liable on prior debts; Cape's Case, 2 De G., M. & G. 562 (1852), holding that the transferee is liable for debts incurred before as well as after the transfer; McMaster *v.* Davidson, 29 Hun, 542 (1883), holding that the transferee is liable on debts contracted before he became such, but falling due after he became a stockholder. Under the Massachusetts Manufacturing Act, as re-enacted in Rhode Island, "the liability extends to all persons who were stockholders when the debt was contracted, and also to all persons who are stockholders when the liability is sought to be enforced, though they may have become such since the debt was contracted, but does not extend to persons who had become stockholders after the debt was contracted, and had ceased to be such before the debt became payable and action was brought." Sayles *v.* Bates, 15 R. I. 342 (1886). By the law of copartnership a new partner is not liable for old debts. See Lindley, Partn. *205, 208, 435 (Callaghan & Co., 1888).

1 Richmond *v.* Irons, 121 U. S. 27, 58 (1887); Irons *v.* Manufacturers' Nat. Bank, 27 Fed. Rep. 591 (1886); Man *v.* Boykin, 60 S. E. Rep. 17 (S. C. 1908); Brown *v.* Hitchcock, 36 Ohio St. 667 (1881), holding also that after the liability attaches to a stockholder it is not discharged by an assignment

rule of the English courts.[1] The corporate creditor, in determining

or transfer of the stock, but the subsequent holders of it impliedly undertake to indemnify the assignor from his liability. A stockholder who sells, but does not cause a transfer of the stock to be recorded until after a debt is incurred is liable on the statutory liability. Knickerbocker T. C. *v.* Myers, 133 Fed. Rep. 764 (1904). *Cf.* Wehrman *v.* Reakirt, 1 Cin. Super. Ct. (Ohio), 230 (1871); Jackson *v.* Sligo Mfg. Co., 1 Lea (Tenn.), 210 (1878); Shellington *v.* Howland, 53 N. Y. 371 (1873); Johnson *v.* Underhill, 52 N. Y. 203 (1873); Veiller *v.* Brown, 18 Hun, 571 (1879); Richardson *v.* Abendroth, 43 Barb. 162 (1864); Worrall *v.* Judson, 5 Barb. 210 (1849); Borland *v.* Haven, 37 Fed. Rep. 394 (1888); Dane *v.* Young, 61 Me. 160 (1872); Skowhegan Bank *v.* Cutler, 49 Me. 315 (1860); Fowler *v.* Ludwig, 34 Me. 455 (1852); Stanley *v.* Stanley, 26 Me. 191 (1846), holding that parol evidence is not admissible, as against the books of a corporation, to prove who were its stockholders in suits by creditors. A transferrer is liable not only for existing debts, but for future debts contracted before he transfers the stock on the books to another. Hence, where both the transferrer and transferee are liable, the loss falls upon the successive owners in the inverse order of their ownership in point of time; Chatham Bank *v.* Brobston, 99 Ga. 801 (1896). A transferrer is not released from statutory liability until the transfer is entered in the books. Parker *v.* Carolina, etc. Bank, 53 S. C. 583 (1898). In support of the general rule see also Price *v.* Whitney, 28 Fed. Rep. 297 (1886), holding that the executors of one whose name appears on the books as a stockholder are liable for assessment, though deceased, in his life-time, had sold the stock; but reversed on other grounds in Whitney *v.* Butler, 118 U. S. 655 (1886). The transferrer is liable on debts existing at the time of registry of the transfer. Harpold *v.* Stobart, 46 Ohio St. 397 (1889). In an action to charge a transferrer for corporate debts incurred between transfer and registry, the transferee is, in Ohio, a necessary party. Wheeler *v.* Faurot, 37 Ohio St. 26 (1881). Where a certificate of stock is transferred to the corporation itself, but is not recorded on the corporate books until after the corporation is insolvent, the transferrer is liable on the stock as though no such transfer had been made. Harper *v.* Carroll, 66 Minn. 487 (1896). A transferrer having paid the statutory liability to the receiver of a national bank cannot recover it back from him. Holt *v.* Thomas, 105 Cal. 273 (1894). A transferrer is liable on the stock until the transfer is registered in the corporate books. Powers *v.* Knapp, 71 Hun, 371 (1893), being a case of liability under a statute; Aulbach *v.* Dahler, 4 Idaho 654 (1896).

[1] Musgrave's Case, L. R. 5 Eq. 193 (1867); Walker's Case, L. R. 6 Eq. 30 (1868); McEuen *v.* West London Wharves, etc. Co., L. R. 6 Ch. App. 655 (1871); Gowers's Case, L. R. 6 Eq. 77 (1868), holding that, where shares had been forfeited by a resolution of the directors, but the names of their owners had not been removed from the register, they were contributories in winding-up proceeding instituted a year later. Humby's Case, 5 Jur. (N. S.) 215 (1859); Head's Case, L. R. 3 Eq. 84 (1866); White's Case, L. R. 3 Eq. 86 (1866); Shepherd's Case, L. R. 2 Ch. App. 16 (1866). Even though stock stands in the name of a pledgee for a short time and is then transferred back to the owner, yet the pledgee is not liable on the statutory liability for subsequent debts, even though he has not given public notice of the transfer

who are stockholders, need only show that the persons whom he sues appear as stockholders on the corporate stock-books.[1]

Different questions arise when an irregular registry of the transfer has been made, or the transferrer has done all in his power to effect a registry, or the corporation has accepted the unregistered transferee as a stockholder. These questions, however, are considered elsewhere.[2]

§ 261. *The transferee's statutory liability.*—The transferee of stock whose name has been duly entered on the stock-book as a stockholder becomes thereupon liable on the stock to corporate creditors. The registry, which operates to change the stockholder, at the same time operates to charge the transferee.[3] A statutory liability attached to stock follows the stock into the hands of a transferee, even as to a liability existing before the purchase.[4] It is immaterial that no certificate has been issued to the transferee, or that the corporation has not issued certificates to any of the stockholders.[5] Nor will the transferee be heard to allege, as defense against an action to enforce the statutory liability, that he was induced by fraudulent

by him as required by statute. Brunswick Terminal Co. *v.* National Bank, 112 Fed. Rep. 813 (1901).

1 Magruder *v.* Colston, 44 Md. 349, 356 (1875). *Cf.* Fisher *v.* Seligman, 75 Mo. 13 (1881); Adderly *v.* Storm, 6 Hill. 624 (1844); Crease *v.* Babcock, 51 Mass. 525 (1846); U. S. Trust Co. *v.* U. S. F. Ins. Co., 18 N. Y. 200, 224 (1858); Holyoke Bank *v.* Burnham, 65 Mass. 183, 187 (1853), and see § 55, *supra*. A stockholder is presumed to have continued to be a stockholder until the contrary is shown. Barron *v.* Paine, 83 Me. 312 (1891).

2 See § 258, *supra*.

3 Webster *v.* Upton, 91 U. S. 65 (1875); De Pass's Case, 4 De G. & J. 544 (1859); Cape's Case, 2 De G., M. & G. 562 (1852); Briggs *v.* Waldron, 83 N. Y. 582 (1881). *Cf.* Chesley *v.* Pierce, 32 N. H. 388 (1855); Thebus *v.* Smiley, 110 Ill. 316 (1884), to the effect that there can be but one amount for which there is liability on account of the same stock, and, the statutory double liability having been once met by an owner of the stock, his transferee takes it free from liaity. A stockholder of record in a national bank cannot set up that the transfer was made without his knowledge or consent, where he was cashier of the bank and was bound by law to know about the stock-book. Finn *v.* Brown, 142 U. S. 56 (1891). Where the certificate of stock is transferred in June, 1891, and is transferred on the books July, 1892, and about a year afterwards the national bank becomes insolvent, the transferee is liable on the statutory liability, and the transferee cannot claim that he was ignorant of the transfer and sale, when he was during this time a director and actually indorsed the transfer on the back of the certificates so issued to him. O'Connor *v.* Witherby, 111 Cal. 523 (1896). The holders of stock cannot escape the statutory liability thereon, even though when the transfer of the stock to them was made the old certificates were not canceled, but were abstracted by a corporate officer and hypothecated by him, thereby creating an over-issue. Burt *v.* Bailey, 73 Fed. Rep. 693 (1896).

4 Barton, etc. Bank *v.* Atkins, 72 Vt. 33 (1899). See 69 Atl. Rep. 765.

5 See § 258, *supra*.

representations to purchase the shares.[1] A stockholder in a national bank who was induced to become such by fraud may have his name taken from the list of stockholders except as against creditors of the bank who became such after he became a stockholder and without notice of the fraud.[2] Whether the statutory liability attaches to a stockholder, in respect of debts contracted before he became a member of the corporation, is a question turning upon the words of the statute.[3] Nevertheless, although the transferee may not be liable to others, he clearly is liable herein to his transferrer for liabilities herein which fall upon the latter.[4] A purchaser of stock may be held liable to creditors upon the liability imposed by statute, although the transfer is not recorded.[5] A statute rendering stockholders personally liable until the whole amount of the capital stock is paid in and the certificate recorded applies to subsequent purchases of the stock as well as the original subscribers.[6]

§ 262. *Liability of transferee to transferrer herein.* —A transfer of stock may be said to involve three distinct acts, all of which may take place at one and the same time, or each at a different time.

1 Oakes *v.* Turquand, L. R. 2 H. L. 325 (1867); Houldsworth *v.* City of Glasgow Bank, L. R. 5 App. Cas. 317 (1880); Tennent *v.* City of Glasgow Bank, L. R. 4 App. Cas. 615 (1879); and see ch. IX, *supra*, and §§ 163, 164, *supra*. *Cf.* Slater's Case, 35 Beav. 391 (1866). Fraud on the part of the officers in inducing the purchase is no defense to the statutory liability after the company becomes insolvent and passes into a receiver's hands. Bissell *v.* Heath, 98 Mich. 472 (1894). A transferee claiming to be defrauded is nevertheless liable on the statutory liability, where he brought a suit for damages for the fraud and recovered judgment. Such a suit is a ratification of the transfer. Stuart *v.* Hayden, 72 Fed. Rep. 402 (1895), aff'd 169 U. S. 1. It is immaterial that he was deceived by the transferrer. O'Connor *v.* Witherby, 111 Cal. 523 (1896).

2 Stufflebeam *v.* De Lashmutt, 83 Fed. Rep. 449 (1897). See also § 356, *infra*.

3 See § 259, *supra*.

4 See § 262, *infra*.

5 An unrecorded transferee was assumed to be liable on the statutory liability of stockholders, in McDowall *v.* Sheehan, 129 N. Y. 200 (1891); Powers *v.* Knapp, 71 Hun, 371 (1893). A purchaser of stock in a bank who pledges it to the bank to borrow money to pay for the stock is liable on the statutory liability on such stock, even though the stock was never transferred into his name. Foster *v.* Row, 120 Mich. 1 (1899). Although a husband indorses a certificate of stock to his wife and keeps it among his papers, yet, if she was informed that the stock was hers and received dividend checks and indorsed them, and received the money, she is liable on the statutory liability. Michigan T. Co. *v.* Comstock, 123 Mich. 689 (1900). *Cf.* § 258, *supra*.

6 Lazard, etc. *v.* Phetteplace, 26 R. I. 568 (1905). In the case Reid *v.* De Jarnette, 123 Ga. 787 (1905) the provision that stockholders shall be liable to the amount of their unpaid subscriptions and for an additional equal amount, was held to apply only to the original subscribers and not to the transferees.

There is, first, the agreement of sale, by which the right to the stock passes from the transferrer to the transferee; second, the formal transfer of the certificate of stock; third, a registry of the transfer, by an entry on the corporate transfer-book. It frequently happens that the registry is not made until some time after the agreement of sale, and that during the interim calls on the subscription are made or corporate creditors' rights attach. The law then holds liable the transferrer whose transfer has not been registered. But in reality his transferee ought to meet that liability. Hence the rule that for liabilities arising after a sale of stock, but before a registry of the same on the corporate books, the vendee is liable to the vendor when such liabilities are paid by the latter.[1] The transferrer in these cases may have recourse to the real and not the nominal transferee.[2] In case of several successive transfers, the transferrer who has paid an assessment or corporate debt may look to his immediate transferee, although there be another one in the series who will ultimately be charged.[3] A transferrer who has paid may file a bill in equity to

1 Johnson *v.* Underhill, 52 N. Y. 203 (1873); Kellogg *v.* Stockwell, 75 Ill. 68 (1874); Morse *v.* Pacific Ry., 93 Ill. App. 33 (1900); Hutzler *v.* Lord, 64 Md. 534 (1886); Brigham *v.* Mead, 92 Mass. 245 (1865); Man *v.* Boykin, 60 S. E. Rep. 17 (S. C. 1908); Walker *v.* Bartlett, 18 C. B. 845 (1856), overruling Humble *v.* Langston, 7 M. & W. 517 (1841); Grissell *v.* Bristowe, L. R. 3 C. P. 112 (1868); rev'd on another point in L. R. 4 C. P. 36; Davis *v.* Haycock, L. R. 4 Exch. 373 (1869); Bowring *v.* Shepherd, L. R. 6 Q. B. 309 (1871); Kellock *v.* Enthoven, L. R. 9 Q. B. 241 (1874); s. c., L. R. 8 Q. B. 458. The statute of limitations does not begin to run against the transferrer until the assessment is paid by him. Hutzler *v.* Lord, 64 Md. 534 (1885). So also when shares are sold for future delivery, but before the time for delivery the seller, in order to save the stock from forfeiture, is compelled to pay assessments duly levied upon it, the seller may refuse to deliver until he is repaid the amount of such assessments. Whitney *v.* Page (N. Y. Supreme Ct.), Daily Register, March 31, 1885. A transferrer who seeks recourse to his transferee for calls paid by the former after the transfer does not prove the transfer by showing a registry of the same. He must prove some act of purchase or acceptance by the transferee. Tripp *v.* Appleman, 35 Fed. Rep. 19 (1888). Where a purchaser of bank stock pays a statutory liability on said stock, he cannot recover from the vendor the amount so paid. Danielson *v.* Yoakum, 116 Cal. 382 (1897).

2 Castellan *v.* Hobson, L. R. 10 Eq. Cas. 47 (1870). But not to an intervening unregistered transferee. Shaw *v.* Fisher, 2 De G. & Sm. 11 (1848); s. c., 5 De G., M. & G. 596 (1855). See also § 253, *supra*. An unrecorded transferee who has transferred the certificate to still another party is not liable to his transferrer for calls made after the transferee had transferred to the second transferee. Brinkley *v.* Hambleton, 67 Md. 169 (1887).

3 Nickalls *v.* Eaton, 23 L. T. Rep. 689 (1871); Kellock *v.* Enthoven, L. R. 9 Q. B. 241 (1874). Or he may look to the final transferee, even though the call was made before the latter purchased. Hawkins *v.* Maltby,

compel a registry of the transfer and to obtain repayment.[1] The transferrer who is sued and held liable in a suit in equity against all stockholders may file a cross-bill and bring in the transferee, although the transfer has never been recorded on the corporate books.[2]

§§ 263–265. *A transfer to a "dummy" or to an insolvent to escape liability.*[3]—In the United States a transfer of shares in a fail-

L. R. 4 Ch. App. 200 (1869), aff'g L. R. 6 Eq. 505 s. c., L. R. 3 Ch. App. 188 (1867). Where a stockholder of record sells the certificate of stock to a broker and delivers the same indorsed in blank, and the broker transfers the same to his principal, the broker is liable to indemnify the vendor against a statutory liability which the vendor has to pay. Boultbee *v.* Gzowski, 29 Canada S. C. Rep. 54 (1898). In Lesassier *v.* Kennedy, 36 La. Ann. 539 (1884), an unregistered vendee escaped liability of indemnity to his vendor, because the vendee sold to a person to whom the transfer direct from the first vendor was made on the corporate books, but without the knowledge of the vendor. The dissenting opinions in this case are to be commended.

1 Wynne *v.* Price, 3 De G. & Sm. 310 (1849); Cheale *v.* Kenward, 3 De G. & J. 27 (1858); Morris *v.* Cannan, 4 De G., F. & J. 581 (1862); Butler *v.* Cumpston, L. R. 7 Eq. 16 (1868); Evans *v.* Wood, L. R. 5 Eq. 9 (1867); Paine *v.* Hutchinson, L. R. 3 Eq. 257 (1866); aff'd L. R. 3 Ch. App. 388; Cruse *v.* Paine, L. R. 6 Eq. 641; s. c., L. R. 4 Ch. App. 441 (1869); Shaw *v.* Fisher, 2 De G. & Sm. 11 (1848); James *v.* May, L. R. 6 H. L. 328 (1873); Allen *v.* Graves, L. R. 5 Q. B. 478 (1870), holding that, where the purchaser did not offer as transferee the name of a person to whom no reasonable objection could be made, he had not fulfilled the contract of sale and was liable for the amount of a call subsequently made, and interest, as damages; Shaw *v.* Rowley, 16 M. & W. 810 (1847), substaining an action for the price of shares sold on which a previous call had not been paid, it being held that plaintiffs could recover because they could have paid the call and transferred the stock if defendants had furnished the name of the transferee when requested. As to interest on the amount paid, see Hawkins *v.* Maltby, L. R. 6 Eq. 505 (1868); aff'd, L. R. 4 Ch. App. 200 (1869). In Ohio, under the act creating a statutory liability on the part of stockholders, transferees are liable, as between themselves and their vendors, for all indebtedness of the corporation, whether incurred before or after the transfer, "as if they had owned the stock from the organization of the company." Wheeler *v.* Faurot, 37 Ohio St. 26 (1881); Brown *v.* Hitchcock, 36 Ohio St. 667 (1881), a case wherein the question of statutory liability is very fully and satisfactorily discussed. To same effect, Cape's Case, 2 De G., M. & G. 562 (1852). That a transferrer may compel the transferee to register the transfer, see § 384, *infra*. The court will determine the liability as between the transferrer and transferee, in connection with a corporate creditors' suit, brought to enforce the stockholder's liability. Mason *v.* Alexander, 44 Ohio St. 318 (1886). Sayles *v.* Blane, 19 L. J. (Q. B.) 19 (1849), holds that a transferrer who continues to be the owner on the registry, and who has been compelled to pay calls made after the transfer, cannot recover the money so paid from the transferee upon the common count for money paid for his use.

2 Harper *v.* Carroll, 66 Minn. 487 (1896).

3 The cases in this section refer to

ing concern, made by the transferrer with the intention and for the purpose of escaping liability as a stockholder, to a person who for any cause is incapable of responding in respect of such liability, is voidable, both as to creditors of the company and as to other stockholders; and that, too, although as between the transferrer and transferee the transaction may have been absolute and no secret trust involved.[1] Where a stockholder knows the corporation is in-

instances where a person transfers stock from his own name to that of a "dummy." An entirely different class of cases exists where the person really interested buys stock or subscribes for stock in the name of a "dummy," and the name of the real owner never appears on the corporate books. The latter class of cases is considered in § 253, *supra*.

1 Cited in McDonald *v.* Dewey, 202 U. S. 510 (1906) and quoted and approved in National, etc. Co. *v.* Story, etc. Co., 111 Cal. 531 (1896); Ward *v.* Joslin, 100 Fed. Rep. 676 (1900); aff'd 186 U. S. 142; Nathan *r.* Whitlock, 3 Edw. Ch. (N. Y.) 215 (1838); s. c., 9 Paige, 152 (1841); Wishard *v.* Hansen, etc. Co., 99 Iowa, 307 (1896); Rider *v.* Fritchey, 49 Ohio St. 285 (1892). An officer of a national bank who knows that it is insolvent and transfers stock to various insolvent people may be held liable on the stock, although the bank does not actually fail for two years thereafter. McDonald *v.* Dewey, 202 U. S. 510 (1906). Where an insolvent Kansas corporation transfers all its assets to a Missouri corporation, and at the same time all the stock of the former is transferred to the latter, the transaction is *ultra vires* and fraudulent, and the statutory liability of the stockholders in the Kansas corporation continues. Anglo-American, etc. Co. *v.* Lombard, 132 Fed. Rep. 721 (1904). A stockholder who transfers his stock to an insolvent person, the corporation being insolvent and the purpose being to avoid liability on the unpaid subscription will be held liable, even though the transferee has transferred the stock to still another insolvent person. People's, etc. Bank *v.* Rickard, 139 Cal. 285 (1903). A stockholder who sells his stock to an irresponsible person, and takes notes in payment secured by the stock, will be held liable on the unpaid subscription. Gillett *v.* Chicago Title & T. Co., 82 N. E. Rep. 891 (Ill. 1907). A transferrer may be held liable herein though the transfer of the certificate was made long previous, but registered only shortly before insolvency, and though all parties acted in good faith. Richmond *v.* Irons, 121 U. S. 27, 58 (1887); Veiller *v.* Brown, 18 Hun, 571 (1879); McClaren *v.* Franciscus, 43 Mo. 452 (1869); Miller *v.* Great Republic Ins. Co., 50 Mo. 55 (1872), holding, however, that if a sale and transfer be made honestly and without intent to defraud the creditors of the corporation, the fact that the purchaser is insolvent will not render the vendor liable; Provident Sav. Inst. *v.* Jackson Place, etc. Rink, 52 Mo. 557 (1873); Chouteau Spring Co. *v.* Harris, 20 Mo. 382 (1855); Mandion *v.* Firemen's Ins. Co. 11 Rob. (La.) 177 (1845), where the transfer was a gift; *Re* Bachman, 12 Nat. Bankr. Reg. 223 (1875); s. c., 2 Fed. Cas. 310; Marcy *v.* Clark, 17 Mass. 330 (1821); Central Agric. etc. Assoc. *v.* Alabama, etc. Ins. Co., 70 Ala. 120 (1881); Gaff *v.* Flesher, 33 Ohio St. 107 (1877); Dauchy *v.* Brown, 24 Vt. 197 (1852); Aultman's Appeal, 98 Pa. St. 505 (1881). In the last case one who held stock as collateral security and surrendered it, after the company's insolvency, to the company, which issued a new cer-

solvent and transfers his stock voluntarily and without consideration and out of the ordinary course of business to an irresponsible transferee, the transfer is void as against corporate creditors without proof that the intent was to escape liability.[1] However, if a stockholder in a national bank sells his stock three weeks before the bank goes into a receiver's hands, yet, if he swears that he sold the stock in good faith without knowledge or suspicion that the bank was insolvent or likely to become insolvent, or that the purchaser of the stock was insolvent, and there is no evidence to the contrary, he is not liable on the stock unless proof to the contrary is given.[2] A stockholder in an insolvent national bank

tificate to the former owners, was held responsible to the creditors of the company. Everhart *v.* West Chester, etc. R. R., 28 Pa. St. 339 (1857); Rider *v.* Morrison, 54 Md. 429 (1880); Paine *v.* Stewart, 33 Conn. 516 (1866); Bowden *v.* Santos, 1 Hughes, 158 (1877); s. c., 3 Fed. Cas. 1034; Wehrman *v.* Reakirt, 1 Cin. Super. Ct. (Ohio), 230 (1871); Bowden *v.* Johnson, 107 U. S. 251 (1882); Davis *v.* Stevens, 17 Blatchf. 259 (1879); s. c., 7 Fed. Cas. 177. *Cf.* Allen *v.* Montgomery R. R., 11 Ala. 437 (1847); Billings *v.* Robinson, 28 Hun, 122 (1882); aff'd 94 N. Y. 415 (1884). It is also held that the owner of stock cannot escape liability by transferring it to his infant children, or by taking it originally in their names. See § 250, *supra.* It has been held, also, that no transfer made in anticipation of a judgment against the corporation, and for the purpose of escaping liability, is valid, and stockholders who make such a transfer will be held liable. McClaren *v.* Franciscus, 43 Mo. 452 (1869); Marcy *v.* Clark, 17 Mass. 330 (1821). Where a transfer is merely colorable, with a secret trust in favor of the transferrer, the transferrer is still liable. Sinclair *v.* Dwight, 9 N. Y. App. Div. 297 (1896), a dictum, aff'd on other points in 158 N. Y. 607. Although creditors may object to an assignment of stock to an irresponsible party after the corporation has become insolvent, yet the corporation itself cannot object and sue the transferrer, where the corporation has accepted the transfer and issued new stock to the transferee, even though the latter is irresponsible. Rochester, etc. Co. *v.* Raymond, 4 N. Y. App. Div. 600 (1896); aff'd 158 N. Y. 576. A transfer to a dummy does not relieve the transferrer from liability to corporate creditors, even though the transfer was made before the corporate debts were incurred. Pioneer Fuel Co. *v.* St. Peter, etc. Co., 64 Minn. 386 (1896).

[1] Welch *v.* Sargent, 127 Cal. 72 (1899).

[2] Earle *v.* Carson, 188 U. S. 42 (1903). The basis on which a stockholder is held liable for transferring his stock with intent to evade liability is fraud, implied in selling with notice of insolvency of the corporation, and with intent to evade liability and the fact that the sale is to an insolvent person is proof of such fraud, but not sufficient proof unless it is proved that the party knew that the corporation was insolvent. McDonald *v.* Dewey, 202 U. S. 510 (1906). A stockholder in a national bank may donate his stock to his children by putting it in trust for them, and he is not then liable on the stock where it is clear that his acts were not for the purpose of avoiding liability. Fowler *v.* Gowing, 152 Fed. Rep. 801 (1907). Under the New York Banking Act a transferrer of stock in an

cannot avoid the liability thereon by transferring his stock with intent to avoid that liability, knowing or having reason to believe, at the time of a transfer on the books of the bank, that it is insolvent or about to fail. The receiver may treat the person so transferring his stock as the real stockholder, without reference to whether the transferee is solvent or not.[1] On the other hand, if a national bank is able to meet its obligations at the time of the transfer of stock, the transferrer is no longer liable on the statutory liability, even though his motive may have been to escape liability on the stock.[2] If, however, the transfer was made to an irresponsible person, it is immaterial as to whether the transferrer knew of the insolvency of the bank or not.[3] Where a national bank is insolvent, and a stockholder transfers his stock to an irresponsible person, both the transferrer and the transferee are liable.[4] In Nebraska a receiver may join both the transferrer and transferee in a suit to set aside the transfer as fraudulent, and to hold the transferrer liable; but if the transferee is held liable the transferrer cannot be.[5] If the transfer is *bona fide,* and the transferrer is ignorant of the insolvency of the transferee, and the company is not insolvent, the transfer is effectual,

insolvent bank is liable on the statutory liability, even though he made the transfer in good faith. Persons *v.* Gardner, 113 N. Y. App. Div. 597 (1906); aff'd 188 N. Y. 571.

1 Stuart *v.* Hayden, 169 U. S. 1 (1898); aff'g 72 Fed. Rep. 402, holding also that in such a suit a cross-bill of the transferee for a rescission on the ground that he was defrauded cannot be tried in that suit. Where the real owner of stock in a national bank transfers it to another person, or causes it to be placed in the name of another person, to avoid the liability to creditors under the national bank act, such real owner may be held liable on such stock. Pauly *v.* State, etc. Co., 165 U. S. 606 (1897). Where a stockholder in a failing national bank transfers his stock without consideration to his children, and the bank fails within five months, the transferrer is liable on the statutory liability, and the transferees are also liable. Foster *v.* Lincoln, 74 Fed. Rep. 382 (1896). Where a national bank, although not supposed to be insolvent, may not be able to stand a run which has commenced, a stockholder cannot give away or transfer his stock to his children and avoid the liability. Foster *v.* Lincoln, 79 Fed. Rep. 170 (1897). In proving that the transferrer knew the bank was insolvent, it is enough to show that he had good ground to apprehend the failure and made the transfer to relieve himself of liability. Cox *v.* Montague, 78 Fed. Rep. 845 (1897). Where a stockholder knows the corporation is insolvent and transfers his stock to avoid liability, he continues liable. May *v.* Ullrich, 132 Mich. 6 (1902).

2 Stuart *v.* Hayden, 169 U. S. 1 (1898).

3 Stuart *v.* Hayden, 169 U. S. 1 (1898), *contra;* Sykes *v.* Holloway, 81 Fed. Rep. 432 (1897).

4 Baker *v.* Reeves, 85 Fed. Rep. 837 (1898).

5 Morrill *v.* Crawford, 51 Neb. 284 (1897). Both the real owner of stock and the nominal holder of record of stock, or either of them, may be held liable on the unpaid subscription price of such stock. Dunn *v.* Howe, 107 Fed. Rep. 849 (1901).

and the transferrer is released from liability.[1] Even though a bank is insolvent, yet, if a stockholder does not know of that fact, a transfer of stock by him is legal, even though such transfer is to a non-resident.[2] Even though a stockholder in a national bank has sold and transferred his stock to avoid liability and the transferees are irresponsible he is not liable to creditors who became such after the date of the transfer.[3] A stockholder in an insolvent corporation may sell and transfer his stock to another person for the purpose of avoiding liability as to future debts of the corporation. The rule prohibiting such transfers applies only to debts existing at the time of the transfer.[4] Where a person transfers his stock regularly on the books to another person who is solvent, corporate creditors who become such after the transfer cannot have recourse to the transferrer on the statutory liability, even though the transferee becomes insolvent.[5] A person selling stock in an insolvent bank to evade liability is not liable if the purchaser is solvent, but the burden of proof is on the transferrer to prove that fact.[6] The creditor's remedy to enforce the liability of a stockholder who has fraudulently assigned or transferred his stock may be in a court of equity,[7] or at

1 Miller *v.* Great Republic Ins. Co., 50 Mo. 55 (1872). See also Cole *v.* Ryan, 52 Barb. 168 (1868). *Cf.* Billings *v.* Robinson, 94 N. Y. 415 (1884); s. c., 28 Hun, 122 (1882). A stockholder who promises a corporate creditor, at the time when the company's affairs are involved, that he will not transfer, thereby inducing him not to sue to collect his debt, is liable to such creditor in case he does transfer. Paine *v.* Stewart, 33 Conn. 516 (1866). But a transfer will be held valid, it seems, when it is made pursuant to an antecedent option agreement, although the final transfer is really made in order to avoid liability. Holyoke Bank *v.* Burnham, 65 Mass. 183 (1853); Magruder *v.* Colston, 44 Md. 349 (1876). *Cf.* Chapman *v.* Shepherd, L. R. 2 C. P. 228 (1867), under the English statute.

2 Foster *v.* Row, 120 Mich. 1 (1899).

3 McDonald *v.* Dewey, 202 U. S. 510 (1906).

4 Sinclair *v.* Dwight, 9 N. Y. App. Div. 297 (1896); aff'd 158 N. Y. 607. It is legal for a stockholder in an insolvent corporation to transfer his stock to an insolvent for the purpose of avoiding liability on the stock to future corporate creditors. Peter *v.* Union, etc. Co., 56 Ohio St. 181 (1897). Where a director must be a stockholder and there is a statutory liability attached to the directorship, the director may transfer his stock in order to cease to be a director and in order to avoid such liability. Sinclair *v.* Fuller, 158 N. Y. 607 (1899). A gift and transfer of stock in a bank before the bank becomes insolvent relieves the transferrer from the statutory liability on such stock. Foster *v.* Row, 120 Mich. 1 (1899).

5 Merrill *v.* Meade, 6 Kan. App. 620 (1897).

6 McDonald *v.* Dewey, 202 U. S. 510 (1906).

7 Hedlund *v.* Dewey, 105 Fed. Rep. 541 (1900); Johnston *v.* Southwestern R. R. Bank, 3 Strobh. Eq. (S. C.) 263, 295 (1848). A receiver of a national bank may sue in the federal courts to ascertain and fix the liability on stock which has been transferred to avoid liability where the amount involved is over $2,000. Thompson *v.*

law.[1] Where national bank stock has been transferred in order to avoid the liability thereon, a bill in equity lies to hold the transferrer liable, even though it is admitted that the transfer was illegal.[2] The state statute of limitations begins to run against an assessment of the comptroller on national bank stock from the time the assessment is due, and the same length of time will be a bar to a suit in equity, even as against the party who transferred the stock to an irresponsible person in order to avoid liability.[3] Questions relative to liability where a stock is placed in the names of "dummies" originally, without ever having been in the names of the real owners, are considered elsewhere.[4]

§ 266. *The rule in England.*—The rule in England is that a stockholder may transfer his shares when the company is in a failing condition, to a man of straw for a nominal consideration, even though the sole purpose of such a transfer be to escape liability. If the transfer be out and out, and not merely colorable and collusive, with a secret trust attached, it is valid, and the transferrer is thereby released from liability, both as to corporate creditors and the other stockholders.[5] But if the transfer is merely colorable, and there

German, etc. Co., 76 Fed. Rep. 892 (1896). Where the chief part of an action against the transferrer of stock to enforce his subscription liability is to set aside a transfer and release, equity has jurisdiction. Wyman *v.* Bowman, 127 Fed. Rep. 257 (1904). A judgment creditor of a corporation may hold liable for unpaid subscription a stockholder who has transferred his stock to an insolvent person, known so to be, and the suit may be in equity. Hall & Farley *v.* Alabama, etc. Co., 143 Ala. 464 (1905).

1 A person who has transferred his stock in an insolvent corporation for the purpose of avoiding the statutory liability may be held liable on such liability, even in an action at law, and the fraudulent transfer may be shown in such an action. Lamson *v.* Hutchings, 118 Fed. Rep. 321 (1902). A suit against the transferrer, the transfer being in fraud of creditors, is at law and not in equity. Anglo-American, etc. Co. *v.* Lombard, 132 Fed. Rep. 721 (1904).

2 Zimmerman *v.* Carpenter, 84 Fed. Rep. 747 (1898).

3 Thompson *v.* German, etc. Co., 77 Fed. Rep. 258 (1896).

4 See § 253, *supra.*

5 Cited in McDonald *v.* Dewey, 202 U. S. 510 (1906). See also De Pass's Case, 4 De G. & J. 544 (1859); Weston's Case, L. R. 4 Ch. App. 20 (1868); Harrison's Case, L. R. 6 Ch. App. 286 (1871); Masters's Case, L. R. 7 Ch. App. 292 (1872); Hakim's Case, L. R. 7 Ch. App. 296, n. (1869); Bishop's Case, L. R. 7 Ch. App. 296, n. (1869); Williams's Case, L. R. 1 Ch. D. 576 (1875); King's Case, L. R. 6 Ch. App. 196 (1871); Chynoweth's Case, L. R. 15 Ch. D. 13 (1880); Jessopp's Case, 2 De G. & J. 638 (1858); *Re* Taurine Co., L. R. 25 Ch. D. 118 (1883); Moore *v.* McLaren, 11 U. C. (C. P.) 534 (1862); Battie's Case, 39 L. J. (Ch.) 391 (1870). *Cf.* Bunn's Case, 2 De G., F. & J. 275 (1860). Thus, in De Pass's Case, 4 De G. & J. 544 (1859), the facts were that De Pass, owning two hundred and fifty shares of stock in the Mexican &

exists a secret trust in favor of the transferrer, so that as between the parties there has been no *bona fide* transfer, but the object is to secure the stock to the transferrer in the event that the concern becomes prosperous, and to leave them to the transferee if there is a winding up, the transferrer's name will be put in the list of contributories, and the pretended transfer be wholly ignored.[1]

The right to transfer shares in England seems to exist up to the time the company is ordered to be wound up and the business is sus-

South American Company, for which he had paid £1,750, upon learning that the concern was involved, handed the certificate to his clerk, without having previously spoken to him of the matter, saying that he might have the stock for a sovereign, which the clerk instantly paid, and at the same time accepted the shares. In about three weeks this clerk sold the shares to another person in the employ of De Pass. Upon the winding up of the company, which was ordered within a few days after the sale by De Pass to his clerk, although it was shown that the shares at the time of that sale were worth considerably more than a sovereign, still, inasmuch as the transaction appeared to have been absolute, although confessedly made to escape possible liability, it was held that the transfer might stand, and that De Pass was not liable in respect to the shares after the date of the sale to the clerk. In Masters's Case, L. R. 7 Ch. App. 292 (1872), a transfer of two hundred and eighty shares of stock on which £15 per share had been paid, for a nominal consideration, to an irresponsible son-in-law of the transferrer, the transfer being made only for the purpose of escaping liability upon the shares, was held to discharge the transferrer. A transfer by a director in a failing corporation to avoid liability is void. *Re* South London, etc. Co., L. R. 39 Ch. D. 324 (1888).

1 Budd's Case, 3 De G., F. & J. 297 (1861); Payne's Case, L. R. 9 Eq. 223 (1869); Kintrea's Case, 39 L. J. (Ch.) 193 (1869); s. c., L. R. 5 Ch. App. 95; Chinnock's Case, Johns. (Eng. Ch.) 714 (1860); Costello's Case, 2 De G., F. & J. 302 (1860); Hyam's Case, 1 De G., F. & J. 75 (1859); Lund's Case, 27 Beav. 465 (1859); *Ex parte* Bennett, 18 Beav. 339 (1854); Daniell's Case, 22 Beav. 43 (1856); Eyre's Case, 31 Beav. 177 (1862); Munt's Case, 22 Beav. 55 (1856); Bank of Michigan *v.* Gray, 1 U. C. (Q. B.) 422 (1834); Cox's Case, 33 L. J. (Ch.) 145 (1864); s. c., 4 De G., J. & S. 53; Williams's Case, L. R. 9 Eq. 225, n. (1869); Capper's Case, L. R. 3 Ch. App. 458 (1868); Mann's Case, L. R. 3 Ch. App. 459, n. (1867); *Ex parte* Hatton, 31 L. J. (Ch.) 340 (1862); Pugh's Case, L. R. 13 Eq. 566 (1872); Lankester's Case, L. R. 6 Ch. App. 905, n. (1870); Gilbert's Case, L. R. 5 Ch. App. 559 (1870). *Cf.* Mitchell's Case, L. R. 9 Eq. 363 (1870); Slater's Case, 35 Beav. 391 (1866); Castellan *v.* Hobson, L. R. 10 Eq. 47 (1870); Maynard *v.* Eaton, L. R. 9 Ch. App. 414 (1874); Colquhoun *v.* Courtenay, 43 L. J. (Ch.) 338 (1874); 29 L. T. Rep. 877; Richardson's Case, L. R. 19 Eq. 588 (1875). A transfer to an irresponsible person of stock in a failing corporation does not release the transferrer from his subscription liability, it appearing that the transferrer intended to protect the transferee, and that the transaction was really a nullity. *Re* Discoverers, etc. Corp. Ltd., 97 L. T. Rep. 757 (1907), distinguishing De Pass's Case, 4 De G. & J. 544.

pended.[1] But after that time the right is gone, and it is the duty of the management to refuse to allow a transfer.[2] Any collusion between the stockholders and the directors to evade the rules governing transfers, for the purpose of evading liability, will invalidate a transfer.[3] Persons to whom shares have been transferred without their knowledge or assent are not estopped, when the knowledge is brought to them, from repudiating and denying the stockholdership.[4]

1 De Pass's Case, 4 De G. & J. 544 (1859), and the cases generally in the preceding notes.

2 Mitchell's Case, L. R. 4 App. Cas. 548 (1879); Weston's Case, L. R. 4 Ch. 20, 30 (1868); *Ex parte* Parker, L. R. 2 Ch. App. 685 (1867); Chappell's Case, L. R. 6 Ch. 902 (1871). See also § 872, *infra*. In this country directors have in general no power to refuse or prevent transfers, such as inheres in the boards of management in English companies. See §§ 622, 641, *infra*.

3 Eyre's Case, 31 Beav. 177 (1862); Bennett's Case, 5 De G., M. & G., 284 (1854). A director will not be allowed to make use of his position as director to transfer his stock, and thus escape chargeability upon it. Munt's Case, 22 Beav. 55 (1856). Nor will a stockholder be allowed to relieve himself, when he learns of the probable insolvency of the concern, by inducing the directors to postpone their application for an order to wind up until he have time to transfer his shares to a pauper or other irresponsible person. *Ex parte* Parker, L. R. 2 Ch. App. 685 (1867); Gilbert's Case, L. R. 5 Ch. App. 559 (1870); Allin's Case, 16 Eq. 449 (1873). And a director who transfers shares standing in his name to a person already holding all the shares any one person is allowed to hold will not thereby escape liability. *Ex parte* Brown, 19 Beav. 97 (1854). In general, moreover, a transferrer is not exempt from liability by reason of a transfer, unless the transferee has the present capacity to assume the liability. Nickalls *v.* Merry, L. R. 7 H. L. 530 (1875); Brown *v.* Black, L. R. 8 Ch. App. 939 (1873); Mann's Case, L. R. 3 Ch. App. 459, n. (1867). *Cf.* Johnson *v.* Laflin, 5 Dill. 65, 81 (1878); s. c., 13 Fed. Cas. 758, 764; aff'd, 103 U. S. 800 (1880); *Re* Reciprocity Bank, 22 N. Y. 9 (1860). Accordingly a transfer to an infant for the purpose of escaping liability is futile. Symons's Case, L. R. 5 Ch. App. 298 (1870); Weston's Case, L. R. 5 Ch. 614 (1870); Curtis's Case, L. R. 6 Eq. 455 (1868); Castello's Case, L. R. 8 Eq. 504 (1869); Walsh *v.* Union Bank, 5 Quebec L. R. 298 (1879).

4 Birch's Case, 2 De G. & J. 10 (1857); Fox's Case, 3 De G., J. & S. 465 (1863); Higgs's Case, 2 Hem. & M. 657 (1865); Somerville's Case, L. R. 6 Ch. App. 266 (1871). *Cf.* Bullock *v.* Chapman, 2 De G. & Sm. 211 (1848). And see also *Re* Reciprocity Bank, 22 N. Y. 9 (1860). Sigua, etc. Co. *v.* Greene, 88 Fed. Rep. 207 (1898). A colorable transfer, as has appeared, will not operate to discharge the transferrer where shares were collusively assigned to a servant for the purpose of evading liability. Hence when the servant, upon the concern becoming solvent, attempted to claim the shares as though the transfer had been out and out, the court having previously decided against the *bona fides* of the transaction, it was held that the owner was entitled to a declaration that the servant held the shares in trust for him. Colquhoun *v.* Courtenay, 43 L. J. (Ch.) 333 (1874); 29 L. T. Rep. 877. As to a transfer made in ignorance of the fact that a winding up has been commenced, see Emmerson's Case, L. R. 1 Ch. App. 433 (1866).

CHAPTER XVI.

ISSUE OF PREFERRED STOCK AND STOCK UPON WHICH INTEREST IS GUARANTEED.

§ 267. What is preferred stock?
268. When may a corporation issue preferred stock?
269, 270. Rights of preferred stockholders—Amount of preference — Voting — Subsequent leases, consolidations, etc.
271. Preferred stockholders are not creditors—Dividends can be only from profits—Mortgages securing preferred stock.
272. What are net profits applicable to preferred dividends—The preferred stockholder's remedy to enforce a dividend.
§§ 273, 274. Arrears of preferred stock, to what extent payable subsequently—Remedies to enforce payment of arrears.
275. Rights of the assignee or transferee of preferred stock in arrears of dividends.
276. "Special stock" in Massachusetts.
277. Interest-bearing stocks.
278. Rights of preferred stockholders on dissolution and on a reduction of the capital stock.

§ 267. *What is preferred stock?*—By preferred stock is to be understood stock which entitles the holder to receive dividends from the earnings of the company before the common stock is paid a dividend from such earnings.[1] In other words, it is stock entitled to dividends from the income or earnings of the corporation before any other dividend is paid.[2] The relation of debtor and creditor does not exist between the preferred stockholders and the corporation, and the right to a preferred or guaranteed dividend is not a debt until the dividend is declared. A dividend is money paid out of profits by a corporation to its stockholders. A preferred dividend is nothing more than that which is paid to one class of stockholders in priority to that to be paid to another class.[3] Guaranteed stock is

1 Totten *v.* Tison, 54 Ga. 139 (1875).

2 Chaffee *v.* Rutland R. R., 55 Vt. 110 (1882).

3 Belfast, etc. R. R. *v.* Belfast, 77 Me. 445 (1885); Taft *v.* Hartford, etc. R. R., 8 R. I. 310, 333 (1866); Chaffee *v.* Rutland, etc. R. R., 55 Vt. 110 (1882). A preferred dividend has also been defined as "substantially interest chargeable exclusively on profits." Henry *v.* Great Northern Ry., 1 De G. & J. 606, 637 (1857); Crawford *v.* North Eastern, etc. R. R., 3 Jur. (N. S.) 1093 (1856). The preferred stockholder is one who may say: "Nobody shall have any portion of the profits of the company until I have been paid my dividend." Henry *v.* Great Northern Ry., 4 Kay & J., 1, 32 (1857); aff'd, 1 De G. & J. 606. A preferred dividend is said to be "a pledge of the funds legally applicable to the purposes of a dividend." Taft *v.* Hartford, etc. R. R., 8 R. I. 310, 335 (1866). "Payment of dividends to preferred stockholders differs from

the same thing as preferred stock,[1] except of course where one corporation guarantees dividends on the stock of another corporation.[2] Founders' shares are a species of preferred or deferred stock, peculiar to England.[3]

§ 268. *When may a corporation issue preferred stock?*—Upon the incorporation of a company the incorporators and stockholders may agree that a part of the stock shall be preferred stock. This is generally done by a by-law or resolutions. It is undoubtedly legal, since there is no rule of public policy that forbids it, and it amounts only to a contract of the stockholders as to how they shall divide the profits among themselves.[4]

such payment to the holders of common stock only in that they are entitled to dividends in priority to any dividends upon the common stock." Miller *v.* Ratterman, 47 Ohio St. 141, 158 (1890). Stock issued as "preferred debenture shares of the capital stock" under the New York statute is a legal contradiction on its face, and in regard to taxation will be construed as being preferred stock. People *v.* Miller, 180 N. Y. 16 (1904). Preferred stock under the New Jersey statute does not differ from the common stock in regard to the liability to calls for the unpaid subscription price in order to pay creditors. Kirkpatrick *v.* American, etc. Co., 140 Fed. Rep. 186 (1905).

1 Taft *v.* Hartford, etc. R. R., 8 R. I. 310, 333, 335 (1866); Field *v.* Lamson, etc. Co., 162 Mass. 388 (1894); Henry *v.* Great Northern Ry., 4 Kay & J., 1, 12, 21 (1857); aff'd, 1 De G. & J. 606; Lockhart *v.* Van Alstyne, 31 Mich. 76 (1875). "Whether the stock is to be called interest-bearing stock, preferred stock, or guarantied stock makes no difference, as the terms, when applied to shares of stock, mean practically the same thing." Cratty *v.* Peoria, etc. Ass'n, 219 Ill. 516 (1906). A guaranteed dividend differs in nothing from a preferred dividend. Miller *v.* Ratterman, 47 Ohio St. 141 (1890). *Cf.* Boardman *v.* Lake Shore, etc. Ry., 84 N. Y. 157, 174 (1881), holding that the word "guaranteed" made the dividends cumulative. See §§ 273, 274, *infra*.

2 See § 775, *infra*.

3 See § 14, *supra*.

4 Coltraine *v.* Blake, 113 Fed. Rep. 785 (1902); Hamlin *v.* Toledo, etc. R. R. 78 Fed. Rep. 664 (1897); Hazelhurst *v.* Savannah, etc. R. R., 43 Ga. 13 (1871); Synnott *v.* Cumberland, etc. Assoc., 117 Fed. Rep. 379 (1902). A corporation may guarantee dividends on its stock. Wisconsin Lumber Co. *v.* Greene, etc. Co., 127 Iowa, 350 (1904). A building and loan association may issue preferred stock. Wilson *v.* Parvin, 119 Fed. Rep. 652 (1903). A telephone company may issue stock, the dividend to consist of a right to a pass for messages over its lines. Wisconsin Lumber Co. *v.* Greene, etc. Co., 127 Iowa, 350 (1904). Where there are but a few stockholders in a corporation and without any formal corporate action they turn a part of the capital stock into preferred stock and thereafter divide the profits among themselves without declaring technical dividends with the knowledge and consent of all the stockholders, no one of them nor the corporation itself can subsequently complain and defeat a suit by one of them for the amount so credited to him on the books, corporate creditors not being injured. Breslin *v.* Fries-Breslin Co., 70 N. J. L. 274 (1904). The court said: "In the present case we apply this doctrine to the non-ob-

But after the corporation has been organized, with common stock only, and the stock issued in whole or in part, and business commenced and money invested in stock, it is then too late to make the unissued stock preferred stock, or to increase the capital stock and issue preferred stock, unless all the stockholders assent thereto, or a

servance of legal forms respecting the creation of preferred stock, the abandonment by preferred stockholders of voting powers, the resignation of directors, the reduction of the number of directors from six to three, and the apportionment of dividends as between the stockholders entitled thereto. In respect to these matters the jury was fully justified in finding that unanimous consent of the stockholders of the defendant company had been given, and had been acted on in good faith by the plaintiff and others concerned during a course of years, and that plaintiff could not be restored to the *status quo ante*, were the assent of his fellow stockholders and of the company to be now withdrawn." Where a corporation issues its stock in payment of a debt and guarantees certain dividends thereon, and afterwards repudiates the guarantee as *ultra vires*, the stockholder may return the stock and sue for the money he paid therefor. McVity *v.* Albro Co., 90 N. Y. App. Div. 109 (1904); aff'd, 180 N. Y. 554. In the case of Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497, 531 (1899), the court said, in regard to the legality of issuing preferred stock where the statutes were silent on the subject, "such an agreement is nothing more than a contract between stockholders as to how they shall divide the corporate property and profits, and, if not prohibited, is clearly within the general powers of such corporators. It is difficult to see how such an arrangement is of the slightest consequence to the public, or to creditors of the corporation. It does not withdraw the property from the demands of creditors, and provides only for the division among those who are the beneficial owners of the corporate property, after the payment of corporate obligations." The case *Re* South Durham Brewery Co., L. R. 31 Ch. D. 261 (1885), clearly holds that, although the charter and statutes are silent on the subject, yet that the by-laws may provide for the issue of preferred stock, and, this provision being in the original by-laws, a stockholder cannot enjoin a subsequent issue of the stock; approving Harrison *v.* Mexican Ry., L. R. 19 Eq. 358 (1875). Judge Cooley, in the case of Lockhart *v.* Van Alstyne, 31 Mich. 76, 81, 85 (1875), said, in reference to the issues of preferred stock, even though the issues are not provided for by charter or statute, "there can be no reasonable objection to them if they are entered into with full knowledge on the part of all concerned. . . . The guaranty, properly construed, is not void, but unobjectionable." In Kent *v.* Quicksilver Min. Co., 78 N. Y. 159 (1879), affirming 17 Hun, 169, the court said: "We know nothing in the constitution or the law that inhibits a corporation from beginning its corporate action by classifying the shares in its capital stock, with peculiar privileges to one share over another, and thus offering its stock to the public for subscriptions thereto. No rights are got until a subscription is made. Each subscriber would know for what class of stock he put down his name, and what right he got when he thus became a stockholder. There need be no deception or mistake; there would be no trenching upon rights previously acquired; no contract, express or implied, would be broken or impaired." The same question has recently arisen in the United States courts, and the court there held

statute authorizes such issue. It would be a breach of contract to issue preferred stock then, inasmuch as the existing stockholders in-

that a stockholder who participated in the issue cannot, after two years, when the corporation is insolvent, say that the statutes of the state authorized the issue of common stock only. Banigan *v.* Bard, 134 U. S. 291 (1890), aff'g Bard *v.* Banigan, 39 Fed. Rep. 13. Although the banking law of New York provides only for instalment stock for building associations, yet the parties interested may provide for prepaid and income stock as well as instalment stock. People *v.* Preston, 140 N. Y. 549 (1894). Preferred stock may be issued without statutory authority. Havemeyer *v.* Bordeaux Co., 8 Nat. Corp. Rep. 127 (Ill. C. C., 1894). After the lapse of twenty years, the creation of preferred stock cannot be attacked by a stockholder. Higgins *v.* Lansingh, 154 Ill. 301 (1895). A corporate creditor cannot object to the issue of preferred stock so long as it is fully paid for, even though such stock was made preferred stock by agreement of the stockholders and not in accordance with any statute. First, etc. Bank *v.* Peoria Watch Co., 191 Ill. 128 (1901). The highest authority in England, Lindley on Companies (Eng. 1902), p. 550, says: "Shares conferring on their holders preferential or additional rights not enjoyed by the holders of other shares are called preference shares. They can only be created when the authority to create them is given by statute or charter, or by agreement between all parties interested." If, however, authority to issue them is given by a company's memorandum of association, or by its articles of association as originally framed, preference shares may be issued. If all assent the issue is legal. *Re* Bridgewater Nav. Co., L. R. 39 Ch. D. 1 (1888); McGregor *v.* Home Ins. Co., 33 N. J. Eq. 181 (1880). In Bates *v.* Androscoggin, etc. R. R., 49 Me. 491 (1860), preferred stock was issued by unanimous consent, but without express statutory authority. Preferred stock was issued without statutory authority in Gordon *v.* Richmond, etc. R. R., 78 Va. 501 (1884). In Sturge *v.* Eastern Union Ry., 7 De G., M. & G. 158 (1855), the court declined to pass upon the question whether, at common law, it was legal for a corporation to issue preferred stock. In England a stock dividend of preferred stock may be enjoined by any stockholder, inasmuch as any stock dividend may be objected to. In America the rule is different. See ch. XXXII, *infra*. Where a person bought new preference stock of a railway company which both he and the directors *bona fide* believed the company had power to issue, but which, in truth, it had not, it was held that he had no remedy against them, for there was nothing more than a common mistake of law. Eaglesfield *v.* Londonderry, L. R. 4 Ch. D. 693 (1876); aff'd (H. L.), 26 W. R. 540. It is no defense to a subscription for stock that the company had secretly agreed with certain subscribers to give them a preferred dividend. Such an agreement is void as regards another subscriber who did not assent thereto. Ryder *v.* Alton, etc. R. R., 13 Ill. 516 (1851). In the case of Bigbee, etc. Co. *v.* Moore, 121 Ala. 379 (1899), the court sustained a by-law whereby stockholders in a steamboat company each put a boat into the service of the company and each was to draw dividends on his stock only so long as his boat remained fit for service, such dividend to cease upon the boat becoming unfit for service until it was repaired by the owner. Even though the preference given by preferred stock is illegal, yet the stock itself may be valid as common stock. Forwood *v.* Eubank, 106 Ky. 291 (1899).

vested their money on the basis of common stock only. Hence a dissenting stockholder may enjoin the corporation, the directors, and the majority of stockholders from issuing preferred stock in such a case.[1]

Preferred stock is not legal in building associations. Sumrall *v.* Commercial Bldg. etc., 106 Ky. 260 (1899); Forwood *v.* Eubank, 106 Ky. 291 (1899). *Contra*, 119 Fed. Rep. 652. Where a joint-stock association having $12,000,000 surplus invested in securities, issues its bonds to the amount of $12,000,000 to its stockholders as a dividend in place of distributing such securities or the proceeds thereof, the interest on the bonds to be paid only from the income from the securities after paying the debts, such bonds do not belong to a life tenant, but belong to the remaindermen. D'Ooge *v.* Leeds, 176 Mass. 558 (1900), the court saying: "If this company had been a corporation, and had wished to make a dividend of preferred stock to its shareholders, it would have done it in just this way. There has been no dividend of any money or property among the shareholders. There has been merely a change of the form of the ownership in the property by dividing it into two classes, and by making a different provision in regard to dividends for each class, and by giving one class a preference over the other in its right to the assets on final liquidation. Not a dollar's worth of the property of the company is taken out of the business, or changed in its relation to the business. . . . It is plain that the action of the company was like making a dividend of preferred stock. It was a more formal capitalization of earnings which previously had been capitalized in substance and effect." See 126 N.Y. A.D. 176

A corporation by the action of its board of directors and consent of all its stockholders may agree that a certain percentage of its profits shall be paid annually to a person for services already rendered by him. In a suit by him to enforce such agreement and asking an injunction against any sales of stock, except with notice of such agreement, stockholders are necessary parties defendant. Such an agreement is not an exclusion of future boards of directors from the management of the company. Dupignac *v.* Bernstrom, 76 N. Y. App. Div. 105 (1902). See 96 Pac. Rep. 52.

[1] Kent *v.* Quicksilver Min. Co., 78 N. Y. 159 (1879). After common stock has been issued, no provision having been made at the time for the issue of preferred stock, and there being no charter provision authorizing the issue of preferred stock, any stockholder can object to an issue of preferred stock. Knoxville, etc. R. R. *v.* Knoxville, 98 Tenn. 1 (1896). Compare Andrews *v.* Gas Meter Co., [1897] 1 Ch. 361, overruling Hutton *v.* Scarborough, etc. Co., 2 Dr. & Sm. 521 (1865). In the case of Moss *v.* Syers, 32 L. J. (Ch.) 711 (1863), the court, at the instance of dissenting stockholders, enjoined the issue of preferred stock which was not provided for by the charter or by the original agreement of the stockholders. A pledgee of a certificate of stock is not bound by a subsequent agreement of all the stockholders to surrender to the corporation a part of their stock, which part is then to be considered preferred stock and is to be sold by the corporation for the purpose of paying corporate debts. Although all the other stock has had this agreement stamped on the certificates, yet the corporation cannot insist that the purchaser of the stock so pledged shall allow the same agreement to be stamped on the new certificates issued to such purchaser. The court will order a transfer free from the agreement. Campbell *v.* American Zylonite

So also a common stockholder may object where preferred and common stock are already issued and an attempt is made to issue second preferred.[1]

But the dissenting stockholder must move quickly in the matter. If he delays in bringing his suit, so that the interested parties are justified in believing that he acquiesces in the issue, and the issue itself is made, his remedy is barred. His injunction suit will fail.[2] Where the statutes of the state authorize the issue of preferred stock, or where the by-laws contemplate a future issue of such stock, its issue will be legal, even though some of the stockholders object.[3]

Preferred stock may be issued subsequently to the issue of the common, and against the dissent of the minority stockholders, where the legislature amends the charter and provides for the issue of pre-

Co., 122 N. Y. 455 (1890). A preliminary injunction against the issue of preferred stock in order to raise capital for an old corporation was refused in Fielden *v.* Lancashire, etc. Ry., 2 De G. & Sm. 531 (1848), because only five stockholders dissented, but the court expressly refused to declare the issue a legal one. 70 Atl. Rep. 295.

1 Melhado *v.* Hamilton, 28 L. T. Rep. 578 (1873); affirmed, 20 L. T. Rep. 364.

2 A stockholder who is an officer of the company, who is active in having preferred stock issued, subscribes for it, pays for it, takes his certificate therefor, votes upon it, and induces others to take it, cannot after two years, when the corporation is insolvent, say that the statutes of the state authorize the issue of common stock only. Banigan *v.* Bard, 134 U. S. 291 (1890), aff'g Bard *v.* Banigan, 39 Fed. Rep. 13. In Andrews *v.* Gas Meter Co., [1897] 1 Ch. 361, where preferred stock had been issued in 1865 upon an increase of the capital stock, although neither the charter nor the by-laws authorized any preferences, the court held that the issue was legal, and overruled Hutton *v.* Scarborough, etc. Co., 2 Dr. & Sm. 521 (1865); rev'g Andrews *v.* Gas Meter Co., 75 L. T. Rep. 267. The court has refused relief where there was a delay of four years, Kent *v.* Quicksilver Min. Co., 78 N. Y. 159 (1879); or ten years, Taylor *v.* South, etc. R. R., 13 Fed. Rep. 152 (1882). Delays in raising the question of the validity of an issue of preferred stock, advantages having accrued in the meantime to the corporation and the stockholders, have been held such acquiescence as will bar the right of a stockholder to object. Acceptance of the preferred stock and dividends thereon also bars the right to challenge the legality of the issue. Branch *v.* Jesup, 106 U. S. 468 (1882). Preferred stock may, by unanimous consent, be issued, although the statutes are silent concerning it. When issued after the first issue of stock has been made, it may be prevented by a dissenting stockholder; yet delay on the part of the latter will bar his objection. Hazlehurst *v.* Savannah, etc. R. R., 43 Ga. 13 (1871). But see Moss *v.* Syers, 32 L. J. (Ch.) 711 (1863).

3 If the by-laws provide that any increased capital may be made in such manner and with rules, regulations, privileges, and conditions as a meeting of the stockholders might determine, preferred stock may be issued on an increase of the capital stock. Harrison *v.* Mexican Ry., L. R. 19 Eq. 358 (1875).

ferred stock. Such an amendment is considered incidental and is constitutional.[1]

But where the articles of incorporation specify the amount of preferred and common stock, and also state that further stock may be issued, this increased stock must be common stock, and cannot be second preferred stock, even though the by-laws provide that it may be issued on such conditions as the corporation may determine.[2] Nevertheless the articles of incorporation may be so drawn as to allow subsequent issues of preferred stock.[3] Thus, where the certificate of

1 Everhart *v.* West Chester, etc. R. R., 28 Pa. St. 339 (1857), holding that a charter amendment authorizing the issue was legal; Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536, 545 (1863), to same effect, and holding that a common stockholder could not defeat his subscription on this ground; Williston *v.* Michigan, etc. R. R., 95 Mass. 400 (1866); Curry *v.* Scott, 54 Pa. St. 270 (1867); Covington *v.* Covington, etc. Bridge Co., 10 Bush (Ky), 69 (1874), where the dissenting stockholder did not object until after the preferred stock had been issued and dividends paid upon it. Under its reserved power to amend or repeal a charter, the legislature may authorize the corporation on a two-thirds vote of its stockholders to issue preferred stock. Hinckley *v.* Schwarzschild, etc. Co., 107 N. Y. App. Div. 470 (1905). Even though the statute under which a corporation is organized authorizes the issue of preferred stock only on unanimous consent, yet such statute may be amended after the corporation has been formed authorizing such issue on a two-thirds vote of the stockholders. Hinckley *v.* Schwarzschild, etc. Co., 45 N. Y. Misc. Rep. 176 (1904). In Covington, etc. Bridge Co. *v.* Sargent, 1 Cin. Super. Ct. (Ohio), 354 (1871), there is an intimation that such a statute is unconstitutional, and the court held that statutory power to issue a certain amount of preferred stock did not authorize an issue of partly preferred and partly common. This decision may well be questioned. In England an act of parliament may authorize such an issue. Stevens *v.* South Devon Ry., 9 Hare, 313 (1851). In one case the legality of the issue of preferred stock under a statute was put upon the ground, not of the right to borrow money, but upon the ground of a right to raise funds by sale of stock. Chaffee *v.* Rutland, etc. R. R., 55 Vt. 110 (1882). In the case of Eichbaum *v.* Chicago Grain Elevators, [1891] 3 Ch. 459, the court held that the company, upon increasing its capital stock, might, by a majority vote of its stockholders, make such increased capital preferred stock, calling for a certain dividend, with no rights in surplus profits beyond that dividend, and might give to common stockholders the right to exchange their common stock for such preferred.

2 Melhado *v.* Hamilton, 28 L. T. Rep. 578; affirmed, 29 L. T. Rep. 364 (1873), the court saying: "If they could issue one share they could issue a thousand, and if at seven per cent. they might issue them at seventy per cent. and thus, at a general meeting, they might pass resolutions which would have the effect of utterly annihilating the interests of the ordinary shareholders."

3 The following is a charter provision in an English corporation:

> Any of the original shares for the time being unissued, and any new shares from time to time to be created, may from time to time be issued with any such guarantee or any such right of preference, whether in respect of dividend or of repayment of capital, or both, or any such other special privilege or advantage over any shares previously issued, or then about to be issued (other

incorporation provides for preferred and common stock, with the further provision that additional stock may be issued at any time with such priority of dividends and generally on such terms as the company might determine from time to time, new preferred stock, ranking equally with the original preferred stock, may be issued.[1] Although the issue of preferred stock is not regularly authorized, yet the issue may be subsequently ratified by a stockholders' meeting.[2] A corporate creditor who takes preferred stock in payment cannot upon corporate insolvency repudiate the issue of stock on the ground that the certificate therefor had not been filed as required by the statutes of the state.[3]

A subscriber to preferred stock may be liable on the subscription, although no preferred stock can be issued, where he continues to act as a stockholder.[4] A person who loans money to be repaid in such stock may recover it back if the stock cannot be issued.[5] Where a person has subscribed for stock, but the corporation finds it has issued all of its stock, it cannot compel such subscriber to take preferred stock instead.[6] An agreement to deliver stock in a company to be formed, nothing being said as to any preferred stock, is not fulfilled by delivering common stock, where there is preferred stock issued also.[7] A provision in a bond that the holder might exchange it for preferred stock at any time within ten days after a dividend is declared, lapses where the holder does not make the demand until several months after the bonds become due.[8]

than shares issued with a preference), or at such a premium, or with such deferred rights as compared with any shares previously issued, or then about to be issued, or subject to any such conditions or provisions, and with any such right or without any right of voting, and generally on such terms as the company may from time to time by special resolution determine.

1 Underwood *v.* London Music Hall, [1901] 2 Ch. 309.

2 *Re* London, etc. Inv. Corp., [1895] 2 Ch. 860.

3 Manufacturers', etc. Co. *v.* Allen, etc. Co., 154 Fed. Rep. 906 (1907). On dissolution a holder of deferred shares cannot claim that they were illegally issued. People *v.* New York, etc. Co., 119 N. Y. App. Div. 830 (1907).

4 Where a person subscribes for preferred stock, but no preferred stock is provided for, and he becomes a director and acts as such for several years, he is liable on such stock to corporate creditors as though it were a subscription for common stock. Tama, etc. Co. *v.* Hopkins, 79 Iowa, 653 (1890).

5 Where a corporation borrows money and agrees to repay it in preferred stock, but has no power to issue the preferred stock, the party paying the money may recover it back. Anthony *v.* Household, etc. Co., 16 R. I. 571 (1889).

6 Knoxville, etc. R. R. *v.* Knoxville, 98 Tenn. 1 (1896).

7 McIlquham *v.* Taylor, [1895] 1 Ch. 53.

8 Loomis *v.* Chicago, etc. Ry., 102 Fed. Rep. 233 (1900). See also § 270, *infra.*

§ 269. *Rights of preferred stockholders—Amount of preference—Voting—Subsequent leases, consolidations, etc.*—The rights, powers, and privileges of preferred stockholders depend largely on the terms upon which the preferred stock is issued. Such stock takes a multiplicity of forms, according to the desire and ingenuity of the stockholders and the necessities of the corporation itself. The percentage of preferred dividend is always fixed at the time of the issue. It is a matter of contract.[1] Negotiations and conversations prior to the issue of preferred stock, such issue being by written agreement, are not admissible to show the intent of the parties as to the rights of such preferred stock, but evidence of the situation and the objects and purposes of the agreement and the agreement itself, and the resolutions authorizing the issue, are admissible under an allegation that the certificates of preferred stock do not contain the whole agreement.[2] The extent of the preference may be determined from the certificate of preferred stock itself, if there is no other evidence, it being shown that the corporation acquiesced in such certificate.[3] The preferred dividends may be made cumulative or non-cumulative. If nothing is specified in respect to this, then the law makes the preferred dividends cumulative.[4] It would seem that unless the contract expressly provides otherwise, preferred stockholders participate in the surplus profits remaining after the preferred dividend has been declared on the preferred and an equal dividend on the common stock.[5] It has been held, however, in Maryland that where preferred

1 Quoted and approved in Scott *v.* Baltimore, etc. R. R., 93 Md. 475 (1901). The amount of preference, and whether cumulative or not, is all a matter of contract. Smith *v.* Cork, etc. Ry., Ir. Rep. 3 Eq. 356 (1869). The amount of preference may be determined by the by-laws, and the provisions of such by-laws constitute a contract. Belfast, etc. R. R. *v.* Belfast, 77 Me. 445 (1885). *Cf.* West Chester etc. R. R. *v.* Jackson, 77 Pa. St. 321 (1875). In this case the preferred stock to be redeemed by payment of the par value and a sum which, with dividends and interest already paid, should amount to eight per cent. per annum from the time of its purchase from the company, was declared to be a contract which entitled its holder to his dividends before dividends were paid on the common stock.

2 Scott *v.* Baltimore, etc. R. R., 93 Md. 475 (1901). See 126 N. Y. A. D. 176.

3 Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497 (1899). The provision in a certificate of stock to the effect that the corporation shall have a lien on the stock for debts due to the corporation from the registered stockholder may be valid and enforceable, even though neither the statutes of the state nor the charter nor the by-laws, nor the proceedings of the directors or stockholders provide for such a lien. It is sufficient that the certificate of stock was the one used by the corporation. Stafford *v.* Produce, etc. Co., 61 Ohio St. 160 (1899).

4 See §§ 273, 274, *infra.*

5 In the case Fidelity Trust Co. *v.* Lehigh Valley R. R., 215 Pa. St. 610 (1906) the preferred dividend had been paid and an equal dividend paid

stock is entitled to dividends "up to, but not exceeding, four per cent., before any dividends shall be set apart or paid on the common stock," such preferred stock is not entitled to dividends in excess of four per cent., even though a larger dividend than four per cent. is paid on the common stock, and even though the preferred dividends are non-cumulative.[1]

Where the preferred stockholders are entitled to participate in all dividends paid after their preferred dividend is paid, they are entitled to participate in a dividend of scrip, similar to a stock dividend, and representing accumulated profits which have been

on the common, and a dividend from the remaining profits had been declared on both preferred and common equally, The court held that this was correct, and that such extra payment on the preferred stock did not apply to the regular preferred dividends in subsequent years, there being no provision that the preferred dividends were limited to the specified amount. See §§ 273, 274, *infra*. The following form provides against such a result:

> The preferred stock of this company shall be entitled to dividends at the rate of six per centum per annum, prior to the payment of any dividends upon the common stock, and such dividends upon the preferred stock shall be cumulative. The preferred stock shall not be entitled to any dividends in excess of said six per cent. and arrears thereof.

The following provision gives a preference and also gives the preferred stockholders an interest in the remaining profits for each year:

> The common stock is not to receive dividends for any year unless —— per cent. be first paid for that year on the existing $—— of preferred capital stock; but when —— per cent. is paid for any year on the whole combined common and preferred capital stock, further dividends for that year are to be paid on all without distinction.

[1] Scott *v.* Baltimore, etc. R. R., 93 Md. 475 (1901), citing the above section. In this case the reasoning of the court went still further and was to the effect that preferred stock is never entitled to dividends in excess of the amount specified, even though the dividends are non-cumulative. Theoretically it is difficult to justify this conclusion, but practically it is true that the investing public assume and understand that preferred stock is never entitled to more than its specified and fixed dividends, even though the certificate is silent as to further dividends, in case a higher dividend is paid on the common stock. A share of stock is a share of stock, whether preferred or common. A share of preferred stock has all the rights of a share of common stock, except as expressly restricted by the terms under which it is issued. Logically there would seem to be nothing in the words "preferred dividend" restricting the preferred stock to that dividend, after an equal dividend had been paid on the common stock, and certainly not after any arrears or equal dividends had been made up and paid on the common stock. There is nothing in the word "preferred" which restricts or cuts down the rights which at common law are inherent in all stock. It is settled law that upon dissolution the preferred stock shares *pro rata* with the common stock, in the distribution of the assets after payment of debts, even though such assets are in excess of the par value of both kinds of stock. The same rule would seem to apply to a distribution of profits in excess of the full preferred dividend, and of an equal dividend on the common stock. However, the question may still be considered an open one.

used for betterments.[1] The disposition of the surplus profits after the regular dividends have been paid may be a matter of contract.[2]

Preferred stockholders are entitled to vote at elections and to exercise the various rights of stockholders the same as common stockholders, unless this right is expressly withheld from them by the terms under which the stock is issued.[3]

1 Gordon's Ex'rs *v.* Richmond, etc. R. R., 78 Va. 501 (1884).

2 Where the articles of incorporation specify that, after certain dividends have been paid on both the preferred and common stock, one-fifth of the surplus shall go to the preferred stock, the company cannot devote such surplus to redeeming of shares. Ashbury *v.* Watson, L. R. 30 Ch. D. 376 (1885). If a stockholder, by accepting the benefits, assents to a change in the privileges which pertain to his stock, he cannot afterwards object thereto. Compton *v.* The Chelsea, 13 N. Y. Supp. 722 (1891); aff'd, 128 N. Y. 537 (1891). A pledgee of a certificate of stock is not bound by an agreement of all the stockholders to surrender to the corporation a part of their stock, which part is to be then considered preferred stock and is to be sold by the corporation for the purpose of paying corporate debts. Although all the other stock has had this agreement stamped on the certificates, yet the corporation cannot insist that the purchaser of the stock so pledged shall allow the same agreement to be stamped on the new certificate issued to such purchaser. The court will order a transfer free from the agreement. Campbell *v.* American Zylonite Co., 122 N. Y. 455 (1890).

3 Miller *v.* Ratterman, 47 Ohio St. 141 (1890), where the right to vote was expressly withheld. Preferred stock may by the terms of its original issue be deprived of voting power, even though the statutes provide for each stockholder casting as many votes as he has shares. State *v.* Swanger, 190 Mo. 561 (1905). Where the preferred stockholders in a Connecticut corporation have no vote, the common stockholders are under greater fiduciary obligations to them than the majority of the stock is under towards the minority. Kidd *v.* New Hampshire, etc. Co., 66 Atl. Rep. 127 (N. H. 1907). In Mackintosh *v.* Flint, etc. R. R., 32 Fed. Rep. 350 (1887); s. c., 34 Fed. Rep. 582 (1888), it appeared that the *common* stockholders were by contract deprived of their right to vote for a specified time. In *Re* Barrow, etc. Co., L. R. 39 Ch. D. 582 (1888), the right to vote was withheld from preferred stockholders. In Hamlin *v.* Toledo, etc. R. R., 78 Fed. Rep. 664 (1897), the court said in regard to preferred stockholders: "They surrendered the privilege of voting. That was perhaps a valid agreement between stockholders, though of doubtful public policy. They thereby gave some additional value to the common stock. The latter was the exclusive voting stock, and that was worth something, as railway management now goes." The preferred stock involved in the case of Storrow *v.* Texas, etc. Assoc., 87 Fed. Rep. 612 (1898), was not entitled to vote. Although preferred stockholders who were deprived of the right to vote and whose stock amounted to practically a debt may be entitled to an injunction and an accounting, if the property is being mismanaged, nevertheless they are not entitled to a receiver, unless the company is insolvent as well as being mismanaged. Texas, etc. Mfg. Assoc. *v.* Storrow, 92 Fed. Rep. 5 (1899). A scheme whereby certain preferred stock in a building and loan associa-

As already stated, there is an infinite variety of provisions under which preferred stock may legally be issued. These provisions are to be found in the charter, the by-laws, the certificates of stock, the resolutions of the stockholders and directors, the minutes of corporate meetings, the reports of or to the company, and any contracts under which the stock was issued. The rights pertaining to the stock are matters of contract, and this contract is ascertained from the sources specified above.[1] Some of the various devices for raising money by issuing various kinds of preferred stock are referred to in the notes below.[2] Where a certain portion of the cumulative preferred stock is entitled to preferred dividends over the remaining preferred stock for the first three years, this particular preference is also cumu-

tion was given the entire control of the association to the exclusion of the common stockholders was declared illegal in the case of Synnott *v.* Cumberland, etc. Assoc., 117 Fed. Rep. 379 (1902). Even though a provision that the preferred stock shall not vote is illegal if objected to, yet if not objected to such provision may be legal. Wilson *v.* Parvin, 119 Fed. Rep. 652 (1903).

1 Boardman *v.* Lake Shore, etc. Ry., 84 N. Y. 157 (1881); Gordon *v.* Richmond, etc. R. R., 78 Va. 501, 510 (1884); Bailey *v.* Hannibal, etc. R. R., 1 Dill, 174 (1871); s. c., 2 Fed. Cas. 371; aff'd, 17 Wall. 96; St. John *v.* Erie Ry., 22 Wall. 136 (1874); Webb *v.* Earle, L. R. 20 Eq. 556 (1875); Matthews *v.* Great Northern Ry., 28 L. J. (Ch.) 375 (1859), construing a statute affecting the rights of holders of "guaranteed" and "deferred" stock; Belfast, etc. R. R. *v.* Belfast, 77 Me. 445 (1885); Stevens *v.* South Devon Ry., 9 Hare, 313 (1851); Sturge *v.* Eastern Union Ry., 7 De G., M. & G. 158 (1855); Harrison *v.* Mexican Ry., L. R. 19 Eq. 358 (1875); Crawford *v.* Northeastern Ry., 3 Jur. (N. S.) 1093 (1856); Henry *v.* Great Northern Ry., 1 De G. & J., 606, 642, 646 (1857). See also Coates *v.* Nottingham, etc. Co., 30 Beav. 86 (1861). The agreement is ascertained from the contract, reports, resolutions, conveyances, etc. Rogers *v.* New York, etc. Land Co., 134 N. Y. 197 (1892). In a suit by a preferred stockholder to enforce his rights as a preferred stockholder he must allege the character of his preference. Hackett *v.* Northern, etc. Ry., 140 Fed. Rep. 717 (1905).

2 Under the powers conferred by the statute, 30 & 31 Vict., ch. 127, various plans have been devised by English companies on the verge of insolvency to raise funds; and a favorite device is the issue of preferred shares of stock. Thus, in one case, there were five kinds of preference shares. Corry *v.* Londonderry, etc. Ry., 29 Beav. 263 (1860). See also, by way of illustration as to these various methods in England of raising funds by the issue of preferred shares, Matthews *v.* Great Northern, etc. Ry., 28 L. J. (Ch.) 375 (1859); *Re* Cambrian Rys., L. R. 3 Ch. App. 278 (1868); *Re* Potteries, etc. Ry., L. R. 5 Ch. App. 67 (1869); Webb *v.* Earle, L. R. 20 Eq. 556 (1875); Stevens *v.* Mid-Hants, etc. Ry., L. R. 8 Ch. App. 1064 (1873); *Re* Bristol, etc. Ry., L. R. 6 Eq. 448 (1868); *Re* Devon, etc. Ry., L. R. 6 Eq. 610 and 615 (1868); Munns *v.* Isle of Wight Ry., L. R. 8 Eq. 653 (1869); *Re* East, etc. Ry., L. R. 8 Eq. 87 (1869); London Fin. Assoc. *v.* Wrexham, etc. Ry., L. R. 18 Eq. 566 (1874); *Re* Anglo-Danubian, etc. Co., L. R. 20 Eq. 339 (1875); Midland, etc. Ry. *v.* Gordon, 16 M. & W. 804

lative as against the remaining preferred stock.[1] A holder of preferred stock may prevent a reduction of the preferred dividend by an amendment of the certificate of incorporation, even though the statutes of the state at the time of the organization of the company authorized amendments to the certificate of incorporation by a certain vote. Such reduction may be enjoined.[2] A provision in the charter to the effect that the rights of preferred stockholders may be modified by a three-fourths vote in interest at a meeting of the preferred stockholders only, is strictly construed, and where the statute provides for the mode of holding such meeting the procedure must be strictly observed.[3]

§ 270. Where the corporation has power to lease its road, it may make a lease, although the rental is sufficient to pay a dividend on the preferred stock alone, leaving nothing for the common stockholders.[4]

But in a contract of lease the rent must be applied to income bonds before it is applied to dividends on preferred stock.[5]

Where a corporation, having issued preferred stock, is merged into a new corporation by consolidation, the preferred stockholders of the old corporation may prosecute a suit for dividends against the new

(1847). For a scheme where the stock was divided into half shares, one-half of which were deferred to the other half, see *Re* Brighton, etc. Ry., L. R. 44 Ch. D. 28 (1890). In Phillips *v.* Eastern R. R., 138 Mass. 122 (1884), a scheme appears by which, under a statute, the creditors elected two-thirds and the stockholders one-third of the directors.

1 Gardner Sav. Bank *v.* Taber, etc. Co., 189 Mass. 363 (1905).

2 Pronik *v.* Spirits, etc. Co., 58 N. J. Eq. 97 (1899).

3 Hemans *v.* Hotchkiss, etc. Co., [1899] 1 Ch. 115. Where in the issue of preferred shares it is provided that the rights therein given might be modified as provided in the by-laws, the preferred shares of £5 each may be changed into five times that number of shares of £1 each, and thereafter the preferred shares may be reduced to thirteen shillings each by canceling the remaining seven shillings, and thereafter the preferred shares may be converted into partly preferred and partly common. *Re* Welsbach, etc. Co., Ltd., [1904] 1 Ch. 87.

4 Middletown *v.* Boston, etc. R. R., 53 Conn. 351 (1885). In *Re* Buenos Ayres, etc. Co., 66 L. T. Rep. 408 (1892), a sale of the company's enterprise to the government upon terms which paid something to the preferred stockholders, but left nothing for the common stockholders, was sustained.

5 In Phillips *v.* Eastern R. R., 138 Mass. 122, 135 (1884), preferred stock had been offered, under a statute, in exchange for indebtedness to be paid from income only. The company leased its property, and the lessee agreed to use the net profits to pay dividends on the preferred stock, the same as the interest on such debts as had not been converted into preferred stock, and, if the net profits were not sufficient, each was to get the same proportionately. The court held this to be illegal, inasmuch as it placed the preferred stockholders on the same basis as the income creditors. On this subject see also §§ 271, 272, *infra*.

corporation, if the consolidated company has assumed all the obligations of the old company.[1] A consolidation which is so unfair towards the preferred stockholders as to be a breach of trust may be enjoined by them.[2] Where dividends on preferred stock are cumulative and are in arrears, and the company is consolidated with another company, the preferred stockholders cannot be compelled to take bonds and stock in the new company for a less amount than their old holdings with the arrears of dividends, especially where the original stock provided that on liquidation it should be paid in full with arrears, and it appearing that there were existing profits in the old company sufficient to pay such arrears, and that these would go to the common stockholders by way of common stock in the new company. A preferred stockholder may enjoin such consolidation, and is not obliged to allow the value of his stock to be appraised, as provided in the statute.[3]

A holder of preferred stock is entitled to subscribe for his proportionate part of new stock, even though the preferred stock is limited absolutely as to dividends and the new stock is common stock.[4]

1 Boardman *v.* Lake Shore, etc. R. R., 84 N. Y. 157 (1881); Chase *v.* Vanderbilt, 62 N. Y. 307 (1875). *Cf.* Prouty *v.* Lake Shore, etc. R. R., 52 N. Y. 363 (1873). See also § 278, *infra.* In Griffith *v.* Paget, L. R. 6 Ch. D. 511 (1877); s. c., L. R. 5 Ch. D. 894, it was held that where the company is dissolved by a consolidation with another company, under a statute, the stockholders of the old being entitled to exchange their stock for stock in the new, the preferred stock is not entitled to preferred stock in the new.

2 A minority preferred stockholder may cause to be set aside the consolidation of his company with another company which the majority of the stockholders of his company own, where before the consolidation his preferred stock represented an amount equal to one-half of the combined value of the two companies, and after consolidation less than five thirty-seconds, and before consolidation the assets of the other company represented six thirty-sevenths of the combined assets and after consolidation it represented four-fifths. This is an abuse of trust by the majority stockholders. Jones *v.* Missouri, etc. Co., 144 Fed. Rep. 765 (1906). A preferred stockholder of a constituent company who by a consolidation is entitled to bonds in the new company having a par value one and one-third times the par value of his preferred stock, cannot object thereto, it being shown that the bonds were worth more in the market than the stock had been worth, and the new company offering to pay him the present value of his stock at the time of the consolidation or the present value with future preferred dividends discounted. Beling *v.* American, etc. Co., 65 Atl. Rep. 725 (N. J. 1907). See also §§ 278, 663, 664, 892, *infra.* 68 O. St. 582.

3 Colgate *v.* United States, etc. Co., 67 Atl. Rep. 657 (N. J. 1907).

4 Jones *v.* Concord, etc. R. R., 67 N. H. 119 (1891). Where two companies are consolidated and their stockholders are to receive new stock in exchange for old stock, such new stock to be of four different kinds, with preferences, any increase of capital stock of the consolidated company must be offered proportionately to all the stockholders making the ex-

A preferred stockholder is entitled to a certificate of stock which sets forth the fact of the preference.[1]

Sometimes the right is given to exchange common for preferred stock, or preferred for common, or bonds for stock. Concerning any such options, it is the settled rule that any time limited for the exercise thereof is of the essence of the offer.[2] Where a corporation is authorized to issue preferred stock it may attach such conditions thereto as it deems best. One of the conditions may be that the corporation may retire the stock at par within a certain time.[3]

change, irrespective of their preference. Jones *v.* Concord, etc. R. R., 67 N. H. 234 (1892).

1 Where by statute municipal-aid bonds are to be paid for by preferred stock, the municipality may by *mandamus* compel the company to issue a certificate of stock setting forth the preference. State *v.* Cheraw, etc. R. R., 16 S. C. 524 (1881).

2 Where the corporation offers to exchange preferred for common stock, upon the payment of an additional sum of money, a stockholder who delays for thirty years to avail himself of the privilege cannot claim the right thereto. The fact that the corporation had taken in some of the common stock on a new basis of exchange is immaterial. Holland *v.* Cheshire R. R., 151 Mass. 231 (1890). An extension of the time when a bond is to be paid does not extend the time within which it may be exchanged for stock of the company. Muhlenberg *v.* Philadelphia, etc. R. R., 47 Pa. St. 16 (1864). Where an option was given to holders of the common stock to take a certain number of new preferred shares within a given time, it was held that a stockholder who lived abroad and had no notice of the option until the expiration of the specified time could not, upon learning of it afterwards, come in and demand the right to purchase the preferred shares. Pearson *v.* London, etc. Ry., 14 Sim. 541 (1845). Such, also, is the rule where there is an option within a fixed time to convert loan notes into common shares. Campbell *v.* London, etc. Ry., 5 Hare, 519 (1846). A provision in a railroad bond that at any time within ten days after a dividend becomes payable the holder of the bond might surrender it and demand full paid preferred stock in exchange therefor, does not continue beyond the time when the bond becomes due. Loomis *v.* Chicago, etc. Ry., 97 Fed. Rep. 755 (1899); aff'd, 102 Fed. Rep. 233 (1900). Where bonds are convertible into preferred stock within ten days after any dividend has been paid on the stock upon unmatured coupons being delivered up, it is too late to demand exchange after the ten days, or after the coupons have matured and been paid. Carpenter *v.* Chicago, etc. R. R., 119 N. Y. App. Div. 169 (1907). See also § 283, *infra*.

3 Where a corporation has power to issue preferred stock on such terms as it may fix, and also has power to borrow money, and it does issue preferred stock, which by its terms may be retired, it may issue certificates of indebtedness to retire such preferred stock, and immediately thereafter as a part of the transaction issue common stock to take up such certificates of indebtedness. This is practically the same as changing the preferred into common stock. A preferred stockholder cannot object thereto on the ground that he was entitled to subscribe for his proportion of the new common stock. Weidenfeld *v.* Northern, etc. Ry., 129 Fed. Rep. 305 (1904). In retiring such preferred stock the corporation may issue addi-

Dividends on the preferred stock must be on all of that class, even though some of it has been exchanged for preferred stock bearing a lower dividend.[1] By the consent of both preferred and common

tional common stock to the holders of the old common stock without giving any rights to the holders of preferred stock. Moreover, even if the preferred stockholders had a right to a part of the new common stock, yet the remedy is not an injunction, but a suit at law for damages. Even though such preferred stock is retired for cash, yet a holder of preferred stock cannot object that this impairs the capital of the company, inasmuch as he ceases to have an interest in the company. Such stock may be retired by a vote of the directors without a vote of the stockholders. Hackett *v.* Northern, etc. R. R., 36 N. Y. Misc. Rep. 583 (1901). See also § 271, *infra.* Where a railroad company issues a bond convertible by its terms into preferred stock at the end of fifteen years, it is no defense that it had no preferred stock outstanding at the date of the issue of the bond, such preferred stock having been issued later, and if it refuses to make the exchange, it is liable in damages to the extent of the market value of the preferred stock. Bratten *v.* Catawissa R. R. Co., 211 Pa. St. 21 (1905). A preferred stockholder may agree with the corporation that his stock shall be common stock in consideration of the corporation waiving the right to redeem such preferred stock as provided by the terms of such stock in the original issue thereof. A purchaser of other stock in the corporation cannot when sued on the contract of purchase set up that such agreement in regard to the preferred stock was illegal. A pledgee of such preferred stock is not bound thereby, but if the debt is afterwards paid his objection falls. Pendleton *v.* Harris-Emery Co., 124 Iowa 361 (1904). Where in the organization of a mercantile corporation some of the principal employees become stockholders, under a contract between all the stockholders, by which a majority might declare a stockholder to be undesirable, and thereupon he was to be paid the cash value of the stock as appraised, the stock to be then divided among the other stockholders, a suit in equity lies to compel an employee to give up stock so appraised, and the appraisal is the actual cash value of the assets without anything for good will, and the fact that there is preferred stock is immaterial, if it is redeemable at any time, it being shown also that the common stock had never been sold on the market. Boggs *v.* Boggs & Buhl 66 Atl. Rep. 105 (Pa. 1907).

[1] Although the preferred stock is partly taken back by the company and new preferred stock of the same amount, bearing a less dividend, is issued in exchange, yet this does not enable the company to declare a dividend on the part not exchanged, and on that alone. It must declare on all. Coey *v.* Belfast, etc. Ry., Ir. Rep. 2 C. L. 112 (1866). If part of the preferred stockholders surrender their stock for new common stock on a reorganization without foreclosure, such stock is canceled, and holders not so surrendering their stock are entitled to arrears of dividends out of the first net profits, without allowing such surrendered stock to participate therein. West Chester, etc. R. R. *v.* Jackson, 77 Pa. St. 321 (1875). In this case there was a special act providing for the issue of preferred stock, and afterwards another for the issue of consolidated stock. A dividend having been declared, a holder of the preferred stock, who had declined to accept the consolidated, was held "entitled to receive just what the company agreed to pay when the money was obtained."

stockholders all the stock may be made common, unless, of course, the charter provides otherwise.[1]

From a decree refusing leave to a preferred stockholder to intervene and become a party to a foreclosure suit no appeal lies.[2]

Preferred stockholders in a railroad may file a bill in a federal court to enjoin the railroad from obeying a state statute requiring the railroad to sell mileage books at two cents a mile, such rate being in violation of a charter provision giving to the directors the power to fix rates subject to revision by the supreme court.[3]

Preferred stockholders are subject to a statutory liability the same as common stockholders.[4]

§ 271. *Preferred stockholders are not creditors — Dividends can be only from profits — Mortgages securing preferred stock.* — Formerly it was a matter of doubt and discussion whether or not a preferred stockholder had any rights as a creditor of the company or was confined to his rights as a stockholder. The law is now clearly settled that a preferred stockholder is not a corporate creditor.[5]

The preferred stockholder is but a stockholder with a right to

1 Synnott *v.* Cumberland, etc. Assoc., 117 Fed. Rep. 379 (1902), holding also that where a proxy votes in favor of making all the stock common stock, the stockholder himself, if he wishes to object, must do so promptly. A scheme by which founders' shares are to be exchanged for ordinary stock at the rate of one hundred shares of the latter for each share of the former, is *ultra vires* and illegal, and will not be sanctioned by the court. *Re* Development Company, etc., [1902] 1 Ch. 547. A corporation may agree to cancel cumulative preferred stock and issue in exchange therefor non-cumulative preferred stock and give an interest-bearing scrip for arrears of dividends. A non-assenting preferred stockholder need not accept the proposition, but, on the other hand, cannot prevent others accepting it, provided the interest on the scrip is paid only *pro rata* with payments to him. The common stockholders cannot object. Wilcox *v.* Trenton, etc. Co., 64 N. J. Eq. 173 (1902).

2 Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497 (1899).

3 Ball *v.* Rutland R. R., 93 Fed. Rep. 513 (1899).

4 Railroad Co. *v.* Smith, 48 Ohio St. 219 (1891).

5 Grover *v.* Cavanaugh, 82 N. E. Rep. 104 (Ind. 1907). A preferred stockholder is not a creditor and cannot be made such. Hamlin *v.* Toledo, etc. R. R., 78 Fed. Rep. 664 (1897). In ascertaining whether a corporation is solvent the preferred stock is not to be considered a debt. People, etc. *v.* St. Louis, etc. R. R., 176 Ill. 512 (1898). Preferred stockholders have no lien prior to the obligation of the company to pay the interest on its mortgage bonds. Mercantile T. Co. *v.* Baltimore, etc. R. R., 82 Fed. Rep. 360 (1897). The House of Lords in England have clearly laid down the rule that preferred stockholders are not creditors. Birch *v.* Cropper, 14 App. Cas. 525 (1889). The same doctrine is expressed in Belfast, etc. R. R. *v.* Belfast, 77 Me. 445 (1885). A very full, clear, and learned discussion of the essential differences between a preferred stockholder and a creditor of a corporation is to be found in

have his dividend paid before dividends on the common stock are paid, and he is not entitled to any dividend until the corporation has funds which are properly applicable to the payment of dividends. A contract that dividends shall be paid on the preferred stock whether any profits are made or not would be contrary to public policy and void. An agreement to pay dividends absolutely and at all events—from the profits when there are any, and from the capital when there are not—is an undertaking which is contrary to law, and is void.[1] Public policy condemns with emphasis any such undertaking on the part of a corporation as to its preferred or guaranteed stock. A preferred stockholder is liable to corporate creditors for illegal dividends paid on his stock, the same as a common stockholder is.[2]

Miller *v.* Ratterman, 47 Ohio St. 141 (1890), a case wherein the preferred stockholder was secured by a mortgage and was deprived of the right to vote at corporate elections. In Field *v.* Lamson, etc. Co., 162 Mass. 388 (1894), it was held that, even though the statute authorized the corporation to guarantee dividends on its stock, nevertheless that the dividends could be paid only out of the net profits. Taft *v.* Hartford, etc. R. R., 8 R. I. 310 (1866); Chaffee *v.* Rutland, etc. R. R., 55 Vt. 110, 129 (1882), the court saying: "The claim is that he is also a creditor, with all the rights pertaining to that relation. Against this claim are the terms of the charter, the presumptions of law, and the usual course of business." In this case certificates issued for "scrip dividends" or "preferred guaranteed stock" were convertible into mortgage bonds. The company having refused to convert them, it was held that general *assumpsit* for the amount of the certificates would lie, and that the suit could be brought in the name of the holder for value. St. John *v.* Erie Ry., 10 Blatchf. 271 (1872); s. c., 21 Fed. Cas. 167; aff'd, 22 Wall. 136. Where a railroad having preferred stock is leased the rental cannot be applied to the preferred dividend equally with the interest on existing debts. Phillips *v.* Eastern R. R., 138 Mass. 122 (1884). See 96 Pac. Rep. 52.

[1] An agreement to pay preferred dividends out of capital stock is illegal and void. Cratty *v.* Peoria, etc. Assn., 219 Ill. 516 (1906). Dividends on preferred stock can be paid only out of profits. Wilson *v.* Parvin, 119 Fed. Rep. 652 (1903). An agreement of the corporation with a stockholder to pay to him in dividends the amount he pays for the stock cannot be enforced as an obligation of the corporation. Smith *v.* Alabama, etc. Assoc., 123 Ala. 538 (1899). Dividends on preferred stock cannot be paid out of the capital stock. Davenport *v.* Lines, 72 Conn. 118 (1899). A contract between a corporation and a stockholder, by which the stockholder is to be repaid before creditors of the corporation are paid is contrary to public policy and void. Guaranty, etc. Co. *v.* Galveston, etc. R. R., 107 Fed. Rep. 311 (1901). A corporation having charter power to purchase the stock of other corporations may give its certificates of indebtedness in payment therefor, and may also issue with such certificates its preferred stock, the dividends to be used to pay the principal and interest of such certificates, the preferred stock then to belong to the vendors. Ingraham *v.* National Salt Co., 130 Fed. Rep. 676 (1904), rev'g National Salt Co. *v.* Ingraham, 122 Fed. Rep. 40.

[2] American, etc. Co. *v.* Eddy, 130 Mich. 266 (1902).

Dividends on preferred stock are payable only out of the net earnings of the company.[1] The question of what constitutes net earnings is considered elsewhere.[2] A subscriber for preferred stock cannot rescind the subscription on the ground that the stock contains a provision that the company shall buy it back at a certain time at par and interest. Such a provision is invalid, but does not invalidate the stock itself.[3]

1 Taft *v.* Hartford, etc. R. R., 8 R. I. 310 (1866); Lockhart *v.* Van Alstyne, 31 Mich. 76 (1875); Chaffee *v.* Rutland, etc. R. R., 55 Vt. 110 (1882); Warren *v.* King, 108 U. S. 389 (1883); Crawford *v.* Northeastern, etc. Ry., 3 Jur. (N. S.) 1093 (1856); Elkins *v.* Camden, etc. R. R., 36 N. J. Eq. 233 (1882); Belfast, etc. R. R. *v.* Belfast, 77 Me. 445 (1885), and the cases *supra*. Dividends may be declared on preferred stock where the net earnings since the issue of the stock are sufficient, even though prior to such issue the capital stock had been impaired. Cotting *v.* New York, etc. R. R., 54 Conn. 156 (1886). See also § 546, *infra*. In Mills *v.* Northern Ry., L. R. 5 Ch. App. 621 (1870), where a corporation, being in arrears in the payment of preferred stock dividends, and being at the same time largely indebted, proposed to appropriate a portion of its capital and to borrow further sums upon debentures for the purpose of paying such preferred dividends, it was held, in a suit by the creditors to prevent such action, that inasmuch as the appropriation of the capital was justified on the ground that an equivalent portion of the revenue had been used for capital purposes, and the proposed loan was within the company's borrowing power, an injunction could not be granted.

In Guinness *v.* Land Corporation, L. R. 22 Ch. D. 349 (1882), the court declared illegal a provision for the payment of preferred dividends out of the *capital stock*. Interest on debts, even those incurred after the preferred stock was issued, and rent on leases, including those taken after such issue, must be paid before dividends are declared on the preferred stock. St. John *v.* Erie Ry., 22 Wall. 137 (1874), affirming 10 Blatchf. 271 (1872); s. c., 21 Fed. Cas. 167, defining also the meaning of net profits. In the case of Williston *v.* Michigan Southern, etc. R. R., 95 Mass. 400 (1866), the court held that preferred and guaranteed stock in a Michigan and Indiana corporation was not entitled to dividends unless there were net profits. Preferred dividends may be paid out of the *gross* earnings where the statute evidently so intended. Gordon *v.* Richmond, etc. R. R., 78 Va. 501 (1884). See also Ragland *v.* Broadnax, 29 Gratt. (Va.) 401 (1877), where the court upheld the charge of guaranteed dividends on the gross receipts. That was the case of a debt converted into guaranteed stock. The debt would have borne, if it had not been converted into stock, interest at the rate of six per cent. per annum, whether they were net earnings or not. The court held that the guaranty of three per cent. dividend on the whole stock, which formerly belonged to the state, was simply the six per cent. interest upon the debt which was converted into stock; and it also held that it was chargeable, in accordance with the plain provisions of the statute, upon the gross receipts. Guaranteed dividends can be paid only from net profits. Miller *v.* Ratterman, 47 Ohio St. 141 (1890).

2 See ch. XXXII, *infra*.

3 Long *v.* Guelph, etc. Co., 31 C. P. Rep. (Can.) 129 (1880). However,

Occasionally a mortgage is given by the corporation to secure the payment of dividends on preferred stock, and to give it a preference in payment over subsequent debts of the corporation upon insolvency or dissolution. It is difficult to see how such a mortgage would be legal unless it has been issued under express statutory authority. The courts have no power to give the stockholders a preference over creditors, even though the preferred stock is by its terms to be a lien on the property.[1] A mortgage given to repay to preferred stockholders

where a corporation has power to borrow and also to issue preferred stock, and does issue certificates which provide for payment of the par value thereof at the end of two years, such certificates may constitute a debt instead of preferred stock, even though they are drawn in the form of preferred stock. Savannah, etc. Co. *v.* Silverberg, 108 Ga. 281 (1899). *Cf.* § 170, *supra.*

[1] Quoted and "heartily concurred" in, in Black *v.* Hobart T. Co., 64 N. J. Eq. 415 (1902). A mortgage given to stockholders for money paid in on their subscriptions cannot be enforced as against creditors. Reed *v.* Helois, etc. Co., 64 N. J. Eq. 231 (1903). In Hamlin *v.* Toledo, etc. R. R., 78 Fed. Rep. 664 (1897), where the preferred stock provided that no debt except the first mortgage debt should come in ahead of preferred stock, the court said: "If the purpose in providing for these peculiar shares was to arrange matters so that, under any circumstances, a part of the principal of the stock might be withdrawn before the full discharge of all corporate debts, the device would be contrary to the nature of capital stock, opposed to public policy, and void as to creditors affected thereby." A corporation cannot, in the absence of statutory authority, make its preferred stock a lien upon its property; nor can an agreement between the subscribers to the stock of the corporation make such stock a lien on its property, as against bondholders or general creditors without notice of such agreement. Continental Trust Co. *v.* Toledo, etc. R. R., 72 Fed. Rep. 492 (1896); aff'd in Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497 (1899). Preferred stock which is "to be and remain a first claim upon the property of the corporation after its indebtedness" has no lien ahead of present or future debts of the company. King *v.* Ohio & M. Ry., 2 Fed. Rep. 36 (1880); aff'd, 108 U. S. 389 *sub nom.*, Warren *v.* King, 108 U. S. 389 (1882), the court holding that although the certificates of preferred stock provided that it should "be and remain a first claim upon the property of the corporation after its indebtedness," etc., and although in foreclosure proceedings the preferred stockholders asked to have their stock declared a lien prior to a subsequent mortgage, yet the court refused the application declaring that they had priority over the common stock only. It has been held, however, that where preferred stock is issued, reciting that it is a lien on all the property of the corporation after the first mortgage, the lien will be upheld by the court as against subsequent mortgages and general creditors, although such lien was not secured by any mortgage, the trustees in the subsequent deed of trust having known of and acquiesced in the priority of the preferred-stock lien, and the deed itself having recognized it. This bound the bondholders. Skiddy *v.* Atlantic, etc. R. R., 3 Hughes, 320, 355 (1879); s. c., 22 Fed. Cas. 274, 288. Where stock is issued to a city by a street railway company in payment for its street rights, a provision in the grant of the street rights

the amount they have invested in their stock as well as to secure regular creditors of the company is invalid altogether.[1]

Nevertheless, a mortgage to secure preferred stock and dividends thereon has been upheld in a few cases.[2] In other cases, that which was called preferred stock was nothing more than income bonds with a voting power.[3] It is of course within the power of the legislature

that in case the company became indebted the city should have a lien on the company's franchise and property does not give the city a lien in preference to creditors of the company, but only in preference to other stockholders. Guaranty, etc. Co. *v.* Galveston, etc. R., 107 Fed. Rep. 311 (1901).

1 Reagan *v.* First Nat. Bank, 157 Ind. 623 (1901). A mortgage by an insolvent corporation for the benefit of the preferred stockholders and also creditors of the company is fraudulent and void so far as it is for the benefit of the preferred stockholders, the statute prescribing that the debts should be paid in preference to any payment on the preferred stock, and if only those creditors were entitled to the benefit thereof who accepted it, the whole mortgage is void. Reagan *v.* First Nat. Bank, etc., 157 Ind. 623 (1901).

2 Although the power of a railroad to borrow be limited, yet preferred stock may be issued, secured by a mortgage, where the power to mortgage has been given, and such preferred stock may be deprived of the power to vote. Miller *v.* Ratterman, 47 Ohio St. 141 (1890). A deed of trust given by a corporation upon its lands to secure the performance of an undertaking of the company to pay dividends on preferred stock which was about to be issued, and also ultimately to pay for the stock itself, is a mortgage. Where the corporation's equity of redemption has been sold, the receiver of the corporation takes nothing. Fitch *v.* Wetherbee, 110 Ill. 475 (1884). In Davis *v.* Second Univ. Meeting-house, 49 Mass. 321 (1844), the stock, by a by-law, was declared to be entitled to redemption when the holder moved from the town. The court upheld and enforced the contract. In Gordon *v.* Richmond, etc. R. R., 78 Va. 501 (1884), a mortgage had been given to secure the payment of the par value and dividends of preferred stock. The case involved a distribution of profits and not a foreclosure of the mortgage, but the court said that the mortgage was legal.

3 Burt *v.* Rattle, 31 Ohio St. 116 (1876), turned upon a general "Act to authorize manufacturing corporations to issue preferred stock." Where such stock was issued certifying that the corporation guaranteed the holders certain dividends not exceeding legal rates, and the final payment of the certificates at a specified time, it being provided that such preferred stock might be converted into common stock, and the corporation issued its bond and mortgage to a trustee to secure such certificates, it was held that holders of the so-called preferred stock did not become stockholders and members, but creditors of the corporation, so that, on the winding up of the company's affairs, they had a lien upon the mortgage property superior to that of general creditors and assignees. "A mortgage creditor, although denominated a 'preferred stockholder,' is a mortgage creditor nevertheless, and interest is not changed into a 'dividend' by calling it a dividend." It was a self-evident misnomer in the act. So also under a statute. See Pittsburg, etc. R. R. *v.* Allegheny County, 63 Pa. St. 126 (1869). Compare s. c., 79 Pa. St. 210.

to prescribe that preferred stock thereafter to be issued by a corporation shall be a lien on the property and franchises of the company with a priority over any subsequent mortgage.[1]

A preferred stockholder is in no better position to enjoin the corporation from giving a mortgage than a common stockholder.[2] Where bonds are deposited as collateral security for preferred stock, it has been held that the corporation may call in, redeem, and cancel the stock in exchange for the bonds;[3] but it would seem that this can be done only upon a legal reduction of the capital stock. By its certificate of incorporation a New Jersey corporation may have power to purchase and retire part or all of its preferred stock, and to issue in payment therefor its bonds, or to sell its bonds and use the proceeds to retire such preferred stock, or it may purchase and hold such stock for re-issue.[4]

In Miller *v.* Ratterman, 47 Ohio St. 141 (1890), the court held that the fact that a mortgage had been given to secure the payment of preferred dividends does not prevent such stock from being considered stock instead of a debt.

1 Such a preference will be upheld, but does not create a lien on fire insurance money for loss sustained nor on merchandise manufactured for sale, nor on book accounts representing such sales, nor on rents due to the corporation. Heller *v.* National, etc. Bank, 89 Md. 602 (1899). Under the statutes in Maryland preferred stock may be a lien. Rogers, etc. Co. *v.* Citizens', etc. Bank, 93 Md. 613 (1901).

2 Preferred stockholders cannot prevent the corporation giving a consolidated mortgage to secure past and future debts. "Holders of preferred stock have no special control over the corporation or its management. . . . The corporation is in no sense the trustee for the holders of preferred stock. Its duty is to each alike according to the conditions attached to the stock of each." Thompson *v.* Erie Ry., 11 Abb. Pr. (N. S.) 188 (N. Y. Supr. Ct., 1871); s. c., 42 How. Pr. 68.

3 Totten *v.* Tison, 54 Ga. 139 (1875). Where preferred stock is merged into bonds, the common stockholders cannot defeat the enforcing of the bonds. Havemeyer *v.* Bordeaux Co., 8 Nat. Corp. Rep. 127 (Ill. C. C., 1894). Even though the directors have sold preferred stock held by them to the corporation and taken its notes therefor when the corporation was insolvent, yet a receiver should not be appointed at the instance of a stockholder. The remedy is an injunction and accounting. Empire Hotel Co. *v.* Main, 98 Ga. 176 (1896).

4 The offer to purchase must be made *pro rata* to all the preferred stockholders. Under the reserved right to amend, alter, or repeal charters, the rights of stockholders among themselves cannot be impaired, except as required by public interest; but, while it is true that the charter constitutes a contract between the stockholders, yet under this reserved power the legislature may authorize existing corporations to purchase and retire preferred stock and issue in lieu thereof mortgage bonds, such amendment being construed to be in behalf of the public interest. Where a corporation has charter authority to retire its preferred stock and issue mortgage bonds in lieu thereof, on a vote of the directors and stockholders, a minority stockholder cannot enjoin such action on the ground that it would be disastrous in its effect on

§ 272. *What are net profits, applicable to preferred dividends?—The preferred stockholder's remedy to enforce a dividend.*—It is largely a matter of discretion with a board of directors as to whether they will use the net profits for a dividend or will use them in the business of the company, although there is a limit to this discretion, and the courts will not allow the directors to use their power oppressively by refusing to declare a dividend where the net profits and the character and condition of the business clearly warrant it. This is the rule where all the stock is common stock,[1] and it is also the rule in regard to dividends on preferred stock. The preferred stockholder is not entitled as a matter of right to his dividend, even though there are net profits which might be used for that purpose. If the directors are reasonable in the exercise of their discretion, and use the profits to improve the corporate property, it is held by the supreme court of the United States that the discretion of the directors will not be interfered with.[2] This rule will work no injustice where

the corporation. Berger *v.* United States Steel Corp., 63 N. J. Eq. 809 (1902). See also Hackett *v.* Northern, etc. R. R. 36 N. Y. Misc. Rep. 583 (1901). *Mandamus* does not lie to compel a corporation to redeem preferred stock at par even though the certificate of stock gave the holder the right to demand such payment, where the statute required the certificate to specify the time when it should be subject to redemption, and the certificate did not so specify, even though the statute was afterwards changed. The court declined to pass upon the question whether a suit at law or in equity would lie. Smith *v.* Ferracute, etc. Co., 68 N. J. L. 237 (1902).

1 See ch. XXXII, *infra.*

2 New York, etc. R. R. *v.* Nickals, 119 U. S. 296 (1886), reversing Nickals *v.* New York, etc. R. R. 15 Fed. Rep. 575. In Field *v.* Lamson, etc. Co. 162 Mass. 388 (1894), the court said: "We do not think that the directors and manager appear so plainly to have acted in disregard of the rights of the preferred stockholders as to justify the interference of a court of equity. The directors and manager were bound to have regard to all of the interests intrusted to them. If one class was to be favored above another, the creditors were to be looked after in preference to the stockholders. It was for the benefit of the stockholders, the preferred as well as the common, that the impaired capital should be made good, and that the business, if possible, should be put on a sound and enduring basis. We cannot say that, if dividends had been paid, the result might not have been to injure the concern, nor that the conduct of the directors and manager has not been on the whole judicious. . . . Neither do we think that the guaranty can be regarded as an undertaking that whenever there were net profits they should be divided, without regard to the circumstances or situation of the company, among the preferred stockholders. The act itself does not in terms compel such a division; and we see nothing in it to take the case out of the general rule that, in the first instance, the decision of the question whether there shall or shall not be dividends lies with the company or its agents." Where a corporation sells its business in exchange for preferred stock in another corporation,

the corporation is liable for arrears of preferred dividends. But if such arrears are not collectible under the terms upon which the stock is issued, then this rule might result in numerous frauds by the corporation on the preferred stockholder, since no dividend might be given to the preferred stockholders unless the net profits were sufficient for a dividend on the common stock also. For instance, where there were enough profits for two annual dividends on the preferred stock and no more, it would be a temptation to the common stockholders to declare no dividend at all the first year, and to declare a dividend on both the common and preferred stock the second year.[1] Where the directors are clearly guilty of a breach of trust in not paying dividends on the preferred stock, a preferred stockholder may file a bill in equity for relief.[2] But where by a by-law the

the transaction cannot subsequently be set aside on the ground that the preferred dividends have not been paid. Feld *v.* Roanoke Inv. Co., 123 Mo. 603 (1894). In Mercantile T. Co. *v.* Baltimore etc. R. R., 82 Fed. Rep. 360 (1897), the court ordered the receiver to pay certain debts and contract obligations, although there were profits which would have been applicable to dividends on the preferred stock if the company had not been in the receiver's hands.

As to whether there are dividends applicable to preferred stock depends upon the circumstances of each case, the nature of the company and the evidence of competent witnesses. Bond *v.* Barrow, etc. Co., 86 L. T. Rep. 10 (1902). Where the licensor of a patent is to have from a corporation as licensee a certain payment from the net profits, such payment not to be cumulative and to be subject to provision for a reserve fund, it is legal for the company to pass a sum to the reserve fund, and also a further sum for depreciation and the cost of licenses. Bagot, etc. Co. *v.* Clipper etc. Co., [1902] 1 ch. 146.

[1] For an instance, see Mackintosh *v.* Flint, etc. R. R. 32 Fed. Rep. 350 (1887); s. c., 34 Fed. Rep. 582. Preferred stockholders, even though the preferred dividend is noncumulative, cannot prevent the company applying the earnings to a large indebtedness incurred during the year in enlarging the works and business, even though the result is that the preferred stock gets no dividend that year. The preferred stock in this case, by its terms, gave wide discretion to the directors in the matter. McLean *v.* Pittsburg Plate-Glass Co., 59 Pa. St. 112 (1893).

[2] Storrow *v.* Texas, etc. Assoc., 87 Fed. Rep. 612 (1898). A bill in equity lies to compel the payment of preferred dividends where the stockholder has repeatedly sought an accounting and there apparently is money available to pay such dividends. Cratty *v.* Peoria, etc. Ass'n, 219 Ill. 516 (1906), the court saying (p. 522): "Generally, the question of declaring a dividend is intrusted to the sound discretion of the directors; and, as to common stock, such discretion will not be interfered with by a court of equity in the absence of bad faith or arbitrary or unjustifiable conduct. But different rules apply with respect to the right of holders of preferred stock to invoke the aid of a court to order the declaration and payment of dividends on their stock."

Where the preferred stockholders in a Connecticut corporation have no vote, the common stockholders are under greater fiduciary obligations to

board of directors has power to set aside from the profits such sum as they think proper as a reserve fund to meet contingencies, they have power, after paying dividends on the preferred stock, to carry the balance to a reserve fund, although the common stock is thereby deprived of any dividend.[1] And such seems to be the rule even if there is no by-law to that effect.[2] Where the charter provides that dividends on the common stock shall be declared after the close of any fiscal year, the corporation has no power to pay any dividends on the common stock prior to the close of the fiscal year, and hence cannot pay quarterly dividends on the common stock.[3]

The question of what constitutes "net profits" is discussed elsewhere.[4] This question has arisen a few times in connection with preferred stock, and the courts are inclined to scan closely a refusal to declare dividends where there are net profits and where the preferred stock is non-cumulative.[5] In an action to compel the

them than the majority of the stock is under towards the minority. Kidd *v.* New Hampshire, etc. Co., 66 Atl. Rep. 127 (N. H. 1907).

1 Fisher *v.* Black, etc., Co., [1901] 1 Ch. 174.

2 The directors are not bound to declare a dividend on the common stock, even though there are profits sufficient for that purpose after paying the dividend on the preferred stock, and even though the profits available for the common dividend may otherwise be absorbed in subsequent years to pay the preferred dividend. Stevens *v.* United States etc. Corp., 68 N. J. Eq. 373 (1905).

3 Marquand *v.* Federal, etc. Co., 95 Fed. Rep. 725 (1899).

4 See ch. XXXII, *infra.*

5 Non-cumulative preferred stock is entitled to a dividend where all the property is leased for $36,000 a year and there is no floating debt and the property cost over $1,000,000, and the bonded debt of $150,000, coming due in three years, may be extended, and all annual outlays are but $9,000. The court will order the payment of a dividend. Hazeltine *v.* Belfast, etc. R. R., 79 Me. 411 (1887). Directors are not allowed to use their power illegally, wantonly, or oppressively in refusing to declare dividends; but where the company owes $88,000 floating debt, $150,000 debt due in five years, and $1,000,000 due in thirty-five years, at which time its profits would probably be nothing, the court will not order a dividend, even on the preferred stock, although the company has $37,000 on hand and an annual income of $36,000 from the lessee of its road. Belfast, etc. R. R. *v.* Belfast, 77 Me. 445 (1885). Profits available for a dividend are such as are left after all debts for rolling-stock, rails, station-houses, etc., are paid, but not the money raised under the borrowing powers. Corry *v.* Londonderry, etc. Ry., 29 Beav. 263 (1860). In Stevens *v.* South Devon Ry., 9 Hare, 313 (1851), the court refused to enjoin the payment of dividends on preferred stock, even though the floating and unsecured debt had not been paid or provided for. Where, by a reorganization plan, common stockholders are allowed to vote, etc., only after certain dividends are declared on preferred stock, the court will determine whether such dividends should have been declared. Mackintosh *v.* Flint, etc. R. R., 32 Fed. Rep. 350 (1887); s. c., 34 Fed. Rep. 582. See also Smith *v.* Cork, etc. Ry., Ir. Rep. 3 Eq. 356 (1869).

In Dent *v.* London Tramways Co.,

declaration of a preferred dividend, the common stockholders are proper but not necessary parties.[1]

A stock dividend is legal in America, but cannot be forced upon stockholders in England.[2]

Dividends need not necessarily be from profits. A bond dividend is legal, and even if it results in impairing the capital stock the court will not interfere if no harm can come from it.[3]

L. R. 16 Ch. D. 344 (1880), it was held that the owners of preference shares, the dividend on which was "dependent upon the profits of the particular year only," were entitled to a dividend out of the profits of any year after setting aside a proportionate amount sufficient for the maintenance and repair of the tramway for that year only; and that they were not to be deprived of that dividend in order to make good the sums which in previous years should have been set aside by the company for maintenance, but which had been improperly applied by them in paying dividends. But preferred stockholders are not entitled to a redemption of their stock in accordance with a statute if it would work an injustice to creditors and the other stockholders by taking all the money from the treasury and thereby crippling or wrecking the enterprise. Culver *v.* Reno, etc. Co., 91 Pa. St. 367 (1879). In the case Roberts *v.* Roberts, etc. Co., 184 N. Y. 257 (1906), rev'g 102 App. Div. 118, a corporation had $75,000 preferred stock and $225,000 common stock. About $90,000 capital stock had been lost. The company then reduced its capital stock to $200,000, being $50,000 preferred and $150,000 common. The court held that inasmuch as by the terms of the preferred stock the dividends were cumulative and bore interest, the dividends which had accumulated on the $75,000 preferred stock, prior to the reduction, must be paid with such interest, before any dividends were paid on the common stock, but that the $10,000 surplus, created solely by a reduction of the capital stock, was not surplus profits, applicable to such accumulated dividends. Such $10,000 is to be divided ratably among all the stockholders without preference.

[1] Thompson *v.* Erie R. R., 45 N. Y. 468 (1871). See also Chase *v.* Vanderbilt, 62 N. Y. 307 (1875), holding that the corporate officers are not necessary parties.

[2] See ch. XXXII, *infra.* In Howell *v.* Chicago, etc. Ry., 51 Barb. 378 (1868), where the rights of the preferred and common stockholders were clearly defined by the contract, a stock dividend of preferred stock was made to the preferred stockholders and of common stock to the common stockholders. In figuring the amount of dividend thus declared the court estimated the stock dividends at their market values. In Wood *v.* Lary, 124 N. Y. 83 (1891), the court sustained the court below (47 Hun, 550) in refusing to cancel a mortgage and bonds, the bonds having been issued as a bond dividend to preferred stockholders.

[3] Where the company pays dividends on preferred stock by issuing certificates entitling the holder to bonds in exchange therefor, the company cannot afterwards refuse to deliver the bonds on the ground that the dividend was illegal or that such an issue of bonds was *ultra vires*, many bonds having already been so issued. Chaffee *v.* Rutland R. R., 55 Vt. 110 (1882). Although a dividend may be illegal, yet "equity even would not interfere with a dividend unless it appeared that somebody in par-

§ 273. *Arrears of preferred stock, to what extent payable subsequently—Remedies to enforce payment of arrears.*—When preferred stock is issued it is generally specified in the certificate itself whether it is "cumulative" or "non-cumulative." In the former case all arrears of dividends must be paid on the preferred stock before any dividend is paid on the common. In the latter case the contrary is the rule. Such are the rules where the question is expressly settled by the terms under which the stock was issued.

If preferred stock is issued without any mention of whether or not the dividends are cumulative, then the law makes them cumulative. As soon as there are net profits available for dividends, the corporation must pay the preferred dividends and all arrears thereon before a dividend is declared on the common stock. This is the well-settled rule at common law in this country[1] and in England, and is not only equitable, but is in accord with the understanding of the business community.[2]

ticular was hurt or liable to be injured. It would not interfere after all danger had passed, and for the sake of vindicating general principles." Chaffee *v.* Rutland R. R., 55 Vt. 110 (1882). See also § 546, *infra.*

1 Boardman *v.* Lake Shore, etc. R. R., 84 N. Y. 157 (1881); Prouty *v.* Michigan, etc. R. R., 1 Hun, 655 (1874); Elkins *v.* Camden, etc. R. R., 36 N. J. Eq. 233 (1882); Taft *v.* Hartford, etc. R. R., 8 R. I. 310 (1866); West Chester, etc. R. R. *v.* Jackson, 77 Pa. St. 321 (1875); Lockhart *v.* Van Alstyne, 31 Mich. 76 (1875), per Cooley, J.; Bates *v.* Androscoggin, etc. R. R., 49 Me. 491 (1860). There are cases, however, to the contrary, under peculiar provisions governing the dividends. When the preferred dividends are "dependent upon the profits of the particular year only," they are not cumulative. Dent *v.* London Tramways Co., L. R. 16 Ch. D. 344 (1880). Preferred stock, under a provision that "should a surplus then remain of net earnings, after both of said dividends in any one year, the same shall be divided *pro rata* on all the stock," is non-cumulative. Hazeltine *v.* Belfast, etc. R. R., 79 Me. 411 (1887). See also dictum in Cotting *v.* New York, etc. R. R., 54 Conn. 156 (1886).

Speaking of preferred stock, the court said in Belfast, etc. R. R., *v.* Belfast, 77 Me. 445 (1885), in a dictum and under a by-law in that case: "It was not intended in the present instance to guarantee a dividend. If a dividend is prevented in any one year by a deficit of earnings, it cannot be made up from the earnings of succeeding years." The preferred stock may be made non-cumulative. Bailey *v.* Hannibal, etc. R. R., 1 Dill. 174 (1871); s. c., 2 Fed. Cas. 371; aff'd 17 Wall. 96 (1873). Where there is a statutory provision that dividends on the preferred stock shall not exceed a certain rate per cent. then there is no carrying over of arrears. Elkins *v.* Camden, etc. R. R., 36 N. J. Eq. 233 (1882).

2 Henry *v.* Great Northern Ry., 1 De G. & J. 606 (1857), aff'g 4. K. & J. 1; Crawford *v.* Northeastern Ry., 3 Jur. (N. S.) 1093 (1856); Sturge *v.* Eastern Union Ry., 7 De G., M. & G. 158 (1855); Stevens *v.* South Devon Ry., 9 Hare, 313 (1851); Matthews *v.* Great Northern Ry., 28 L. J. (Ch.) 375 (1859); Corry *v.* Londonderry,

The right of the preferred stockholder to arrears of dividends is not deemed waived by delay, nor in any way except upon clear proof of intent to waive.[1] The dividends on the common stock may be made cumulative also before the preferred stock shares in the surplus profits remaining after preferred dividends are paid.[2]

etc. Ry., 29 Beav. 263 (1860); Webb *v.* Earle, L. R. 20 Eq. 556 (1875); Coates *v.* Nottingham, etc. Co., 30 Beav. 86 (1861); Smith *v.* Cork, etc. Ry. Ir. Rep. 3 Eq. 356 (1869); s. c., Ir. Rep. 5 Eq. 65 (1870); The Companies Clauses Act of 1863 (26 and 27 Vict., ch. 118, § 14) provides that preference shares or stock shall be entitled to the preference dividend or interest assigned thereto, out of the profits of each year, in priority to the ordinary shares and stock of the company; but that if in any year there are not profits available for the payments of the full amount of the preferential dividend or interest for that year, no part of the deficiency shall be made good out of the profits of any subsequent year, or out of any other funds of the company. In Henry *v.* Great Northern Ry., 1 De G. & J. 606 (1857), in which the matter of arrears in preferred dividends was elaborately considered, it was stated that the reason why such arrears ought to be held payable out of subsequent profits is that otherwise there would be a temptation to the corporation to set aside profits for improvements when the profits were too small for a dividend on both the common and the preferred shares, and not to set aside enough for improvements when the company made a dividend for both. Dividends are not cumulative under the following provision: "The capital of the company is £150,000, divided into ten thousand ordinary shares of £10 each and five thousand preference shares of £10 each. The holders of preference shares shall be entitled, out of the net profits of each year, to a preference dividend at the rate of £10 per cent. per annum on the amount for the time being paid or deemed to be paid up thereon. After payment of such preferential dividend, the holders of ordinary shares shall be entitled to a like dividend at the rate of £10 per cent. per annum on the amount paid on such ordinary shares. Subject as aforesaid, the preference and ordinary shares shall rank equally for dividend." Staples *v.* Eastman, etc. Co., [1896] 2 Ch. 303.

[1] Quoted and approved in Fidelity T. Co. *v.* Lehigh Valley R. R., 215 Pa. St. 610 (1906). Boardman *v.* Lake Shore, etc. R. R., 84 N. Y. 157 (1881). In Smith *v.* Cork, etc. Ry., Ir. Rep. 3 Eq. 356 (1869), the court held, under the facts of that case, that the preferred stockholders had not waived their right to arrears, although they had forborne and had taken part in inducing new capital to come in. Where each share in a company was converted into two half shares, one preferred, the other common or deferred, and the holders of the preferred half shares had, in a former year, acquiesced in the declaration of a dividend on the deferred half shares, while there was an arrearage of dividends on the preferred half shares, it was held that, although they had precluded themselves from making any claim to those specific arrears, they had not waived their right to claim subsequent arrears. Matthews *v.* Great Northern Ry., 28 L. J. (Ch.) 375 (1859).

[2] When the preferred stock is entitled to participate in the surplus after the dividends are paid on the preferred, and "a dividend of the same amount upon the whole amount of paid-up capital" has been paid, arrears of dividends on the common stock as well as on the preferred

§ 274. The remedy of a preferred stockholder, when the company proposes to pay dividends on the common stock before paying arrears of dividends on preferred stock, is in a court of equity.[1]

But an action at law will lie if dividends have already been declared and paid to the common stockholders in violation of the rights of the preferred stockholders.[2]

When the arrears and dividends of preferred stock are recoverable, the interest on such arrears may be recovered from the time when moneys sufficient to pay the arrears were unlawfully used to

must be paid before there is any surplus. Allen *v.* Londonderry, etc. Ry., 25 W. R. 524 (1877).

[1] A suit in equity to restrain the corporation from declaring dividends on the common stock, and to compel an accounting and the payment of dividends on the preferred stock, is the proper remedy. Boardman *v.* Lake Shore, etc. R. R., 84 N. Y. 157 (1881); Williston *v.* Michigan, etc. R. R., 95 Mass. 400 (1866). In this case the decision was that, when a preferred stockholder is entitled to share *pro rata* with holders of common stock in dividends over and above the preference, his remedy is not by an action at law against the corporation, but by a suit in equity. In an action by a preferred stockholder in behalf of himself and others to enjoin the payment of dividends to common stockholders before the arrears of preferred dividends are paid, he need not join all the common stockholders as parties defendant. Smith *v.* Cork, etc. Ry., Ir. Rep. 3 Eq. 356 (1869); Prouty *v.* Michigan, etc. R. R. 1 Hun, 655 (1874), where an injunction was granted to restrain the declaring of dividends or making other disposition of the funds of the corporation until arrears on preferred stock should be paid; Thompson *v.* Erie, etc. R. R., 45 N. Y. 468 (1871), involving an action to "enforce the declaration and payment of a dividend;" Barnard *v.* Vermont, etc. 89 Mass. 512 (1863), holding that where certificates for an intended dividend had been issued payable at a future time when the company should be able to pay them, the final decision as to when the company is able to pay does not rest with the directors but with the court. Where the common stockholders in a reorganized company claim that the preferred stockholders are defrauding them, a preliminary injunction will not be ordered unless imminent danger is shown. Mackintosh *v.* Flint, etc. R. R., 32 Fed. Rep. 350 (1887). Where dividends have been paid on the common stock, a preferred stockholder, as plaintiff, by offering in evidence his certificate of stock and showing that no dividends have been paid, makes out a *prima facie* case entitling him to dividends and arrears. Boardman *v.* Lake Shore, etc. R. R., 84 N. Y. 157 (1881).

[2] If dividends are declared and paid on the common stock, before paying the arrears of dividends on the preferred stock, the holders of the latter may collect such arrears by an action at law in *assumpsit*. West Chester, etc. R. R., *v.* Jackson, 77 Pa. St. 321 (1875). In the case of Bates *v.* Androscoggin, etc. R. R., 49 Me. 491 (1860), an action of debt for past-due dividends was sustained, although such dividends had not been declared, they having been earned. Coey *v.* Belfast, etc. Ry., Ir. Rep. 2 C. L. 112 (1866), holding that an action at law will lie against a railway company for not giving to the plaintiff preferred stockholder the same dividend that it has given to others.

pay dividends on the common stock instead of being used to pay the arrears on the preferred stock.[1]

§ 275. *Rights of the assignee or transferee of preferred stock in arrears of dividends.*—The transferee or assignee of preferred stock stands, in respect to arrears of dividends, in the shoes of his assignor or transferrer. The undeclared arrears of dividends pass to him in the transfer of the stock, unless by the terms of the transfer the arrears are expressly separated from the stock itself and reserved to the transferrer.[2] An assignment of preferred stock carries with it all arrears of dividends, and a subsequent assignment of arrears by the transferrer conveys nothing.[3]

§ 276. *"Special stock" in Massachusetts.*—In Massachusetts incorporated companies are permitted by statute[4] to issue a peculiar kind of stock, known as "special stock." It is something essentially different from preferred stock.[5] Its chief characteristics are that it is limited in amount to two-fifths of the actual capital; it is subject to redemption by the corporation at par after a fixed

1 Boardman *v.* Lake Shore, etc. R. R., 84 N. Y. 157 (1881); Prouty *v.* Michigan, etc. R. R., 1 Hun, 655 (1874). See Adams *v.* Fort Plain Bank, 36 N. Y. 255 (1867). *Contra*, Corry *v.* Londonderry, etc. Ry., 29 Beav. 263 (1860). *Cf.* ch. XXXII, *infra*. In the case Roberts *v.* Roberts, etc. Co., 184 N. Y. 257 (1906), rev'g 102 App. Div. 118, a corporation had $75,000 preferred stock and $225,000 common stock. About $90,000 capital stock had been lost. The company then reduced its capital stock to $200,000, being $50,000 preferred and $150,000 common. The court held that inasmuch as by the terms of the preferred stock the dividends were cumulative and bore interest, the dividends which had accumulated on the $75,000 preferred stock, prior to the reduction, must be paid with such interest before any dividends were paid on the common stock, but that the $10,000 surplus, created solely by a reduction of the capital stock, was not surplus profits, applicable to such accumulated dividends. Such $10,000 is to be divided ratably among all the stockholders without preference.

2 Jermain *v.* Lake Shore, etc. Ry., 91 N. Y. 483 (1883); Boardman *v.* Lake Shore, etc. Ry., 84 N. Y. 157 (1881); Hyatt *v.* Allen, 56 N. Y. 553 (1874); Manning *v.* Quicksilver Min. Co., 24 Hun, 360 (1881).

3 Manning *v.* Quicksilver Min. Co., 24 Hun, 360 (1881). A stock dividend provided for in a certificate of stock passes to the transferee of the stock. Louisville, etc. R. R., *v.* Hart County, 116 Ky. 186 (1903). Where, upon the sale of all the assets of one corporation to another, stock of the latter is issued to stockholders of the former, and it is provided that any surplus remaining from a certain fund shall be divided among all the stockholders of both companies, this interest in the surplus vests in the then existing stockholders individually, and this interest does not pass on a subsequent sale of his stock by a stockholder. Read *v.* Citizens', etc. R. R., 110 Tenn. 316 (1903). See also § 641, *infra*.

4 Stats. 1855, ch. 290; 1870, ch. 224, §§ 25, 39, cl. 4; Pub. Stats., ch. 106, §§ 42, 61, cl. 3.

5 American Tube Works *v.* Boston Machine Co., 139 Mass. 5 (1885).

time, to be expressed in the certificate; the corporation is bound to pay a fixed half-yearly sum, or dividend, upon it as a debt; the holders of it are in no event liable for the debts of the corporation beyond their stock, and the issue of this special stock makes all the general stockholders liable for all debts and contracts of the corporation until the special stock is fully redeemed.[1] Special stock can be issued only by a vote of three-fourths of the general stockholders of the company at a meeting duly called for that purpose.[2] The guarantee of dividends of special stock in Massachusetts is an absolute one, and not in any degree conditional upon the earning of sufficient profits by the corporation.[3]

§ 277. *Interest-bearing stocks.*—Occasionally, instead of issuing preferred stock, a corporation issues ordinary common stock, together with a promise that the corporation will pay interest thereon. Such a promise is generally lawful, and may be enforced as a contract in the nature of an agreement to pay a dividend.[4] It is a lawful contract, however, only when it is to be interpreted as requiring payment from profits alone.[5] Any contract on the part of a corpora-

1 The statutes cited *supra;* American Tube Works *v.* Boston Machine Co., 139 Mass. 5 (1885).

2 Stats. 1870, ch. 224, § 25. And the corporation must have a clerk, who is sworn, and who acts as recorder at such meeting. Stats. 1870, ch. 224, §§ 15, 18; Pub. Stats., ch. 106, §§ 23, 26. See also Reed *v.* Boston Machine Co., 141 Mass. 454 (1886). This special stock is declared to be "a peculiar kind of stock, distinctly provided for by statute;" and it is important that the marked distinction between preferred stock, as usually understood, and special stock, as authorized by the statute cited in the notes, be kept plainly in view. American Tube Works *v.* Boston Machine Co., 139 Mass. 5 (1885).

It was held, in accordance with this view, in the case last cited, that a vote of a corporation to issue special stock, at a meeting called to consider whether the corporation will issue preferred stock, is invalid; that a vote to issue special stock is invalid if the record of the meeting fails to show that three-fourths of the general stockholders voted for such issue; that the court will not presume, because the record showed that more than three-fourths of the stockholders were present at the meeting, that therefore three-fourths or more voted for the issue of special stock; and that a holder of special stock which is illegally issued cannot, by estoppel or otherwise, become a member of the corporation in respect of such shares.

3 Williams *v.* Parker, 136 Mass. 204 (1884). See also Allen *v.* Herrick, 81 Mass. 274 (1860).

4 Barnard *v.* Vermont, etc. R. R., 89 Mass. 512 (1863).

5 Richardson *v.* Vermont, etc. R. R., 44 Vt. 613 (1872); Miller *v.* Pittsburgh, etc. R. R., 40 Pa. St. 237 (1861); Cunningham *v.* Vermont, etc. R. R., 78 Mass. 411 (1859); City of Ohio *v.* Cleveland, etc. R. R., 6 Ohio St. 489 (1856); Wright *v.* Vermont, etc. R. R., 66 Mass. 68 (1853); Waterman *v.* Troy, etc. R. R., 74 Mass. 433 (1857); Barnard *v.* Vermont, etc. R. R., 89 Mass. 512 (1863). In Ohio College *v.* Rosenthal, 45 Ohio St. 183 (1887), where certificates of stock bearing interest were issued by a corporation which merely owned real

tion to pay interest or dividends to its stockholders, without reference to the ability of the company to pay them out of its earnings, is not enforceable unless sufficient profits exist to make such payment.[1] Moreover, the directors or corporate officers paying interest on stock out of the capital stock are jointly and severally liable to refund the amounts so paid out.[2] It has been held that a railroad company may lawfully receive subscriptions to its capital stock upon the condition to pay interest thereon as soon as the amount of the subscription shall have been paid in, and until completion of the road, or of some part thereof, or until the road shall have been put in operation,[3] but stipulated interest on stock cannot become a debt payable absolutely.[4] The right of a subscriber drawing interest on his stock to participate in elections and general corporate meetings, and to exercise generally the rights of a stockholder is the same as that of other stockholders.[5] Where stockholders advance money in prepayment of calls, the company may pay them interest on the same up to the time that the call is due, even though such interest is paid out of capital.[6]

estate, which was not organized for profit, never made any profit, never expected to, and had existed for forty years, a suit by a stockholder to collect interest failed.

1 Painesville, etc. R. R. *v.* King, 17 Ohio St. 534 (1867); Pittsburg, etc. R. R. *v.* Allegheny County, 79 Pa. St. 210 (1875); Pittsburg, etc. R. R. *v.* Allegheny County, 63 Pa. St. 126 (1869); Lockhart *v.* Van Alstyne, 31 Mich. 76 (1875); Troy, etc. R. R. *v.* Tibbits, 18 Barb. 297 (1854); Salisbury *v.* Metropolitan Ry., 38 L. J. (Ch.) 249 (1869); s. c., on further hearing 22 L. T. Rep. 839; *Re* National, etc. Co., L. R. 10 Ch. D. 118 (1878). *Cf.* Bardwell *v.* Sheffield Water-works Co., L. R. 14 Eq. 517 (1872). In City of Ohio *v.* Cleveland, etc. R. R., 6 Ohio St. 489 (1856), interest payable by stock dividends was allowed by statute. A subscriber to stock which by its terms is to draw interest cannot defeat the subscription on the ground that the provision as to interest is illegal. Evansville, etc. R. R. *v.* Evansville, 15 Ind. 395 (1860). In McLaughlin *v.* Detroit, etc. Ry., 8 Mich. 100 (1860), a railroad company issued stock bearing interest. The court sustained it. The stock called for interest instead of dividends. Bonds were tendered to the stockholder in payment of such "interest." He declined the tender and sued for the interest money. The court sustained his suit. No question was raised as to paying such "interest" irrespective of profits.

2 *Re* National, etc. Co., L. R. 10 Ch. D. 118 (1878). See also § 550, *infra*.

3 Milwaukee, etc. R. R. *v.* Field, 12 Wis. 340 (1860); Racine County Bank *v.* Ayers, 12 Wis. 512 (1860); Miller *v.* Pittsburgh, etc. R. R., 40 Pa. St. 237 (1861); Waterman *v.* Troy, etc. R. R., 74 Mass. 433 (1857).

4 Barnard *v.* Vermont, etc. R. R., 89 Mass. 512 (1863). The relation of debtor and creditor is created to the extent of the interest stipulated for. McLaughlin *v.* Detroit, etc. Ry., 8 Mich. 100 (1860).

5 McLaughlin *v.* Detroit, etc. Ry., 8 Mich. 100 (1860).

6 Lock *v.* Queensland Inv. etc. Co., [1896] 1 Ch. 397; aff'd H. L., [1896] A. C. 461. A construction company owning the stock of a gas company,

§ 278. *Rights of preferred stockholders on dissolution and on a reduction of the capital stock.*—Upon the dissolution of a corporation, and the distribution of its assets among the stockholders after the payment of the corporate indebtedness, it is the settled rule of law that, in the absence of any provision in the statutes, by-laws, certificate of stock, or contract under which the preferred stock was issued to the contrary, preferred stockholders have no priority over common stockholders. Their stock was preferred in respect of dividends, and not in reference to the capital stock. The assets of the corporation are to be distributed as though the preferred stock had been common stock. The preferred stockholder in the distribution becomes a common stockholder.[1] Thus, where the pre-

upon selling such stock, on payments to be made in instalments, may agree to allow interest on the instalments paid in advance. Hetfield *v.* Addicks, 154 Pa. St. 1 (1893); Porter *v.* Beacon Con. Co., 154 Pa. St. 8 (1893).

1 Coltrane *v.* Baltimore, etc. Assoc., 110 Fed. Rep. 281, 288 (1901); *Re* Northwest, etc. Ry., [1900] 2 Ch. 882; People *v.* New York, etc. Co., 50 N. Y. Misc. Rep. 23 (1906). Preferred stock is not preferred as to assets where there is no provision to that effect, even though there is a provision that such stock is to mature and be payable seven years after the first payment on the subscription price has been paid. Sumrall *v.* Commercial Bldg. etc., 106 Ky. 260 (1899); Forwood *v.* Eubank, 106 Ky. 291 (1899). The House of Lords has held that, upon the dissolution of a corporation having preferred stock and common stock, the surplus assets, after repayment of the paid-up capital, the common stock not having been paid up, is divisible among all the stockholders, common and preferred, in proportion to their holdings. Birch *v.* Cropper, 14 App. Cas. 525 (1889), reversing *Re* Bridgewater Nav. Co., L. R. 39 Ch. D. 1 (1888), a case where there was a large surplus. See also *Re* London India Rubber Co., L. R. 5 Eq. 519 (1868); McGregor *v.* Home Ins. Co., 33 N. J. Eq. 181 (1880), a dictum, the court holding, however, that under the statutes of the state the preferred stockholders had a preference as to assets also, the statute providing for a division of the surplus after payment to preferred stockholders. Stock with guaranteed *dividends* is stated in Gordon *v.* Richmond, etc. R. R., 78 Va. 501 (1884), to give a preference as to dividends, but not of the assets on a winding up. Under the terms of a charter, distribution on dissolution may be according to the amount paid in, some of the stock not being full paid. Sheppard *v.* Murphy, 70 L. T. Rep. 3 (1893). In Griffith *v.* Paget, L. R. 6 Ch. D. 511 (1877); s. c., L. R. 5 Ch. D. 894, it was held that where the company is dissolved by a consolidation with another company under a statute, the stockholders of the old being entitled to exchange their stock for stock in the new, the preferred stock is not entitled to preferred stock in the new. On a winding up, if it turns out that the profits had been systematically overestimated for a number of years, thereby depriving common stockholders of the dividends, an account should be taken and such dividends should be paid. *Re* Bridgewater Nav. Co., [1891] 2 Ch. 317. See also s. c., [1891] 1 Ch. 155. A contest between the preferred and common stockholders as to who shall be entitled to the surplus will not be decided in a foreclosure suit, but the surplus will be

ferred stock is not preferred as to assets, and a reorganization is had by selling out the property of the company to a new company for preferred and common stock in the new company, this preferred and common stock of the new company must be distributed ratably among both the common and preferred stockholders of the old company. A preferred stockholder in the old cannot be given the preferred stock in the new. A common stockholder may enjoin such a distribution. He is entitled to his share of the new preferred.[1] But where a railroad may, by statute, consolidate with another railroad on such terms as a majority of the stockholders approve, the terms may be that four preferred shares in the old shall receive five preferred shares in the new, and two shares of common in the old shall receive one preferred share in the new. It is not such a dissolution as entitles the common to share equally with the preferred.[2] Where profits have been earned and properly entered as profits on the corporation books they belong to the stockholders, even though thereafter the corporation becomes insolvent and is wound up before such profits are declared to be dividends. The creditors of the corporation are entitled to the corpus of the estate, but not to any profits. If there is preferred stock such profits go to that stock,[3] but the rule may be different where the directors had power to create a reserve fund.[4]

Where a preference as to capital has been expressly contracted

paid to the corporation for distribution. Continental Trust Co. *v.* Toledo, etc. R. R., 86 Fed. Rep. 929 (1898). On dissolution a holder of deferred shares cannot claim that they were illegally issued. People *v.* New York, etc. Co., 119 N. Y. App. Div. 830 (1907).

1 Simpson *v.* Palace Theater, 69 L. T. Rep. 70 (1893). See also § 270, *supra.*

2 Hale *v.* Cheshire R. R., 161 Mass. 443 (1894). *Cf.* § 270, *supra.* Under the Ohio statute one of the terms of a consolidation may be that each constituent company shall first pay its debts and that the stock going to any such company shall be sold to pay such debts, and that the remainder of the stock shall be distributed among the holders of the preferred and common stock of such company in proportion to the relative value of such preferred and common stock. Cleveland City Ry. *v.* First Nat. Bank, 68 Ohio St. 582 (1903).

3 Bishop *v.* Smyrna, etc. Ry., [1895] 2 Ch. 265.

4 Where a company, having preferred and common stock, sells its assets, excepting the profits of the previous year, these profits do not belong to the preferred stockholders, no dividend thereon having been declared, even though the preferred stock was in arrears as to dividends, the board of directors having full power to use profits for a reserve fund and the company having had losses in prior years. The amount will be passed to assets for final distribution. *Re* Crichton's Oil Co., [1901] 2 Ch. 184; aff'd, [1902] 2 Ch. 86.

for,[1] or is given by a statute,[2] the preferred stock is, of course, preferred as to assets also. In New Jersey it is held that preferred stock is entitled to a preference on dissolution under the statutes of that state, which provides for dividends before any dividend shall be set apart on the common stock.[3]

If the capital stock is reduced, the preferred stock is reduced proportionately with the common, unless the preferred stock is preferred as to assets as well as dividends.[4] Where the preferred

1 *Re* Bangor, etc. Slate Co., L. R. 20 Eq. 59 (1875). In the issue of preferred stock there may be a provision that any amounts which have to be paid to corporate creditors on the winding up shall be paid by the common stockholders. Welton *v.* Saffery, [1897] A. C. 299. The preference may, by express agreement, be made to give a preference to capital as well as to profits. Hamlin *v.* Toledo, etc. R. R., 78 Fed. Rep. 664 (1897). Founders' shares are one species of preferred or deferred stock. See § 14, *supra*. Where, on dissolution, the founders' shares were to have one-fifth of the surplus assets, the words "surplus assets" are construed to be the assets remaining after paying the debts and also paying back whatever the stockholders had originally paid in. *Re* New Transvaal Co., [1896] 2 Ch. 750, 86 Fed. Rep. 929. In the case South African, etc. Co., [1904] 2 Ch. 268, the preferred stock was entitled to a bonus of fifteen per cent. on its par value in case of winding up for reconstruction or amalgamation.

2 McGregor *v.* Home Ins. Co., 33 N. J. Eq. 181 (1880).

3 Hellman *v.* Pennsylvania, etc. Co., 67 Atl. Rep. 834 (N. J. 1907).

4 When the capital stock is reduced by decreasing the par value of the stock, the preferred stock may be reduced equally with the rest. *Re* Barrow, etc. Co., L. R. 39 Ch. D. 582 (1888). Where, in consequence of losses, the capital stock is reduced, as allowed by the charter, by reducing the par value of the stock one-half, the preferred stock as well as the common is reduced one-half. Bannatyne *v.* Direct, etc. Co., L. R. 34 Ch. D. 287 (1886). But not where the preferred stock is preferred as to assets as well as dividends, unless all the preferred stockholders assent thereto. *Re* Quebrada Ry., etc. Co., L. R. 40 Ch. D. 363 (1889). Where a company has not issued or has acquired some of its stock, it may reduce its capital stock by canceling the part owned by it, although it is all preferred, or all common, or a part of both. *Re* Gatling Gun, L. R. 43 Ch. D. 628 (1890). Where there is both common and preferred stock, it is legal for the company to reduce the common stock without reducing the preferred. *Re* Agricultural Hotel Co., [1891] 1 Ch. 396. Under the English statutes, where the capital stock consists of stock and deferred stock, the former being practically preferred stock and the latter common stock, a reduction of the whole capital stock may be effected, with the consent of the common stockholders, by canceling a part of the common stock and having the remainder become preferred stock (in other words, by wiping out all preferences), even though some of the preferred stockholders objected, there being originally no preferences as to assets. *Re* Hyderabad Co., 75 L. T. Rep. 23 (1896). In National Dwelling Soc., Lim., 78 L. T. Rep. 144 (1898), by unanimous consent, upon the reduction of the capital stock of a company having both preferred and common stock, the capital stock having become impaired, all the stock became com-

stock is reduced, a preferred stockholder, who accepts the reduced amount of preferred stock and turns in the old certificate, may claim the accumulated dividends on the amount canceled by the reduction, but if the reduction resulted in a surplus over the reduced capital stock, such surplus may be used for dividends on both classes of stock, because it is not "surplus profits." [1] Where the preferred stock was to have five per cent. and the common stock seven per cent., and the remaining profits were to go equally to the common stock and to founders' shares, and a reduction of capital is made by reason of losses, the reduction may be made by canceling the founders' shares and part of the common stock.[2] Under the Eng-

mon stock, the preferred stockholders reducing their holdings three-fifths and the common stockholders reducing their holdings nine-tenths. A holder of preferred stock may prevent a reduction of the preferred dividend by an amendment of the certificate of incorporation, even though the statutes of the state at the time of the organization of the company authorized the certificate of incorporation to be amended by a certain vote. Such reduction may be enjoined. Pronik *v.* Spirits, etc. Co., 58 N. J. Eq. 97 (1899). Where the property of the corporation consists of a mine and it has been largely worked out, and the corporation applies to the court to sanction a reduction of both preferred and common stock by canceling one-half, the court will refuse where it is shown that a large sum had been passed to a reserve fund and profit and loss. *Re* Barrow, etc. Co., Ltd., 85 L. T. Rep. 493, [1902] 2 Ch. 746. In this last case the lower court held that under the English statute requiring the consent of the court to a reduction of capital stock, the court will, on protest of preferred stockholders, refuse a reduction of all classes of stock to the extent of one-half of their face value, where the only ground for the reduction is that the property is not worth the entire capital stock, and a preferred stockholder shows that the good will and reserve fund have not been taken into consideration, and that the scheme is for the purpose of practically reducing the dividend on the preferred stock. Barrow, etc. Co., [1900] 2 Ch. 846. Even though there are different classes of stock, a reduction of the capital may be made on a different basis from the basis specified as applicable upon a dissolution and winding up. *Re* Credit Assurance, etc. Corp., [1902] 2 Ch. 601.

[1] Roberts *v.* Roberts-Wicks Co., 184 N. Y. 257 (1906). In this case a corporation had $75,000 preferred stock and $225,000 common stock. About $90,000 capital stock had been lost. The company then reduced its capital stock to $200,000, being $50,000 preferred and $150,000 common. The court held that inasmuch as by the terms of the preferred stock the dividends were cumulative and bore interest, the dividends which had accumulated on the $75,000 preferred stock, prior to the reduction, must be paid with such interest, before any dividends were paid on the common stock, but that the $10,000 surplus, created solely by a reduction of the capital stock, was not surplus profits, applicable to such accumulated dividends. Such $10,000 is to be divided ratably among all the stockholders without preference.

[2] *Re* London, etc. Inv. Corp., [1895] 2 Ch. 860, the court saying that, "where there are different classes of shares, the loss on a reduction ought

lish statute a reduction of the capital stock, when approved by the court, is binding, and the court may approve a reduction which pays off the founders' shares at par, even though the reserve is more than sufficient therefor, it appearing that the founders' shares have no commercial value.[1] The subject of reducing the capital stock by purchasing and retiring a part of the preferred stock is considered elsewhere.[2]

to fall on those who would have to bear it if there were a winding up."

1 Poole *v.* National Bank of China, 96 L. T. Rep. 889 (1907), disapproving *Re* Anglo-French Ex. Co., [1902] 2 Ch. 845.

2 See § 271, *supra*.

CHAPTER XVII.

INCREASE AND REDUCTION OF THE CAPITAL STOCK AND OVERISSUED STOCK.

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295. Personal liability of the officers of the corporation on overissued stock.
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297. Equity will enjoin voting, transferring, and dividends on such stock, and will adjust the rights of all parties.
298. Subscriber's right to defeat a subscription to overissued stock, and to recover back money paid thereon.

§ 279. *Introductory.*— The capital stock of all incorporated companies is generally fixed by the charters which give them an existence. Frequently, however, in the progress of the corporate enterprise, it happens that the capital stock is found to be too small or too large for the demands of the business, and there is a desire to change it. This change can be made lawfully only under certain conditions and limitations. These are the subject of this chapter.

A. LEGAL INCREASE OR REDUCTION OF CAPITAL STOCK.

§ 280. *Power of the legislature to authorize an increase or reduction.*—It is clearly constitutional for the legislature, upon granting a charter, to fix the capital stock and to authorize the corpora-

tion to increase or decrease that capital stock. But where the legislature did not authorize the corporation to vary its capital stock, it is a serious question whether, as against a dissenting stockholder, the capital stock may be subsequently changed, even under the authority of a legislative enactment. The better and prevailing opinion is that it may be; that the statute authorizing the change is constitutional; and that the increase or reduction is valid.[1]

A different conclusion may be reached, however, as regards the rights of creditors of the corporation. It is clear that the legislature cannot constitutionally authorize a reduction of the capital stock in prejudice of their rights as to an existing corporate indebtedness.[2] The supreme court of Minnesota has held that it is an unconstitutional delegation of authority for a legislature to authorize state railroad commissioners in their judgment to allow an increase of capital stock only for such purposes and on such terms as they may deem advisable or in their discretion to refuse to allow such increase.[3]

§ 281. *Power of the corporation to increase or reduce the capital stock.*—In the absence of express authority from the state, a corporation has no power whatsoever to increase or reduce the amount of its stock, and any attempt upon the part of the corporation, either by the corporate officers or by the stockholders, to do so is wholly illegal and void.[4] Accordingly it is not competent for a corporation having a fixed capital stock, and being without legislative authority to change it, to reduce that capital to the amount actually paid in.[5]

1 See ch. XXVIII, *infra*, on this subject. An amendment authorizing a corporation to increase its capital stock is a fundamental, and hence is a special act in violation of a constitutional prohibition against special acts. Marion T. Co. *v.* Bennett, 82 N. E. Rep. 782 (Ind. 1907).

2 See ch. XXVIII, *infra*.

3 State *v.* Great Northern Ry., 111 N. W. Rep. 289 (Minn. 1907). This is different from delegating to the commission the ascertainment of facts and deciding whether the facts bring the application within the specifications of a statute authorizing such an increase. See same case on this subject of delegation of authority, compare Trustees of Saratoga *v.* Saratoga, etc. Co., 191 N. Y. 123 (1908).

4 Scovill *v.* Thayer, 105 U. S. 143, 148 (1881); Sutherland *v.* Olcott, 95 N. Y. 93, 100 (1884); New York, etc. R. R. *v.* Schuyler, 34 N. Y. 30 (1865); Mechanics' Bank *v.* New York, etc. R. R., 13 N. Y. 599 (1856); Grangers', etc. Ins. Co. *v.* Kamper, 73 Ala. 325 (1882); Moses *v.* Ocoee Bank, 1 Lea (Tenn.), 398 (1878); Ferris *v.* Ludlow, 7 Ind. 517 (1856); Lathrop *v.* Kneeland, 46 Barb. 432 (1866); Salem Mill-Dam Corp. *v.* Ropes, 23 Mass. 23 (1827). Parker, C. J., in the case last cited, says that, if a corporation is "created with a fund limited by the act, it cannot enlarge or diminish that fund but by license from the legislature."

5 Droitwich Patent Salt Co. *v.* Curzon, L. R. 3 Exch. 35, 42 (1867).

Where the attempted increase or reduction of the stock is not authorized by the charter, not even the unanimous assent and agreement of all the parties concerned will legalize it.[1]

A subscriber for stock may defeat an action on his subscription by the defense that the stock subscribed for is part of an increase of stock which the statutes do not allow to be made.[2] Where there is no statutory authority for the increase, and an attempted increase is made under a by-law, a subscriber for the increased capital stock is not liable even to corporate creditors, although he acted as a stockholder.[3]

A different rule prevails, however, where the increase of capital stock is authorized by charter or statute, but is informally made. In such a case the increase is valid as against all parties excepting the state which created the corporation.[4] Where the statutes do not fix or limit the capital stock, and give the corporation power to fix it by by-law, the capital stock may be increased from time to time by amending the by-law.[5]

An authority to reduce the number of shares cannot be inferred from the authority to increase, and a reduction with no other warrant of authority than a right to increase will be held void.[6]

If the charter of the corporation provides that the capital stock shall not be less than a specified sum, nor greater than another specified sum, the corporation may commence business with less than the latter sum, and afterwards increase the capital until the limit is reached.[7]

1 Quoted and approved in Cooke *v.* Marshall, 191 Pa. St. 315 (1899); s. c., 196 Pa. St. 200. See § 292, *infra*. Where a corporation having power to increase its capital $100,000, increases it $1,100,000, the whole increase is void, and subscribers to it are not liable thereon to corporate creditors. Kampman *v.* Tarver, 87 Tex. 491 (1895). The purchasers of stock which they suppose is the original capital stock, but which is really increased capital stock, cannot sustain a bill to cancel the original capital stock, even though the latter is held by the parties who issued the increased stock, without amending the charter as required by statute. Byers *v.* Rollins, 13 Colo. 22 (1889).

2 Laredo Imp. Co. *v.* Stevenson, 66 Fed. Rep. 633 (1895).

3 Ross-Mehan, etc. Co. *v.* Southern, etc. Co., 72 Fed. Rep. 957 (1896). See also § 298, *infra*.

4 See § 288, *infra*.

5 Peck *v.* Elliott, 79 Fed. Rep. 10 (1897).

6 Sutherland *v.* Olcott, 95 N. Y. 93 (1884); Seignouret *v.* Home Ins. Co., 24 Fed. Rep. 332 (1885).

7 Gray *v.* Portland Bank, 3 Mass. 364 (1807); Somerset, etc. R. R. *v.* Cushing, 45 Me. 524 (1858). In the case last cited it is held that, where the number of shares is not fixed by charter, the directors or stockholders must fix it before an assessment can be levied, and that then, if the number fixed is greater than the number taken, it may be reduced subsequently.

An injunction is the proper remedy to prevent an illegal increase or reduction of the capital stock of a corporation. But an injunction against the issue of new stock by a foreign corporation will be dissolved where the courts of the state where the corporation was created decide such issue of stock to be legal.[1]

§ 282. *Effect of purchase by a corporation of shares of its own stock.*—If a corporation has power to reduce its capital stock, it may do so by purchasing and retiring a portion of its shares.[2] Whether the purchase by a corporation of its own stock will operate to diminish the capital stock is a question of intention. If a reduction is authorized by charter or by statute, and the formalities of making the reduction have been complied with, and the proper corporate authorities purchase for the corporation shares of its own stock and consider the capital stock thereby reduced, the law holds that a reduction of the capital stock is thereby made. But if any of these elements are wanting, then no reduction is effected, and the corporation may at any time sell and re-issue the stock. Hence a mere transfer of stock to the corporation, whether the corporation assumes to buy the stock or the stockholders simply to surrender it, will in no case constitute a reduction, when no formal reduction of the capital stock is made. Even if the stockholder is held to be released by such a transfer, still the stock survives and subsists.

1 O'Brien *v.* Chicago, etc. R. R., 53 Barb. 568 (1868). An increase of the capital stock without warrant of authority is called an overissue of stock —a subject fully considered in the succeeding sections of this chapter. The issue of new stock by the corporation cannot be enjoined where neither the corporation nor any of its directors are parties to the action. White *v.* Wood, 129 N. Y. 527 (1892). A promoter cannot enjoin the corporation from increasing its stock, even though he claims that such increase will defeat a contract made prior to incorporation, by which he was to have a one-sixth interest, the corporation not having ratified such contract. Martin *v.* Remington, etc. Co., 95 N. Y. App. Div. 18 (1904). See § 288, *infra.*

2 Quoted and approved in Tulare, etc. Dist. *v.* Kaweah, etc. Co. 44 Pac. Rep. 662 (Cal. 1896). The corporation may purchase its own stock from a part of the stockholders as a means of reducing its capital stock. British, etc. Corp. *v.* Couper, [1894] A. C. 399. Where a corporation uses its profits to buy its own stock, the remaining stockholders are not liable on the statutory liability attaching to the stock so purchased by the corporation. Moon, etc. Co. *v.* Waxahachie, etc. Co., 13 Tex. Civ. App. 103 (1896); aff'd, 89 Tex. 511 (1896); State *v.* Smith, 48 Vt. 266 (1876), dictum. So also City Bank *v.* Bruce, 17 N. Y. 507 (1858). *Contra*, Currier *v.* Lebanon Slate Co., 56 N. H. 262 (1875). Where a company has not issued or has acquired some of its stock, it may reduce its capital stock by canceling the part owned by it, although it is all preferred, or all common, or part of both. *Re* Gatling Gun, L. R. 43 Ch. D. 628 (1890).

The corporation is merely the holder of it, and may sell and reissue it at any time.[1]

§ 283. *The issue of bonds convertible into stock.*—Where the charter of a railroad corporation authorizes the issue of bonds, convertible at the option of the holder into stock, such an issue may be made, even though, if the bonds were converted into stock, the capital stock would thereby be increased beyond the amount fixed by the charter. The statute or charter authorizing such an issue of bonds is held to thereby authorize, by necessary implication the right to increase the capital stock to the extent required in the fulfillment of the contract to allow the bonds to be converted into stock.[2]

1 A street railway company which has purchased shares of its own stock is liable for the price, even though the stock turns out to be worthless. Stock so purchased by the company may be reissued and does not amount to a reduction of the capital stock. A statute prohibiting street railways from owning stock relates to stock in other companies. Leonard *v.* Draper, 187 Mass. 536 (1905). The purchase by a corporation of its own stock does not necessarily decrease the capital stock. "It might or might not have that effect, at the option of the company, and would require, I think, some manifestation of such an intent to produce that result." Such stock may be re-issued at any time. City Bank *v.* Bruce, 17 N. Y. 507 (1858). Where a corporation has power to reduce its capital stock it may purchase from one of its stockholders his stock and give him in payment therefor his *pro rata* share of the assets of the corporation, the corporation being solvent. This amounts to a reduction of the capital stock, and a subsequent creditor of the corporation cannot complain. Shoemaker *v.* Washburn, etc. Co., 97 Wis. 585 (1897). In Louisiana the purchase by a corporation of its own stock cancels the stock until re-issue. If, however, in the reissue the corporation gives away the stock, the parties receiving it are liable to subsequent corporate creditors. No formal contract of subscription is necessary, but the mere taking of the stock is sufficient to render them liable. Belknap *v.* Adams, 49 La. Ann. 1350 (1897). A purchase by the corporation itself does not amount to a reduction of the capital stock. Western Imp. Co. *v.* Des Moines Nat. Bank, 103 Iowa, 455 (1897). See § 313, *infra*, and Hartridge *v.* Rockwell, R. M. Charlt. (Ga.) 260 (1828). In an early case a transfer to the corporation seems to have been regarded as a reduction of the capital stock *pro tanto*. Percy *v.* Millaudon, 3 La. 568, 587 (1832). It is important to note in this connection that the purchase of its own stock by a corporation is an act not permitted at all in England, and not permitted in this country when corporate creditors' rights would be prejudiced thereby. See §§ 309–312, *infra*. It was held in New England, etc. Ins. Co. *v.* Phillips, 141 Mass. 535 (1886), that a purchase by a corporation of certificates of indebtedness effects a cancellation, even though the certificates have a voting power. An unincorporated association may purchase its own stock, and the question of whether a reduction of the capital stock is thereby effected is a question of intention. Booth *v.* Dodge, 60 N. Y. App. Div. 23 (1901).

2 Belmont *v.* Erie R. R., 52 Barb. 637, 669 (1869); Ramsey *v.* Erie Ry., 38 How. Pr. 193, 216 (1869); s. c., 7

The issue of a bond convertible into stock must comply with the rules regulating the issue of stock,[1] and the par value of the stock must be received by the corporation.[2] If the old stockholders have the prior right to subscribe for new stock, this right cannot be taken away by issuing a bond convertible into stock.[3] The holder of the bonds may demand stock therefor at any time; and even though the demand is made just before a dividend is declared, he is entitled to the stock and dividend.[4] A provision in a bond, however, that the holder might exchange it for preferred stock at any time within ten days after a dividend was declared, lapses where the holder does not make the demand until several months after the bonds become due.[5]

Abb. Pr. (N. S.) 156. When bonds are convertible by their terms into stock, but the company has no stock, specific performance will not be decreed, but damages given. Chaffee *v.* Middlesex R. R., 146 Mass. 224 (1888). Where the stock of a land corporation is convertible into land, a stockholder may enforce the change by bill in equity. Franco-Texan Land Co. *v.* Bousselet, 70 Tex. 422 (1888). The bonds may provide that the holder may take certain lots of land in satisfaction thereof. Chicago, etc. Land Co. *v.* Peck, 112 Ill. 408 (1885).

1 Where a corporation has power to increase its capital stock, it may issue bonds at fifty per cent. of their par value, convertible into stock upon payment of the other fifty per cent. Van Allen *v.* Illinois Central R. R., 7 Bosw. 515 (1861).

2 Where debentures are issued at eighty cents on the dollar and by their terms the holder may convert them into stock equal to the par value of the debentures, this is the same as issuing stock at a discount for cash, and may be enjoined by its shareholders. Moseley *v.* Koffyfontein Mines, Ltd., [1904] 2 Ch. 108.

3 A stockholder may enjoin his company from issuing mortgage bonds convertible into stock at the rate of $500 par value of stock for each $1,000 bond, inasmuch as he is entitled to subscribe for his *pro rata* part of new stock. Wall *v.* Utah Copper Co., 70 N. J. Eq. 17 (1905), the court distinguishing Meredith *v.* New Jersey, etc. Co., 55 N. J. Eq. 211 (1897), aff'd 56 N. J. Eq. 454, on the ground that in the latter case the complainants held less than one per cent. of the entire stock, and the defendant offered at the trial to allow the complainants to purchase their proportion of the new stock at par, and in the third place the property was worth what was paid for it. See also § 286, *infra*.

4 Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196 (1874). Where bonds are convertible into stock, a bondholder is entitled to stock equal in par value to the par value of his bonds, but is not entitled, in addition thereto, to past stock dividends declared on such stock. Sutliff *v.* Cleveland, etc. R. R., 24 Ohio St. 147 (1873). In a suit by holders of bonds convertible into stock against the corporation for refusal to allow such conversion, the plaintiffs must allege that they still hold the bonds. Denney *v.* Cleveland, etc. R. R., 28 Ohio St. 108 (1875). A corporation with authority to increase its capital stock may lawfully issue new stock and receive in payment therefor the bonds of the corporation. Lohman *v.* New York, etc. R. R., 2 Sandf. (N. Y. Super. Ct.) 39 (1848); Reed *v.* Hayt, 51 N. Y. Super. Ct. 121 (1884); aff'd, 109 N. Y. 659. See 70 Atl. Rep. 295.

5 Loomis *v.* Chicago, etc. Ry., 102 Fed. Rep. 233 (1900). A person hold-

An option to convert stock into bonds must be exercised within a reasonable time if the option itself contains no limit.[1]

Where bonds are convertible into stock, the holder may demand conversion into the stock of a new consolidated corporation that has assumed all the claims and liabilities of the old.[2] But where a bondholder is not entitled by the terms of his bond to convert it into stock, and a subsequent statute prescribes that it may be converted into stock, but such conversion is not made and the company consolidates with another company, the right to so convert the bonds into stock is lost.[3] Where a railroad company issues a bond convertible by its terms into preferred stock at the end of fifteen years, it is no defense that it had no preferred stock outstanding at the date of the issue of the bond, such preferred stock having been issued later, and if it refuses to make the exchange, it is liable in damages to the extent of the market value of the preferred stock.[4]

ing a certificate of indebtedness from the corporation payable in cash or at his option convertible into stock, cannot, after he has received payment, return the money and claim the stock on the ground that he had forgotten about the convertibility. Johnson *v.* Richmond, etc. R. R., 101 Va. 156 (1903). Where bonds are convertible into preferred stock within ten days after any dividend has been paid on the stock upon unmatured coupons being delivered up, it is too late to demand exchange after the ten days, or after the coupons have matured and been paid. Carpenter *v.* Chicago, etc. R. R., 119 N. Y. App. Div. 169 (1907). See also § 270, *supra*.

1 Catlin *v.* Green, 120 N. Y. 441 (1890). Where the subscribers for stock have an option to exchange their stock for bonds of the company, and fail to exercise that option for nine years, when the company has passed into the hands of a receiver and the stock become worthless, the right is gone. The option, not being limited in time, must be exercised within a reasonable time. Catlin *v.* Green, 120 N. Y. 441 (1890).

2 Day *v.* Worcester, etc. R. R., 151 Mass. 302 (1890). When by statute the consolidated company is liable for the contracts of the old companies, it must issue stock in exchange for bonds of the old company which were convertible into stock. India Mut. Ins. Co. *v.* Worcester, etc. R. R., 25 N. E. Rep. 975 (Mass. 1890). Where a bondholder has a right to convert his bonds into stock, a consolidation cannot deprive him of that right until after he has been notified of the intended consolidation and given an opportunity to exercise his rights. Rosenkrans *v.* Lafayette, etc. R. R., 18 Fed. Rep. 513 (1883). In Cayley *v.* Cobourg, etc. Co., 14 Grant's Ch. Rep. (Can.) 571 (1868), where the bondholders of a railroad company had a right to convert their bonds into stock, it was held that a consolidation authorized by statute did not destroy this right of the bondholders, but that the consolidated company must issue the stock in exchange for the bonds. *Cf.* 161 Fed. Rep. 472.

3 Parkinson *v.* West End, etc. Ry., 173 Mass. 446 (1899), the court intimating further that the right of a bondholder to convert his bonds into stock is lost upon the dissolution of the company.

4 Bratten *v.* Catawissa R. R. Co., 211 Pa. St. 21 (1905).

§ 284. *The power of a court to direct an increase or reduction.*— The courts have no power, by mandate or decree or in any other manner, to effect an increase or reduction of the capital stock of a corporation. Hence, where the whole capital stock has been issued, and the corporation, by reason of its misconduct or mistakes, is bound to issue new certificates to the owner of the stock or pay him damages, the court can give judgment for damages only. It cannot order the corporation to issue stock, since to do so would be to direct an overissue.[1]

In Massachusetts a later and better rule prevails, to the effect that the corporation in such a case may be compelled to issue the stock, and in order to prevent an illegal overissue it must purchase an equal amount of stock in the market.[2]

Where corporate officers enter into a contract to pay for services or property wholly or partially in stock of the corporation, a court will not, after the whole amount of the stock has been issued, decree a specific performance of the contract, but the aggrieved party is remitted to his action for damages.[3]

1 "When a corporation has issued certificates of stock (which are valid and not void) to the full extent of all the shares which by law and the constitution of the company it may issue, no court can order the issuance of other shares, because in that respect the powers of the corporation have been exhausted." Smith *v.* North American Min. Co., 1 Nev. 423 (1865); Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418 (1851); Mechanics' Bank *v.* New York, etc. R. R., 13 N. Y. 599 (1856); Sewall *v.* Eastern R. R., 63 Mass. 5 (1851); Gray *v.* Portland Bank, 3 Mass. 364 (1807). See also § 388, *infra*. In an action for the conversion of stock, the question of an increase or reduction not being involved, it was said that "to require a new issue of the stock, might, in cases like this, where shares have gone into the hands of innocent purchasers, involve an overissue of stock, which would be illegal." Baker *v.* Wasson, 59 Tex. 140 (1883); s. c., 53 Tex. 150 (1880).

2 This rule, with an equitable adjustment of the conflicting interests of all the parties, where an owner of stock was deprived of it by forgery, was established by the supreme judicial court of Massachusetts in the case of Machinists' Nat. Bank *v.* Field, 126 Mass. 345 (1879). See also Pratt *v.* Machinists' Nat. Bank, 123 Mass. 110 (1877); Pratt *v.* Boston, etc. R. R., 126 Mass. 443 (1879); and Boston, etc. R. R. *v.* Richardson, 135 Mass. 473 (1883), each of the three cases growing out of the same transaction. See also § 327, *infra*.

3 Finley, etc. Co. *v.* Kurtz, 34 Mich. 89 (1876). In this case the court said that, where the capital stock may be increased by vote of the stockholders, "it certainly could not be within the implied powers of any corporate officer to obligate the corporation to any such increase, and thus indirectly do what the law permits to be done only by the body of corporators specially convened for the purpose." In actions against corporations for conversion of stock, the relief demanded is usually in the alternative, being either for an issue of a certificate of stock, or damages in lieu thereof. Even though a stockholder pledges his stock to secure a debt of the cor-

§ 285. *Stockholders, not directors, should authorize the increase.*— An increase or reduction of the capital stock of a corporation is such a fundamental change in its affairs that, although it has been duly authorized by act of the legislature or by the charter of incorporation, it cannot lawfully be effected merely by the act or assent of the board of directors,[1] but must be authorized by the stockholders at a corporate meeting.[2] Where, however, the directors have made the change and the stockholders have acquiesced therein, they are as fully bound as though the increase or reduction had been expressly authorized at a corporate meeting. The stockholders' assent to the change may be shown as conclusively by their conduct and acquiescence as by a formal vote.[3] The power to increase the capital stock may be vested in the directors.[4] Although the stockholders have regularly voted to increase the capital stock, in pursuance of legislative authority, still, inasmuch as the increase is not accomplished until the stock is actually issued, the vote may be reconsidered in a lawful manner at any time before the stock is

poration, and such stock is sold out, yet he is not entitled to an equal amount of stock from the corporation, but is merely a creditor of it. Dempster *v.* Rosehill, etc. Co., 206 Ill. 261 (1903).

1 Percy *v.* Millaudon, 3 La. 568, 585 (1832); Eidman *v.* Bowman, 58 Ill. 444 (1871); Finley, etc. Co. *v.* Kurtz, 34 Mich. 89 (1876); Crandall *v.* Lincoln, 52 Conn. 73, 99 (1884); People *v.* Parker Vein Coal Co., 10 How. Pr. 543 (1854). See also Railway Co. *v.* Allerton, 18 Wall. 233 (1873). It is for the stockholders to increase the capital stock, and a contract of the directors in reference to making an increase is not enforceable. McNulta *v.* Corn Belt Bank, 164 Ill. 427 (1897). *Cf.* Chicago *v.* Joney, 60 Ill. 383 (1871); *Re* Wheeler, 2 Abb. Pr. (N. S.) 361 (1866); People *v.* Twaddell, 18 Hun, 427, 432 (1879); State *v.* Merchant, 37 Ohio St. 251 (1881). See also §§ 708, etc., *infra*.

2 Quoted and approved in Newport, etc. Co. *v.* Mimms, 103 Tenn. 465 (1899).

3 Sewell's Case, L. R. 3 Ch. App. 131 (1868); Lane's Case, 1 De G., J. & S. 504 (1863); Payson *v.* Stoever, 2 Dill. 427 (1873); s. c., 19 Fed. Cas. 27. See also ch. XLVII, *infra*, relative to mortgages; but see also § 288, *infra*. An allegation of ratification must not be in general terms, but must set out specifically the facts constituting the ratification. Eidman *v.* Bowman, 58 Ill. 444 (1871). An amendment of the charter which allows the directors instead of the stockholders to authorize an increase of the capital is not such a fundamental change in the constitution of the corporation as will operate to release non-assenting stockholders from the obligation of their stock. Payson *v.* Withers, 5 Biss. 269 (1873); s. c., 19 Fed. Cas. 29; Payson *v.* Stoever, 2 Dill. 427; s. c., 19 Fed. Cas. 27.

4 Sutherland *v.* Olcott, 95 N. Y. 93 (1884). Their resolution that "the capital stock of this company be and the same is hereby increased to ——" is sufficient to effect the increase. Sutherland *v.* Olcott, 95 N. Y. 93 (1884).

finally issued.[1] The courts will not inquire into the necessity of an increase.[2]

§ 286. *Prior right of the old stockholders to buy increased stock when issued for cash—Rule when new stock is issued for property or on consolidation—Are stockholders entitled to new stock at par—Remedies for refusal of corporation to recognize rights—Waiver of rights.*—When the capital stock of a corporation is increased by the issue of new stock, each holder of the original stock has a right to offer to subscribe for and to demand from the corporation such a proportion of the new stock as the number of shares already owned by him bears to the whole number of shares before the increase. This pre-emptive right of the stockholder in respect to new stock is well recognized.[3]

1 Terry *v.* Eagle Lock Co., 47 Conn. 141 (1879). In this case the court said: "It cannot be said that the capital is actually increased until the new stock is subscribed for, at least. Until then there is an element of uncertainty about it. It may never be taken. It is very clear that the vote to increase is not *per se* an increase."

2 Jones *v.* Concord, etc. R. R., 67 N. H. 119 (1891); s. c., 67 N. H. 234.

3 Quoted and approved in Stokes *v.* Continental Trust Co., 186 N. Y. 285 (1906); and Electric Co. *v.* Edison, etc. Co., 200 Pa. St. 516 (1901); Gray *v.* Portland Bank, 3 Mass. 364 (1807); Eidman *v.* Bowman, 58 Ill. 444 (1871); Reese *v.* Bank of Montgomery, 31 Pa. St. 78 (1855); Jones *v.* Morrison, 31 Minn. 140 (1883); Bank of Montgomery *v.* Reese, 26 Pa. St. 143 (1856); Real Estate, etc. Co. *v.* Bird, 90 Md. 229 (1899). *Cf.* Curry *v.* Scott, 54 Pa. St. 270 (1867); Miller *v.* Illinois Cent. R. R., 24 Barb. 312 (1857); Wilson *v.* Bank of Montgomery County, 29 Pa. St. 537 (1857); Mason *v.* Davol Mills, 132 Mass. 76 (1882). Where a corporation is authorized to issue preferred stock it may attach such conditions thereto as it deems best. One of the conditions may be that the corporation may retire the stock at par within a certain time. In retiring such preferred stock the corporation may issue additional common stock to the holders of the old common stock without giving any rights to the holders of preferred stock. Moreover, even if the preferred stockholders had a right to a part of the new common stock, yet the remedy is not an injunction but a suit at law for damages. Even though such preferred stock is retired for cash, yet a holder of preferred stock cannot object that this impairs the capital of the company, inasmuch as he ceases to have an interest in the company. Such stock may be retired by a vote of the directors without a vote of the stockholders. Hackett *v.* Northern, etc. R. R., 36 N. Y. Misc. Rep. 583 (1901). Where a corporation has power to issue preferred stock on such terms as it may fix, and also has power to borrow money, and it does issue preferred stock, which by its terms may be retired, it may issue certificates of indebtedness to retire such preferred stock, and immediately thereafter as a part of the transaction issue common stock to take up such certificates of indebtedness. This is practically the same as changing the preferred into common stock. A preferred stockholder cannot object thereto on the ground that he was entitled to subscribe for his proportion of the new common stock. Weidenfeld *v.* Northern, etc. Ry., 129 Fed. Rep. 305 (1904). Where there

This rule does not apply to a sale of treasury stock by the corporation, inasmuch as that is a mere reissue of stock, which has already been issued once.[1] It applies, however, to fractional

are four classes of stock new stock may be common stock, but must be offered proportionately to all classes and where two companies are consolidated and their stockholders are to receive new stock in exchange for old stock, such new stock to be of four different kinds, with preferences, any increase of capital stock of the consolidated company must be offered proportionately to all the stockholders making the exchange, irrespective of their preference. Jones *v.* Concord, etc. R. R., 67 N. H. 119; s. c., 67 N. H. 234 (1892). See also § 270, *supra*. The stockholders, in increasing the capital stock, may prescribe the mode of issue. Stephenson *v.* Vokes, 27 Ont. Rep. (Can.) 691 (1896). A stockholder may enjoin the company from selling to the highest bidder, on sealed bids, increased capital stock, especially where the new stock might change the control of the company. The court said that "the tendency of such method is to defeat or greatly impair the right of the majority stockholders to obtain their fair and ratable proportion of the new stock at a fair and reasonable price." Electric Co. *v.* Edison, etc. Co., 200 Pa. St. 516 (1901). An incorporator is not entitled to the increased stock as a gratuity; he must pay for it. Brown *v.* Florida Southern Ry., 19 Fla. 472 (1882). A stockholder may enjoin his company from issuing mortgage bonds convertible into stock at the rate of $500 par value of stock for each $1,000 bond, inasmuch as he is entitled to subscribe for his *pro rata* part of new stock. Wall *v.* Utah Copper Co., 70 N. J. Eq. 17 (1905), the court distinguishing Meredith *v.* New Jersey, etc. Co., 55 N. J. Eq. 211 (1897), aff'd 56 N. J. Eq. 454, on the ground that in the latter case the complainants held less than one per cent. of the entire stock, and the defendant offered at the trial to allow the complainants to purchase their proportion of the new stock at par, and in the third place the property was worth what was paid for it. In England it is held that a contract by which underwriters for the increased capital stock are given the absolute right to take a portion thereof at the same price as the balance is offered to the stockholders, will be closely scrutinized by the court. Hence, where unissued shares of the par value of £1 each are worth about £4 each, and a portion thereof are offered to the stockholders at £2 10*s.* each, and an option on the balance is given to the underwriters at the same price, in consideration of the underwriters agreeing to take such of the stock as is offered to the stockholders and is not taken by the latter, a minority stockholder may enjoin the carrying out of such option to the underwriters, it being in violation of the English statute prohibiting the payment of a commission for underwriting subscriptions. Burrows *v.* Matabele, etc. Co., [1901] 2 Ch. 23.

In an early Indiana decision it is said to be the law that where, in the charter, directors are given full power to effect an increase of the capital stock "on such terms and conditions and in such manner as to them shall seem best," they may authorize the increase without the consent of the stockholders; that as to such increase there is no pre-emptive right, and that accordingly, the newly issued shares may be disposed of as the directors determine. Ohio Ins. Co. *v.* Nunnemacher, 15 Ind. 294 (1860).

[1] State *v.* Smith, 48 Vt. 266 (1876); Hartridge *v.* Rockwell, R. M. Charlt. (Ga.) 260 (1828); Curry *v.* Scott, 54

shares [1] and to such part of the original capital stock as is issued long after business has been commenced by the company.[2] Especially is this the rule where the directors issue such new stock to themselves or their friends in order to control an election or make a profit.[3]

Pa. St. 270 (1869), in which Reese *v.* Bank of Montgomery, 31 Pa. St. 78 (1855), was said to decide "nothing more than that untaken stock is held by the corporation in trust for the corporators and must be disposed of for the benefit of all;" and it was held that a stockholder has no greater right than a stranger to subscribe to original stock untaken. See also §§ 65, 70, *supra*, and §§ 614, 653, *infra*. Treasury stock, when sold, need not be offered proportionately to the stockholders. Crosby *v.* Stratton, 17 Colo. App. 212 (1902).

1 In December, 1906, the Chicago, Milwaukee & St. Paul R. R. Co. in issuing new stock cut off all fractional rights. Litigation was threatened by some of the stockholders, and thereupon the company ordered the sale at public auction of a block of the unissued stock equal in par value to the par value of all the fractional shares united, and further ordered that the amount realized on such sale, after deducting the par value of the stock, be distributed in cash in lieu of the fractional shares.

2 Gray *v.* Portland Bk., 3 Mass. 364 (1807). Shellenberger *v.* Patterson, 168 Pa. St. 30 (1895); Sims *v.* Street R. R., 37 Ohio St. 556 (1882). See also §§ 65 and 70, *supra*.

3 Quoted and approved in Electric Co. *v.* Edison, etc. Co., 200 Pa. St. 516 (1901). Where a majority of the directors do not represent a majority of the stock, and for the purpose of obtaining control of the company cause treasury stock to be sold among their friends, the sale will be set aside if the purchaser knew and participated in the unlawful act. Elliott *v.* Baker, 80 N. E. Rep. 450 (Mass. 1907). Where new shares are issued by the directors, not for the general advantage of the company, but in order to control the vote at a meeting, the issue may be set aside by the court, and pending trial the court will enjoin the holding of the meeting. Punt *v.* Symons & Co. Ltd., [1903] 2 Ch. 506. A dissenting stockholder may cause to be set aside a sale of unissued stock to other stockholders at a grossly inadequate price to enable them to obtain control. Essex *v.* Essex, 141 Mich. 200 (1905). Where a majority of the directors have issued stock to a friend in order to carry an election, the court has power to set aside the issue and also the election. Luther *v.* Luther Co., 118 Wis. 112 (1903). Where, long after the company has commenced business, it has disposed of its property and is ready to declare a five hundred per cent. dividend, the directors issue to themselves at par that part of the original capital stock which never had been issued, it is a fraud on the remaining stockholders. Arkansas, etc. Soc. *v.* Eichholtz, 45 Kan. 164 (1891). See also Hilles *v.* Parrish, 14 N. J. Eq. 380 (1862). Where directors have issued stock to themselves at a price less than the market price they may be held liable at the instance of a stockholder suing for the benefit of the corporation, for the difference between the price they paid and the price of the stock when it was issued to them. The highest market price since that day for small amounts of stock is no basis for the measure of damages. Shaw *v.* Holland, [1900] 2 Ch. 305. Where directors issue new stock to their friends at less than par and without offering it to the existing stockholders, the object being to control a coming election, the election will be enjoined and the issue set aside. Way *v.* American,

Any stockholder may sell his right to subscribe for a proportion of new stock.[1]

etc. Co., 60 N. J. Eq. 263 (1900). Where a director issues to himself, at par, stock belonging to the corporation and which is worth more than par, the transaction is voidable; but if all the stockholders acquiesce therein for a long time, the acquiescence of the executors of a deceased stockholder binds the estate. St. Croix Lumber Co. *v.* Mittlestadt, 43 Minn. 91 (1890). In the case Reese *v.* Bank of Montgomery, 31 Pa. St. 78 (1855), where a part of the authorized capital stock remained untaken, and a resolution of the directors was carried into effect by which the untaken portion of the stock was issued to those stockholders not in arrears upon stock previously taken, to the exclusion as to the new stock, of those in arrears upon the original issue, it was held an invalid discrimination and an unlawful imposition of a penalty upon those in arrears. In regard to the right to subscribe for the unissued portion of the original capital stock, see also § 70, *supra*, and §§ 614, 653, *infra*. Where a corporation has an authorized capital of $5,000, but only $2,500 are directed by the stockholders to be issued, it is illegal and fraudulent to issue the remaining authorized capital without giving the existing stockholders a prior right to subscribe to such increased capital *pro rata*. Directors elected by reason of such illegal issue will be enjoined from acting where they are about to change the whole policy of the company. Humboldt, etc. Assoc. *v.* Stevens, 34 Neb. 528 (1892). Where *de facto* directors immediately after the election, order an issue of a large amount of the original unissued capital stock of the company and most of it is taken by one of their number, who thereby acquires a majority of the stock of the company, and subsequently the election is declared illegal, such directors may be enjoined from voting the stock so issued, and, if they have sold it, may be enjoined from voting other stock equal in amount to the stock so sold by them. The existing stockholders are entitled to subscribe for their proportion of the unissued original capital stock. A stockholder who was not present at the stockholders' meeting is not bound by a ratification by such meeting. Morris *v.* Stevens, 178 Pa. St. 563 (1897). Where the president of an unincorporated association issues treasury stock and thereby obtains control of the association and sells it out to a corporation organized by himself, the minority stockholders of the association may compel him to account for the property. As regards the person to whom the stock was issued, however, a general allegation that he acted in connection with the president is not sufficient to render him liable on the ground of fraud. Booth *v.* Dodge, 60 N. Y. App. Div. 23 (1901). A majority of the directors cannot issue unissued stock to themselves, thereby obtaining control, without first offering the stock to the other stockholders. Whitaker *v.* Kilby, 55 N. Y. Misc. Rep. 337 (1907). Where the minority have fraudulently obtained control by obtaining increased capital stock without the majority having the right to subscribe therefor, a court of equity will compel the minority to turn over such stock on payment therefor. Schmidt *v.* Pritchard, 112 N. W. Rep. 801 (Iowa 1907).

1 Quoted and approved in Hammond *v.* Edison Ill. Co., 131 Mich. 79 (1902); Jones *v.* Concord, etc. R. R., 67 N. H. 119 (1891); s. c., 67 N. H. 234; Stokes *v.* Continental T. Co., 186 N. Y. 285, 297 (1906). Biddle's Appeal, 99 Pa. St. 278 (1882). A sale of shares of the original capital stock carries with

A person having merely a contract right to convert corporate notes into stock cannot claim the right to subscribe for a portion of new increased stock.[1] The presumptive right of stockholders to subscribe for new stock does not apply to an issue of stock in payment for property, where the statutes provide for the issue of stock in payment for property.[2] Neither does the rule apply where the

it as an incident the right which the vendor had previously acquired by subscription to shares of increased capital stock. Baltimore, etc. Ry. *v.* Hambleton, 77 Md. 341 (1893). The assignee of a stockholder's right to take new stock may enforce such right. Schmidt *v.* Pritchard, 112 N. W. Rep. 801 (Iowa 1907).

1 Pratt *v.* American Bell Tel. Co., 141 Mass. 225 (1886), where one who held notes convertible into stock at a future time sought to establish his right as a stockholder to an equitable share of an increase of capital stock to which stockholders had a first right to subscribe upon favorable terms. The court held that the suit could not be maintained, on the ground that until he had converted the notes into stock he had no rights as stockholder. A pledgee of stock is not entitled to this right to take up new stock. The right belongs to the pledgor. Miller *v.* Illinois Cent. R. R., 24 Barb. 312 (1857), holding also that a stockholder who holds a receipt from a corporation for money payable on demand in cash, or at his option, in new stock when issued, has no interest in such stock as a stockholder until he has elected to take it instead of the cash. A contract by which a person who has promoted the organization of a company is to have a certain percentage of the capital stock and five per cent. of any increase of the capital stock, such contract being with the corporation itself, is legal, and may be enforced as to such increase. Hix *v.* Edison El. L. Co., 10 N. Y. App. Div. 75 (1896), and 27 N. Y. App. Div. 248; aff'd, 163 N. Y. 573. The case of Hirsch & Co. *v.* Burns, 74 L. T. Rep. 769 (1897), was affirmed in 77 L. T. Rep. 377, to the effect that a person having an option to purchase the unissued stock of a company has a claim for damage in case the company sells the business of the company to another company without protecting such option.

2 Meredith *v.* New Jersey, etc. Co., 55 N. J. Eq. 211 (1897); aff'd, 56 N. J. Eq. 454. See also dictum in Stokes *v.* Continental T. Co., 186 N. Y. 285 (1906). Although a person holds a majority of the stock and causes his friends to be made directors, yet he may sell property to the corporation and take stock in payment, if the transaction is a fair one. Russell *v.* Rock, etc. Co., 184 Pa. St. 102 (1898). In this case, however, the point that other stockholders had been deprived of their pre-emptive right was not raised, the question being whether the directors committed any fraud in issuing the new stock. A minority stockholder cannot enjoin the company from issuing its stock in payment for the stock of other similar companies on the ground that the price to be paid is excessive and that three of the directors are interested as stockholders in the other companies, where he does not prove that the price is excessive, and it appears that the stockholders will have to approve the transaction before the directors can issue the stock, and it appears also that the plaintiff owns but a very small amount of stock. Geer *v.* Amalgamated, etc. Co., 61 N. J. Eq. 364 (1901). The fact that the holders of a majority of the stock are stockholders in another contracting corporation does not render the contract voidable. Ziegler *v.* Lake Street El. R. R., 69 Fed. Rep. 176, 182 (1895).

company is consolidated with another and the entire stock of the consolidated company is divided between the stockholders of both parties, in accordance with the articles of consolidation, as provided by statute.[1]

The question now arises whether the corporation in offering new stock to its stockholders is bound to offer it to them at par or whether it may fix the price at more than par. In Pennsylvania[2] and Michigan[3] it has been clearly held that the corporation cannot com-

Where the directors, upon an increase of the capital stock, issue a part of the stock for worthless notes, the directors, upon the bank becoming insolvent, are liable to the receiver for the par value of such stock, unless they can show the stock could not have been otherwise issued or sold. Cockrill *v.* Abeles, 86 Fed. Rep. 505 (1898).

1 A contract of a corporation that a patentee shall have a certain percentage of any increase of stock does not apply to the capital stock of a consolidated company, although the former corporation is one of those making up the consolidation. Einstein *v.* Rochester, etc. Co., 146 N. Y. 46 (1895). A stockholder in a national bank which consolidates with another national bank, as allowed by act of congress cannot object that a part of the increased capital stock is issued to the stockholders in the other bank, instead of being offered to the stockholders in his bank, inasmuch as the consolidation created a new corporation. Bonnet *v.* First Nat. Bank, 24 Tex. Civ. App. 613 (1900).

2 Cunningham's Appeal, 108 Pa. St. 546 (1885). In this case an insurance company offered increased capital stock to its stockholders at twice the par value, and a stockholder brought suit to compel the company to issue his proportion to him at par, and the court did so, although nearly all of the remainder of the stock had been paid for at twice par. The same increase of stock was involved in a later case, De La Cuesta *v.* Insurance Co. of North America, 136 Pa. St. 62, 658 (1890), where the court held that a similar stockholder who, instead of bringing suit in the first instance, had paid for the new stock at the price demanded by the company, namely, twice par, could not recover back one-half of the money, even though he paid under protest. The court said, however: "He could have tendered the par of the stock and demanded a certificate. If the company had refused to issue it, he could have brought suit and recovered its market value. If he wanted the shares he could have bought them in the market and recovered from the company what he paid in excess of par. . . . He had to do only with the company; and, after tender of the par, could have brought his suit and recovered, as above stated, the market value of the stock, and if he wanted shares, with the money thus recovered could have bought a corresponding amount of other shares."

3 Hammond *v.* Edison Ill. Co., 131 Mich. 79 (1902). In this case the new stock was offered to all the stockholders at twenty-five per cent. over par. A stockholder applied to the court for a mandamus to compel a corporation to issue his proportion to him at par. The court granted the mandamus and said: "Notwithstanding the zeal of the very able counsel engaged in the case, our attention is not called to an authority which holds that an original stockholder is not entitled to his *pro rata* share of stock upon tendering its par value. We have been unable to find such an authority." Where by its charter a

pel the old stockholders, upon their subscription for new stock, to pay more than the par value thereof. They are entitled to it at par and without payment of any sum in addition to par. In New York this whole question arose and was carefully considered by the court of appeals in 1906. The lower court had held that a stockholder had a right to subscribe for his proportion of new stock and to subscribe for it at par. The intermediate appellate court held that he had no prior right to subscribe for his proportion of new stock, either at par or any other price. The highest court,—the court of appeals,—held that he had a prior right to subscribe, but that the stockholders in meeting assembled might fix a higher price than par, at which the stock should be issued. The court held that "the corporation could not compel the plaintiff to take new shares at any price," but might fix a reasonable price, not less than par, or might provide for the sale of the stock in parcels or bulk at public auction, and the court intimated that the proceeds of the sale at public auction must be distributed among the stockholders, after deducting, of course, the par value, which would be retained by the corporation.[1]

terminal and union depot company is obliged to allow new roads to demand and pay for a proportional part of the former company's capital stock, the price is par even though it is worth more. St. Paul, etc. Co. *v.* Minnesota, etc. R. R., 47 Minn. 154 (1891). It has been held in Maryland that a subscriber to the increased capital stock of a company is not entitled to a certificate until he has paid for the stock in full, and such subscriber is not entitled to the rights of a stockholder until he has paid in full. The court stated that such stockholders are not entitled to dividends equally with other stockholders. The basis of the decision was the difference between original stock and increased stock. The court refused to compel the corporation to issue a certificate. Baltimore, etc. Ry. *v.* Hambleton, 77 Md. 341 (1893). In the case Attorney-General *v.* Boston, etc. R. R., 109 Mass. 99 (1871), the court held that at common law stock might be issued at par to the old stockholders although it was worth more than par in the market.

1 Stokes *v.* Continental Trust Co., 186 N. Y. 285, 298 (1906). The court said: "A majority of the stockholders, as part of their power to increase the stock, may attach reasonable conditions to the disposition thereof, such as the requirement that every old stockholder electing to take new stock shall pay a fixed price therefor, not less than par, however, owing to the limitation of the statute. They may also provide for a sale in parcels or bulk at public auction, when every stockholder can bid the same as strangers." The court said also (p. 299): "When the new stock is issued for money, while the stockholders may provide that it be sold at auction or fix the price at which it is to be sold, each stockholder is entitled to his proportion of the proceeds of the sale at auction, after he has had a right to bid at the sale, or to his proportion of the new stock at the price fixed by the stockholders." For an article on Stokes *v.* Continental Trust Co., see 18 Harvard Law Review, 541. In the case *Re* Wheeler, 2 Abb. Pr. (N. S.) 361, 363 (1866), it was said that if new stock is not apportioned among old stockholders it should be sold at

It would seem to be clear that this decision, however just it may turn out to be in its workings, is contrary to precedent in some respects, and without precedent in other respects. It may be that the court was correct in its statement that "this rule is just to all and tends to prevent the tyranny of majorities which needs restraint, as well as virtual attempts to blackmail by small minorities which should be prevented." Furthermore, it is likely that public policy and conservative financing and the real interests of the stockholders may favor increasing of the cash assets of the company by issuing new stock at as high a price as possible, but it would seem that this should be accomplished by statute rather than by a court decision, which is hardly in accord with the common law. In Massachusetts this whole subject has been regulated by statute, so that any increase of the capital stock of *quasi public* corporations shall be offered to the stockholders, at its market value, to be determined by state commissioners, but, on the other hand, the statutes in that state prescribe that increased capital stock of manufacturing and other miscellaneous corporations shall be offered to the stockholders at par.[1] The wisdom of the Massachusetts statute requiring payment of more than par has well been doubted.[2]

public auction to the highest bidder so that all may share in the gains resulting from its sale. In the case *Re* Hoare & Co., Ltd., [1904] 2 Ch. 208, the court in a dictum stated that the premium paid on the issue of stock at a price greater than par might be used for a dividend.

1 By Ch. 109, §§ 30, 31 (p. 953) of the Mass. Rev. L. (1902), all railroad, gas, electric light, water, telegraph and telephone companies must offer increased capital stock to their stockholders at its market value to be determined by state commissioners, but at not less than par, and any portion not so taken is to be sold at public auction at not less than par. In Smith *v.* Franklin Park, etc. Co., 168 Mass. 345 (1897), it was held that a sale at public auction must be in strict accordance with the statute. By Ch. 109, § 29 (p. 952), and Ch. 110, § 34 (p. 965), of the same statutes the increased capital stock of manufacturing and other classes of corporations must be offered to the stockholders at par, and any stock not taken by them is to be disposed of as the stockholders may direct at not less than par. By Ch. 437, § 40 of the Laws of 1903 (p. 437) relative to the increased capital stock of business corporations a majority of the stockholders shall "determine the terms and manner of the disposition of such increased stock." As long ago as 1871 in Massachusetts (Laws 1871, Ch. 392), railroads in issuing increased stock, which was worth more than par, were obliged by this statute to sell the same at public auction.

2 In 1908 a special commission on commerce and industry in Massachusetts made a report on the question of allowing the New York, New Haven & Hartford R. R. Co. to own a majority of the stock of the Boston & Maine R. R. Co., and the following summary of its report is taken from the Railroad Gazette of March 27, 1908:

"Another point of wide and national interest is the finding of the commission on the question of allowing prosperous

The remedy of a stockholder against a corporation for depriving him of his right to subscribe for new stock presents a still further difficulty. It would seem that a bill for an injunction should lie against the corporation issuing his proportion of the stock to any one else, and in Pennsylvania, Wisconsin and Iowa it has been held that such a bill will lie.[1] For instance, it has been held in Penn-

public service corporations to issue new stock at par. In Massachusetts prior to 1871 railroad stock could be offered stockholders at par; from 1871 to 1878 it was to be sold at auction; from 1878 to 1893 it could again be offered at par, and since 1893 it and new street railway stock have had to be issued at or above par, but at market price as fixed by the state railroad commission. The fifteen years' test of the law convinces the special commission that the old 'par' plan is sane and expedient. The commission's main argument rests upon the theorem that the compulsory market price establishes a new par which the state must adhere to as a basis of regulation. Probably it would be fairer to say that it establishes really two 'pars' with very confusing results to the relative rights of old and new stockholders when it comes to a matter of state regulation, especially if based on dividends. The commission also asserts that the 'market price' law has deprived the state of the new capital needed for the development of her transportation systems. The subject has been and will always be a complex one with arguments on both sides, and it becomes especially perplexing in a period of rapidly fluctuating and falling values—perplexing not only to the state, but to the corporations. For example, the New Haven company in its last annual report practically announced a new issue of stock at $125 a share, and rights to the stock 'to be delivered when as and if issued' were freely sold in the market. A rapidly falling market compelled the company to drop the plan and an issue of six per cent. debentures were substituted. From both the public and corporative viewpoint evidently an element of opportunism thus enters the question, resting on stable or fluctuating values. But what cannot be gainsaid as a piece of objective and telling evidence is the unqualified approval of the 'par' plan of issue by an intelligent commission in a state whose policy for fifteen years has been in favor of the market value rule."

The commission also pointed out that it was bad policy for the state to require more than par to be paid for new stock, inasmuch as the state would thereafter be obliged to allow a higher rate of dividend on such stock than it would be called upon from a standpoint of business ethics to allow for stock issued at par and that where new stock was issued for more than par it raised all the previous stock to the same basis so far as dividends were concerned.

1 Cunningham's Appeal, 108 Pa. St. 546 (1885). In Wisconsin it is held that an injunction will lie. "The effect of such an action (*i. e.*, the action for damages) would be to convert part of his interest as a shareholder into a judgment for damages; in other words, to sell a portion of his stock to the corporation. . . . The judgment, to be effectual, must be against the directors personally, who may be changed from time to time." Dousman *v.* Wisconsin, etc. Co., 40 Wis. 418 (1876). In this case it is also held that the stockholder, where the stock is not fully issued, may have a decree in a court of equity restraining the whole issue, or else that there be an equitable distribution; and, if the stock is already partially distributed, that the proper amount be issued to the party complainant. A stockholder who has applied regularly for his part of the increased capital stock, but whose application has been rejected, may by a bill in equity compel the company to issue the stock to him upon payment therefor, and if the stock has been already issued to parties in control they will be compelled to give it up. He may also enjoin officers and directors who have been illegally elected by means of such stock, from acting, pending the

sylvania that a stockholder may enjoin the company from selling to the highest bidder, on sealed bids, increased capital stock, especially where the new stock might change the control of the company.[1] The usual remedy, however, is a suit at law against the corporation, in which the plaintiff demands judgment that the corporation issue to the plaintiff his proportion of the capital stock upon his paying therefor, and in case said stock cannot be delivered to him, then that he have damages.[2] In New Jersey it is held that the legal remedy is exclusive if the corporation is responsible.[3] Such a suit at law should be by each stockholder separately, inasmuch as the liability of the corporation is several and not joint.[4]

decision in the case. Schmidt *v.* Pritchard, 112 N. W. Rep. 801 (Iowa 1907). There are strong reasons why a court of equity should take jurisdiction of such a case. For instance, in the recent and important New York case mentioned above, Stokes *v.* Continental T. Co., 186 N. Y. 285 (1906), the new stock at the time when it was voted and sold to outsiders at $450 a share was worth $550 a share in the open market, and at the time of trial it had risen to $700 a share, and yet the damages allowed the plaintiff were only $100 a share. The fact is that the unknown earning capacity of stock enters largely into its value, and stockholders should not be compelled to go into a court of law and collect damages, instead of going into a court of equity and obtaining the stock itself. The courts have no power to compel the corporation or the directors to issue the stock to the party aggrieved, if the whole capital stock is already out. Sewall *v.* Eastern R. R., 63 Mass. 5 (1851). The corporation may possibly be compelled to buy stock in the open market. See § 284, *supra*. In the case Butler *v.* Wright, 186 N. Y. 259 (1906) a vendee of stock was granted specific performance of the contract on showing that the stock had never been listed on any exchange and had no quoted value or any definite market price or any certain value capable of exact ascertainment, and that the defendant owned ninety-two per cent. of the stock and controlled the balance. The court further held that the decision of such a case rests in the sound discretion of the court. On this subject see §§ 337, 338, *infra*.

1 The court said "that the tendency of such method is to defeat or greatly impair the right of the majority stockholders to obtain their fair and ratable proportion of the new stock at a fair and reasonable price." Electric Co. *v.* Edison, etc. Co., 200 Pa. St. 516 (1901).

2 Stokes *v.* Continental T. Co., 186 N. Y. 285 (1906); Gray *v.* Portland Bank, 3 Mass. 364 (1807); Eidman *v.* Bowman, 58 Ill. 444 (1871); Real Estate, etc. Co. *v.* Bird, 90 Md. 229 (1899); Reese *v.* Bank of Montgomery, 31 Pa. St. 78 (1855). In the case Shellenberger *v.* Patterson, 168 Pa. St. 30 (1895), it is held that where the plaintiffs have not offered or shown a willingness to take the stock at par, and it is not alleged that it would have sold for more than par, the directors cannot cancel the first sale nor would a suit in equity lie at the instance of a stockholder to cancel such sale, his remedy in such a case being at law for damages.

3 Meredith *v.* New Jersey, etc. Co., 55 N. J. Eq. 211 (1897); aff'd, 56 N. J. Eq. 454; Hackett *v.* Northern, etc. R. R., 36 N. Y. Misc. Rep. 583 (1901).

4 Dousman *v.* Wisconsin, etc. Co., 40 Wis. 418 (1876).

The measure of damages in such a suit at law depends on two questions, first, whether the court holds that the stockholder was entitled to the new stock at par, or may be compelled by the corporation to pay a higher price. If he is entitled to the stock at par, the measure of damages is the difference between par and the market value of the stock, with legal interest on such excess.[1] If, on the other hand, the corporation legally may and does fix the price of the new stock at more than par, and then denies to a particular stockholder his right to subscribe for his proportion at such higher price, his measure of damages is the difference between such higher price and the market value of the stock.[2]

The second question which enters into the measure of damages is whether such market value shall be the market value at the time when the stockholder first demanded his proportion of the new stock, or should be the market value at the time of trial, or should be the highest market value between those two dates. This question is fully considered elsewhere.[3]

In Michigan neither of the above remedies need be resorted to, but the court at the instance of a stockholder will grant a writ of mandamus commanding the corporation to issue to him his proportion of the stock at par.[4]

A stockholder may waive his right to subscribe for new stock and such waiver may arise by express agreement or by laches or acquiescence or by acts equivalent to an express waiver. For instance a stockholder who voluntarily pays more than par for his stock can-

1 Gray *v.* Portland Bank, 3 Mass. 364 (1807); Reese *v.* Bank of Montgomery, 31 Pa. St. 78 (1855); Eidman *v.* Bowman, 58 Ill. 444 (1871). In all of these cases the new stock was issued at par and a particular stockholder who was not given his share brought suit for damages.

2 Stokes *v.* Continental T. Co., 186 N. Y. 285 (1906).

3 See §§ 581–583, *infra*. In Pennsylvania the courts in determining the measure of damages for refusal of the corporation to issue to a stockholder his proportion of new stock, held that the proper measure was the "market value after the new stock was subscribed." Reese *v.* Bank of Montgomery, 31 Pa. St. 78 (1855). In another decision in the same case, Bank of Montgomery *v.* Reese, 26 Pa. St. 143 (1856), the court held that the measure of damages was the difference between the par value and the highest market price up to the date of trial. In this case the new stock was issued at par. In England it has been held that where directors have issued stock to themselves at a price less than the market price they may be held liable at the instance of a stockholder suing for the benefit of the corporation, for the difference between the price they paid and the price of the stock when it was issued to them. The highest market price since that day for small amounts of stock is no basis for the measure of damages. Shaw *v.* Holland, [1900] 2 Ch. 305.

4 Hammond *v.* Edison Ill. Co., 131 Mich. 79 (1902).

not compel the company to repay to him the excess, even though other stockholders paid only par, it being shown that the parties originally agreed on the payments as made.[1] Moreover, the right of existing stockholders to subscribe for increased capital stock must be exercised within a fixed or reasonable time; and if the stockholder fails to avail himself of it, he is barred, by his laches or acquiescence, from contesting a disposition of the stock to some one else.[2]

1 Esgen *v.* Smith, 113 Iowa, 25 (1901). He should have tendered par and then sued for refusal of the corporation to accept it. De La Cuesta *v.* Insurance Co. of North America, 136 Pa. St., 62, 658 (1890).

2 Terry *v.* Eagle Lock Co., 47 Conn. 141 (1879); Hart *v.* St. Charles St. R. R., 30 La. Ann. 758 (1878); Brown *v.* Florida Southern Ry., 19 Fla. 472 (1882). Where a stockholder is asked to subscribe for increased stock and for six months does not do so, and the directors then take the stock by reason of their being unable to sell it elsewhere, he cannot complain. Hoyt *v.* Shenango, etc. Co., 207 Pa. St. 208 (1903). Where the president subscribes for the untaken or original capital stock and for two years none of the stockholders object, it is legal. Shellenberger *v.* Patterson, 168 Pa. St. 30 (1895). Where the directors sell unissued stock at a discount to a party who resells part of it to a director, other stockholders cannot, ten years afterwards, hold him liable. Keeney *v.* Converse, 99 Mich. 316 (1894). Where the stockholders are present and only one objects to the issue of unissued stock to a director whereby he acquires control, such issue is legal. Christopher *v.* Noxon, 4 Ont. Rep. (Can.) 672 (1883). In *Re* London, etc., Ltd., 77 L. T. Rep. 146 (1897), there were one hundred and twenty founders' shares of £10 each, and twelve thousand ordinary shares of £10 each. The founders' shares were entitled to half of any dividend which might remain after paying ten per cent. on the ordinary shares. The directors allotted to themselves eighty of these founders' shares, and the court upheld the allotment. The prospectus stated that each person taking fifty ordinary shares would be entitled to take one of the founders' shares. The directors caused the fifty ordinary shares for each of the eighty founders' shares to be taken by others. Where a director issues to himself, at par, stock belonging to the corporation and which is worth more than par, the transaction is voidable; but if all the stockholders acquiesce therein, for a long time, the acquiescence of the executors of a deceased stockholder binds the estate. St. Croix Lumber Co. *v.* Mittlestadt, 43 Minn. 91 (1890). Where an insolvent corporation which has never issued any certificates of stock resolves by a vote of its stockholders to apply its assets to the extent of their value to the payment of the debts, and that new stock be issued to the stockholders upon their paying therefor in full, and one stockholder sells his interest in the original stock, and the purchaser for seven years does not complain, he cannot, after the corporation has become prosperous, claim that he is entitled to the old stock or any interest in the corporation. Stoddard *v.* Decatur, etc. Co., 184 Ill. 53 (1900). A stockholder who is not present at a stockholders' meeting is not bound by a vote at that meeting to waive the right to subscribe. Morris *v.* Stevens, 178 Pa. St. 563 (1897). Even though in anticipation of an increase of the capital stock the stockholders agree among themselves to waive their prior right to subscribe for such increased capital stock, yet a *bona fide* purchaser of

It has been held, however, that a tender need not be made where the stockholder has demanded the right to subscribe for his proportion of stock and the corporation has refused to consider the demand;[1] but if the stockholder remains silent and makes no request or protest, he thereby waives his rights.[2] The corporation may and usually does limit the time within which the stockholders may signify their intention to take up the new stock, and may require a part payment upon the stock within that time.[3] The stockholder, therefore, who brings his action against the corporation for damages for refusal to allow him to subscribe for the new stock, or for selling the stock to some one else, or for depriving him in any other way of it, must allege and prove that he demanded the stock and offered to subscribe and pay for it in the regular way, within the time fixed for such subscriptions.[4] The claim of a stockholder against a corporation for

a certificate of stock prior to such increase is not bound by such agreement and may claim his *pro rata* share of the increased capital stock at par. Real Estate, etc. Co. *v.* Bird, 90 Md. 229 (1899). In this case the purchaser of a certificate of stock applied to the corporation for a transfer prior to the time when the right to subscribe for the increased capital stock accrued, such time being the date of the voting of the increase. The corporation refused to make the transfer and thereupon the purchaser sued for his proportion of the increased capital stock, and the court held that he was entitled to it.

1 Stokes *v.* Continental T. Co., 186 N. Y. 285 (1906). A mere verbal notice by the stockholder to the corporation that he will take his proportion of the new issue under an increase is held in Louisiana not to be sufficient to render the company liable in damages for selling the stock to someone else. Hart *v.* St. Charles St. R. R., 30 La. Ann. 758 (1878), holding also that a tender must be made.

2 Stokes *v.* Continental T. Co., 186 N. Y. 285 (1906).

3 Sewall *v.* Eastern R. R., 63 Mass. 5 (1851); Hart *v.* St. Charles St. R. R., 30 La. Ann. 758 (1878). In the case of Pearson *v.* London, etc. Ry., 14 Sim. 541 (1845), where notices to the stockholders were sent on July 25th giving them the right to subscribe for new stock on or before August 10th, it was held that a stockholder who did not subscribe by that time lost his right, even though he resided abroad and did not receive the notice until August 12th, and on that day wrote to the company making his subscription. Where the stockholders are given ten days to apply for the increased capital stock, nothing being said as to time of payment, an application within ten days is sufficient, even though payment is not tendered until later. Schmidt *v.* Pritchard, 112 N. W. Rep. 801 (Iowa 1907). Even though a stockholder does not tender payment until sixty days after he subscribes, yet if no time of payment was prescribed and others have not paid, this is no defense. Schmidt *v.* Pritchard, 112 N. W. Rep. 801 (Iowa 1907).

4 Wilson *v.* Bank of Montgomery, 29 Pa. St. 537 (1857). Where only ten days are given to the subscribers to subscribe to the new stock, the representatives of a stockholder who was dead at the time of the issue, and to whose address no notice was sent, may claim their proportion of the stock which the corporation has not yet disposed of, although they applied about a year after the ten days

refusal to issue to him his part of the increased capital stock is barred by the six years' statute of limitations.[1]

§ 287. *Issue of new stock by a stock dividend.*—A frequent method of issuing an increase of the capital stock is by a stock dividend. In England there is some doubt as to whether such dividends may be imposed upon stockholders who object thereto, and demand the money dividend in lieu of which the stock is issued.[2] In this country such dividends are legal unless prohibited by constitutional or statutory provisions.[3] But in all cases of a stock dividend, as a method of issuing an increase of the capital stock, there must be in the possession of the corporation an amount of property, over and above its corporate debts, equal to the whole capital stock, including the increase; and this amount cannot afterwards be used for any kind of a dividend.

§ 288. *Liability of the stockholder upon an increase of the capital stock—Irregularities in increasing the stock.*—A stockholder may maintain a suit in equity to enjoin the corporation from issuing increased capital stock, where the statutory proceedings authorizing such issue have not been complied with.[4] But a person subscribing for shares of stock upon an increase of the capital stock is liable thereon the same as a subscriber to the orginal capital stock. In

elapsed, they not having heard of the matter until that time. James *v.* Buena Ventura, etc. Syndicate, [1896] 1 Ch. 456. Where the life tenant refuses to pay for increased capital stock which is issued at fifty cents on a dollar, the remaining fifty cents being a stock dividend, and the trustee takes the stock for himself, and ten years have elapsed since the life tenant claimed the stock, the statute of limitations is a bar to his suit to compel the trustee to account for the stock. Matter of Smith, 66 N. Y. App. Div. 340 (1901); aff'd, 179 N. Y. 536. A stockholder suing a corporation for failure to allow him to subscribe for new stock must show that he demanded the stock and offered to subscribe and pay for the same in the regular manner. Bonnet *v.* First, etc. Bank, 24 Tex. Civ. App. 613 (1900).

1 Woodworth & Co. *v.* Carroll, 112 N. W. Rep., 1054 (Minn. 1907).

2 See ch. XXXII, *infra*.

3 See ch. XXXII, *infra;* also § 51, *supra;* Howell *v.* Chicago, etc. Ry., 51 Barb. 378 (1868). An increase of the capital stock by the issue of new stock and the sale of it for less than its par value, is not such an "issue of fictitious stock" as the California state constitution forbids (art. XII, § 11). Stein *v.* Howard, 65 Cal. 616 (1884). Where the company is under obligations to issue stock to represent interest on subscriptions until dividends are declared, a stock dividend does not stop the interest. Hardin County *v.* Louisville, etc. R. R., 92 Ky. 412 (1891).

4 McDermont *v.* Anaheim, etc. Co., 124 Cal. 112 (1899). A stockholder's suit to set aside an alleged illegal issue of new stock must join a holder of such new stock, especially where the holder is a holding corporation which it is alleged has been buying the stock illegally. Weidenfeld *v.* Northern, etc. Ry., 129 Fed. Rep. 305 (1904). See also § 281, *supra*.

some respects he cannot set up defenses that an original subscriber might have set up. Thus, a subscriber for increased stock cannot defeat an action to enforce his subscription by setting up the failure of the corporation to obtain subscriptions for the whole of the authorized increase.[1] A statute that a corporation cannot enforce a contract unless ten per cent. of its capital stock has been paid in does not apply to a contract made when that part of the original capital stock had been paid in, although subsequently the capital stock was

1 Quoted and approved in Pope *v.* Merchants' T. Co., 103 S. W. Rep. 792 (Tenn. 1907); McCoy *v.* World's, etc. Exposition, 186 Ill. 356 (1900); Clarke *v.* Thomas, 34 Ohio St. 40 (1877); Nutter *v.* Lexington, etc. R. R., 72 Mass. 85 (1856); Delano *v.* Butler, 118 U. S. 634 (1886); Aspinwall *v.* Butler, 133 U. S. 595 (1890); Avegno *v.* Citizens' Bank, 40 La. Ann. 799 (1889); Pacific Nat. Bank *v.* Eaton, 141 U. S. 227 (1891), rev'g Eaton *v.* Pacific Nat. Bank, 144 Mass. 260 (1887); Greenbrier, etc. Exposition *v.* Ocheltree, 44 W. Va. 626 (1898). Even though the act of Congress declares that an increase in the capital stock of a bank shall not be valid until the whole amount of the increase has been paid, and the comptroller of the currency has certified to that effect, nevertheless, the subscriber for a portion of the increase who has paid therefor and received a certificate and also dividends and appeared as a stockholder upon the books cannot defeat the statutory liability by the defense upon the insolvency of the bank that the full increased stock had not been subscribed. It is immaterial that the bank had no right to issue the certificate before the entire increase was paid in. Scott *v.* Deweese, 181 U. S. 202 (1901); aff'g Scott *v.* Latimer, 89 Fed. Rep. 843. Where the comptroller has authorized an increase of the capital stock of a national bank and part of the increase is subscribed for and paid in, and three years thereafter stockholders reduce the increase to the amount actually paid in and the comptroller approves the same, stockholders cannot avoid their statutory liability on the ground that the increase was not complete; neither can a stockholder avoid his liability on the ground that although he subscribed for increased stock he received original stock, it appearing that he waited three years before complaining. Bailey *v.* Tillinghast, 99 Fed. Rep. 801 (1900). Where the increased capital stock is not all subscribed for, and hence not effective, a subscriber who has paid for a part thereof may recover back the money; he may also recover back an assessment which the comptroller levied on such stock and which he paid. Brown *v.* Tillinghast, 84 Fed. Rep. 71 (1897). Where some of the stock is void, a subscriber for both kinds, who has paid in part, cannot have the payments applied altogether on the valid stock. Kampmann *v.* Tarver, 29 S. W. Rep. 1144 (Tex. 1895). Where the increase is to be $200,000, but the comptroller will allow but $150,000, and, before anything is done, the bank becomes insolvent, a person who has partially paid for some of the proposed increase may recover the money back. McFarlin *v.* First Nat. Bank, 68 Fed. Rep. 868 (1895). Where, by the charter, there are two hundred shares and only eleven are subscribed and then the charter is amended, increasing the shares to two hundred and fifty thousand and decreasing the par value thereof, this is not an increase of the capital stock within the rule that such increase need not be wholly subscribed in order to hold the sub-

increased and that percentage was not paid in.[1] In general, a subscriber to an increase of stock cannot interpose defenses to his subscription which subscribers to the original stock could not have raised —such, for example, as technical objections to the validity of his contract of subscription.[2] For instance where the stockholders formally increase the capital stock and certify that it has been increased and issue mortgage bonds to the full amount of such increased capital stock, under a statute which prohibits the issue of bonds in excess of the capital stock, they will be held to have subscribed *pro rata* to such increased capital stock.[3] Nor can the subscriber set up that the increase was irregularly effected. It is for the state alone to raise the question whether the corporate capital stock has been lawfully and regularly increased.[4] Especially it is the rule that, as against corporate creditors, stockholders who have subscribed for the increased stock, accepted the certificate, and received dividends thereon,

scribers liable. Gettysburg, etc. Bank *v.* Brown, 95 Md. 367 (1902).

1 Fishback *v.* Fond Du Lac, etc. Co., 158 Fed. Rep. 88 (1907).

2 Kansas City Hotel Co. *v.* Hunt, 57 Mo. 126 (1874). See also chs. IV and X, *supra.*

3 Kreisser *v.* Ashtabula, etc. Co., Ohio Circuits (1903), p. 313.

4 Pullman *v.* Upton, 96 U. S. 328 (1877). The executory contract of a person to take and pay for increased capital stock cannot be enforced without proof of the capital being increased regularly or a proper ratification of an irregular increase. Pacific Mill Co. *v.* Inman, etc. Co., 90 Pac. Rep. 1099 (Ore. 1907). It is no defence to liability on increased capital stock that a certificate was not filed with the secretary of state as required by statute. Man *v.* Boykin, 60 S. E. Rep. 17 (S. C. 1908). A party purchasing a certificate of stock not under seal nor signed by the president must take notice, and cannot afterwards complain that it was an irregular increase of stock. Byers *v.* Rollins, 13 Colo. 22 (1889). Stockholders participating in an irregular increase of stock cannot afterwards object to it. Poole *v.* West Point, etc. Assoc., 30 Fed. Rep. 513 (1887). Irregularities in the increase of the capital stock will be disregarded as between the stockholders who participate. Bailey *v.* Champlain, etc. Co., 77 Wis. 453 (1890); Bard *v.* Banigan, 39 Fed. Rep. 13 (1889); aff'd, Banigan *v.* Bard, 134 U. S. 291. A stockholder in a national bank cannot recover back a payment which he has made on increased capital stock, on the theory that the increase was irregularly made. The certificate of the comptroller fixing the increase is conclusive as to the regularity of all proceedings. Columbia Nat. Bank *v.* Mathews, 85 Fed. Rep. 934 (1898), rev'g Matthews *v.* Columbia Nat. Bank, 79 Fed. Rep. 559, and 77 Fed. Rep. 372. To same effect, Tillinghast *v.* Bailey, 86 Fed. Rep. 46 (1897); aff'd, 99 id. 801. A proxy authorizing the holder to vote "in the same manner as I should do were I there personally present," estops the stockholder giving the proxy from questioning the call of the meeting or the irregularity of an increase of stock voted for at such meeting. Columbia Nat. Bank *v.* Mathews, 85 Fed. Rep. 934 (1898). A constitutional provision prescribing the procedure for increasing the capital stock repeals prior statutes which prescribe a different procedure, Ewing *v.* Oroville Min. Co., 56 Cal. 649 (1880).

are estopped from defeating an action on their subscription by setting up that the stock was increased in an irregular or unlawful manner.[1] Subscribers to increased capital stock cannot escape lia-

1 Chubb *v.* Upton, 95 U. S. 665 (1877); *Re* Miller's Dale, etc. Co., L. R. 31 Ch. D. 211 (1885), in which a subscriber to new shares was not permitted to plead, as against creditors, that the issue was irregular because only thirteen days had elapsed between the passing of the resolution to increase the capital and the confirming of it, when the law required fourteen days. Kansas City Hotel Co. *v.* Harris, 51 Mo. 464 (1873); and see McCarthy *v.* Lavasche, 89 Ill. 270 (1878); Veeder *v.* Mudgett, 95 N. Y. 295 (1884)—the last case holding that a statute allowing increase to be made by stockholders in meeting assembled on a specified notice is invalid if the notice did not conform to the statute, but that the stockholders are liable nevertheless to corporate creditors on such stock. Sewell's Case, L. R. 3 Ch. App. 131 (1868); Upton *v.* Jackson, 1 Flip. 413 (1874); s. c., 28 Fed. Cas. 844; Kansas City Hotel Co. *v.* Hunt, 57 Mo. 126 (1874). In such a case the state alone can properly raise the question whether the corporate stock had been regularly and lawfully increased. Pullman *v.* Upton, 96 U. S. 329 (1877). See Clarke *v.* Thomas, 34 Ohio St. 46 (1877). *Re* Reciprocity Bank, 22 N. Y. 9 (1860). See also Peckham *v.* Smith, 9 How. Pr. 436 (1854). Increased capital stock is legal, although it was issued to a person who was treasurer of a city and who paid for the stock out of the city funds, the corporation not knowing thereof. Olson *v.* State Bank, 67 Minn. 267 (1897). One who has accepted increased capital stock of a corporation, and has taken the office of president of such corporation by virtue alone of such stock, is estopped to question its validity on the ground of the nonpayment of a tax required to be paid by the corporation on increasing its stock. Peck *v.* Elliott, 79 Fed. Rep. 10 (1897). Where, upon the increase of the capital stock, $3,000 of stock is issued to a party for a patent-right, and in about six months the patent-right is assigned back to him for $1, he will be held liable for the $3,000 in case the corporation becomes insolvent. Peck *v.* Elliott, 79 Fed. Rep. 10 (1897). A holder of increased capital stock of a national bank cannot defeat the statutory liability on the ground that the increase was irregularly made, and was fraudulently made, in that the directors issued it to themselves without paying therefor. Latimer *v.* Bard, 76 Fed. Rep. 536 (1896). Even after the corporation had passed into the hands of a receiver, a subscriber for stock may rescind and sue for money paid, fraudulent representations having been made as to the condition of the company, the subscription being for increased stock, and the increase not having been made until sometime after the subscription. Newbegin *v.* Newton Nat. Bank, 66 Fed. Rep. 701 (1895); aff'd, Newton Nat. Bank *v.* Newbegin, 74 Fed. Rep. 135 (1896). Even though a corporation cannot give a mortgage for more than one-half of its capital stock, the validity of the mortgage cannot be questioned on the ground that the capital stock had been irregularly increased. First National Bank *v.* Wyoming, etc. Co., 136 Fed. Rep. 466 (1905). In Farmers' L. & T. Co. *v.* Forest Park, etc. R. R., 65 Fed. Rep. 882 (1895), a mortgagee, who had not been made a party defendant in the foreclosure of mechanics' liens, attempted to foreclose its mortgage and claim that the mechanic's-lien foreclosure sale was subject to the mortgage. The mortgage was illegal when issued, because

bility therefor by setting up that the notice of the increase was not published, or filed,[1] as required by statute.[2]

Even though the constitution and statutes require that the capital stock shall not be increased, except upon a majority vote of the stockholders at a meeting called for the purpose, on sixty days' public notice, yet the stockholders may unanimously waive such notice and

it exceeded the amount of the capital stock in violation of the statute. Resolutions to increase the capital stock had been passed, but the papers had not been filed, nor the statutory fees to the state paid, until after the foreclosure of the mechanics' liens. The company had received nothing from the bonds. The purchasers at the first foreclosure sale had expended large sums of money. Speculators, who long afterwards bought the bonds with the knowledge of the facts, bought them for a small sum in order to bring this suit. The suit failed. It is no defense to a mortgage that a consolidation was irregular, or that the debt exceeded the capital stock, contrary to statute, or that an increase of stock was irregular, or that there had been an overissue of bonds, all parties having concurred therein and interest having been paid for three years. Farmers' L. & T. Co. *v.* Toledo, etc. Ry., 67 Fed. Rep. 49 (1895). This same principle has arisen in many municipal-bond cases, holding that, although the bonds are not issued in conformity with the statute, yet, if the municipality had the benefit of the money, it is bound. See also the principles and cases in § 298, *infra*. The invalidity or irregularity of an increase of stock may be set up by the subscribers therefor as against creditors who were stockholders and managers of the company. Sayles *v.* Brown, 40 Fed. Rep. 8 (1889). Even though a gas company issues stock without the consent of a state board, as required by statute, yet this is no defense to a tax levied on the corporation based on the amount of its capital stock, including such stock. Attorney-General *v.* Mass., etc. Co., 179 Mass. 15 (1901).

1 A subscriber to increased capital stock cannot, after the company becomes insolvent, have the subscription canceled and the money repaid to him on the ground that the certificate of the increase had not been filed with the secretary of state and the town clerk, as required by statute, even though the only step towards increasing the stock was merely a vote of the stockholders that it should be increased, especially where for six years he attended meetings and accepted dividends without investigating or objecting. Barrows *v.* Natchaug, etc. Co., 72 Conn. 658 (1900). A stockholder who votes to increase the capital stock and becomes a director and takes his proportion of the increase and pays therefor, and two years afterwards, when the company is embarrassed, discovers that the certificate of increase was not recorded as required by statute, cannot tender back his certificate and demand repayment of the money. The omission to file and record the certificate was no damage to him. Hoeft *v.* Kock, 123 Mich. 171 (1900).

2 Handley *v.* Stutz, 139 U. S. 417 (1891). Holders of increased capital stock cannot defeat their liability for the subscription price by alleging that the increase was made by a stockholders' meeting held out of the state, or that proper notice of the meeting was not given, or that the required statutory publication of the increase was not made. Stutz *v.* Handley, 41 Fed. Rep. 531 (1890); rev'd on another ground in Handley *v.* Stutz, 139 U. S. 417. If the stockholders have

the expiration of such time.[1] But a contrary rule prevails as regards essential steps in the increase.[2] If a statute authorizing an increase of stock is unconstitutional the subscribers therefor are not

knowledge of the intention to increase the stock, the failure to give statutory notice cannot be taken advantage of by one not injured by such want of notice. Columbia Nat. Bank's Appeal, 16 W. N. Cas. 357; 42 Leg. Int. 226 (1885). Irregularity of notice of a meeting to increase the capital stock has been held to be fatal. *Re* Wheeler, 2 Abb. Pr. (N. S.) 361 (1866). In the case of Riesterer *v.* Horton, etc. Co., 160 Mo. 141 (1901), holding that a constitutional provision requiring the stockholder's assent to a corporate mortgage on sixty days' notice might be waived by the stockholders, the court expressly overruled State *v.* McGrath, 86 Mo. 241. See also § 599, *infra*. Concerning the failure to give the requisite notice, see also chs. XXXVI and XLVI, *infra*. Where a person subscribes to the proposed increased capital stock, and the officers surreptitiously transfer some of their own old stock to him, he is not liable on the statutory liability thereon, even though he accepted the stock, being ignorant of the fraud practiced upon him. Stephens *v.* Follett, 43 Fed. Rep. 842 (1890). Where the increase of the capital stock is not published as required by the statute, a corporate creditor who cancels his debt in consideration of a part of such new stock may be restored to his original position, except as to other corporate creditors who became such on the faith of the increase, and it is presumed that all creditors after such increase became such on the faith thereof. Palmer *v.* Bank, etc., 72 Minn. 266 (1898). The holder of stock in a national bank cannot avoid his statutory liability thereon on the plea that he supposed he was purchasing increased capital stock which afterwards turned out to have been unauthorized by the comptroller, whereas as a matter of fact he had purchased a part of the original capital stock, five years having elapsed. Rand *v.* Columbia Nat. Bank, etc., 94 Fed. Rep. 349 (1899).

[1] State *v.* Cook, 178 Mo. 189 (1903). In California an increase of capital stock must be after sixty days' notice and this cannot be waived by consent of all the stockholders, inasmuch as the provision is in the constitution and by another provision of the constitution all its provisions are declared to be mandatory and prohibitory unless otherwise provided. Navajo, etc. Co. *v.* Curry, 147 Cal. 581 (1905).

[2] Where creditors' rights do not intervene, a subscriber for increased capital stock may defend against the subscription on the ground that the increase had not been made in accordance with the statutes, and may do so even though he has paid part of the subscription and was one of the directors. Such subscriber may recover back such part of the money as he has paid, corporate creditors' rights not being prejudiced. In this case the company had not registered the increase of stock as required by statute. Union Ry. *v.* Sneed, 99 Tenn. 1 (1897). Where the charter provided that the capital stock may be increased after the existing capital stock is paid up, an increase before such payment is irregular, and a subscriber to an increase so made is not liable. Page *v.* Austin, 10 S. C. Rep. (Can.) 132 (1884). The annual meeting cannot vote an increase of the capital stock unless special notice of that business has been given, even though the by-laws provide that any business may be transacted at the annual meeting without special notice; the statute, however, prescribing that an increase of capital stock may be at

liable.[1] Or if there is no vote of the stockholders as required by statute, they are not liable on the stock.[2] Stockholders of the original capital stock are of course not liable for the defaults of subscribers to the increased capital stock.[3] Where a corporation receives money in payment for increased capital stock to be issued and never increases its stock, and the money has been used in the business and the corporation becomes insolvent, the subscriber is not entitled to repayment in preference to other creditors.[4] Mere payment of money to a corporation for increased capital stock to be thereafter voted and

"any meeting called for the purpose." Jones *v.* Concord, etc. R. R., 67 N. H. 234 (1892).

1 Marion T. Co. *v.* Bennett, 82 N. E. Rep. 782 (Ind. 1907).

2 The receiver of a national bank cannot hold stockholders liable on increased stock where such increase was not authorized by a two-thirds vote of the stockholders. Winters *v.* Armstrong, 37 Fed. Rep. 508 (1889). In American Tube Works *v.* Boston Machine Co., 139 Mass. 5 (1885), it was held that a creditor who had taken irregularly issued stock in payment of his debt might over two years thereafter, and after the corporation became insolvent, repudiate the stock and again become a creditor. Where the president issues increased capital stock to himself and pays for it, it seems that upon the insolvency of the company he cannot rescind the transaction on the ground that the increased stock had never been voted by the stockholders or authorized by the comptroller of the currency. Western Nat. Bank *v.* Armstrong, 152 U. S. 346 (1893). A person who subscribes and pays for stock in a corporation may return the stock and recover back his subscription where such stock subscribed for by him was increased capital stock, but the increase was not made according to law. In this case the stockholders had voted the increase but had not given thirty days' public notice, and had not filed a certificate with the secretary of state as required by statute. Lincoln *v.* New Orleans Exp. Co., 45 La. Ann. 729 (1893). A stockholder in a national bank cannot defend against his liability on increased capital stock by setting up that the requisite amount of stock did not vote for such increase. Bailey *v.* Tillinghast, 99 Fed. Rep. 801 (1900).

3 Veeder *v.* Mudgett, 95 N. Y. 295 (1884). See also §§ 215, 218, *supra*. A stockholder not participating is not liable for fraud in the increase of stock where the directors received pay therefor in notes which are worthless. So held under the Iowa statute. Miller *v.* Bradish, 69 Iowa, 278 (1886). See also Delano *v.* Butler, 118 U. S. 634 (1886). A statutory requirement that a certificate shall be filed when stock is fully paid does not render old stockholders liable for failure to file as to increased stock. Sayles *v.* Brown, 40 Fed. Rep. 8 (1889). A liability imposed until a specified certificate is filed is not revived by an increase of the capital stock. Veeder *v.* Mudgett, 95 N. Y. 295 (1884). See also Ochiltree *v.* Railroad Co., 21 Wall. 249 (1874), as to liability on increase of capital stock. As to the liability on a reduction of the capital stock and the constitutionality thereof, see Dane *v.* Young, 61 Me. 160 (1872); also § 497, *infra*. In suing a stockholder on a statutory liability for failure to file a certificate upon an increase in the capital stock, only those who hold the increased capital stock are liable. Griffith *v.* Green, 129 N. Y. 517 (1892).

4 Bircher *v.* Walther, 163 Mo. 461 (1901).

issued is not binding on either party, and the money may be recovered back.[1]

§ 289. *Rights and liabilities of the stockholders upon a reduction of the capital stock.*—Upon an authorized reduction of the capital stock of an incorporated company, regularly effected, the amount of corporate assets, over and above the amount of the capital stock as reduced and the debts, is equivalent to surplus profits, and may be treated as such by the corporation. It may be set aside as surplus, or it may be divided among the stockholders proportionally, inasmuch as the rights of previous corporate creditors are not injured.[2] Where a holding corporation has been declared illegal and

1 Wolf *v.* Chicago, etc. Co., 84 N. E. Rep. 614 (Ill. 1908).

2 Cited and approved in Kassler *v.* Kyle, 28 Colo. 374 (1901). Strong *v.* Brooklyn Crosstown R. R., 93 N. Y. 426 (1883), where a corporation, whose capital had been reduced one-half, issued certificates of indebtedness bearing interest to stockholders for the excess. The application of a dissenting holder to have them declared illegal, and to restrain the corporation from paying them, was refused; Seeley *v.* New York, etc. Bank, 8 Daly, 400 (1878); aff'd, 78 N. Y. 608 (1879); McCann *v.* First Nat. Bank, 112 Ind. 354 (1887), approving the text herein, and holding that where, by reason of bad debts, the capital stock is reduced, a subsequent collection of such debts does not sustain an action by a stockholder for his proportion thereof. Where the capital stock is reduced by reason of certain doubtful securities, the securities should not be withdrawn from the assets of the bank and put into a trust. McCann *v.* First Nat. Bank, 131 Ind. 95 (1892). If an increase of capital stock is afterwards canceled, a corporate creditor who was such previous to the increase cannot complain. Coit *v.* Gold Amal. Co., 119 U. S. 343 (1886). Where the capital stock is reduced and the corporate property over and above the reduced capital stock is distributed among the stockholders, this is not a dividend within the meaning of the New York tax statute. People, etc. *v.* Roberts, 41 N. Y. App. Div., 21 (1899). For the rules herein relative to life estates and remainders in stock, see §§ 559, 560, *infra*. A stockholder may enjoin the corporation from reducing its capital stock, as allowed by statute; calling in all certificates of stock; issuing new certificates proportionately; declaring a dividend of the surplus over the reduced capital stock, and, on account of the corporate property being invested, borrowing money to pay that dividend. Coquard *v.* St. Louis, etc. Co., 7 S. W. Rep. 176 (Mo. 1888). And in general, see also *Re* State Ins. Co., 14 Fed. Rep. 28 (1882); Excelsior Petrol. Co. *v.* Lacey, 63 N. Y. 422 (1875). A by-law cannot compel a stockholder to sell his stock to the corporation for the purpose of retiring it. Bergman *v.* St. Paul, etc. Assoc., 29 Minn. 275 (1882). In England it is the rule that, when the assets are already reduced by losses, the corporation cannot effect a reduction of the capital stock so as to cover up the losses. *Re* Ebbw Vale Steel, etc. Co., L. R. 4 Ch. D. 827 (1877). And yet it would seem that a greater injury would be worked upon the public by continuing business with an impaired capital than to reduce it openly to what it actually is. *Cf. Re* Kirkstall Brewery Co., L. R. 5 Ch. D. 535 (1877). In England, by statute, a plan for reducing the capi-

a distribution to its stockholders ordered, the stockholders are not entitled to the stock which they turned in originally, but are entitled only to their *pro rata* share of the assets existing at the time of the injunction and decree of distribution, the capital stock having been reduced for that purpose. The assets may be distributed in kind *pro rata* among the stockholders, or may be sold for cash, and the company may by vote adopt the former plan, thus avoiding the disastrous consequences of a forced sale.[1] Under certain circumstances the surplus may be used to buy outstanding shares of stock.[2] But it is not the rule that the reduction of the capital stock of a corporation always authorizes the distribution among the stockholders of a sum equal to the difference between the original and the reduced amount of capital. Such a distribution is lawful only when it appears that the original capital stock was unimpaired at the time of the decrease. The corporation can divide among its stockholders only such a sum as will leave with the corporation an amount equal to the reduced capital stock in addition to the amount of the debts.[3] Where on the reduction of the capital stock the surplus resulting therefrom is disposed of by charging off certain bad debts which

tal stock must be presented to and approved by the courts. *Re* Direct, etc. Co., L. R. 34 Ch. D. 307 (1886) And a distribution of part of the capital stock among the stockholders proportionally is an unauthorized reduction, and the stock so distributed will be ordered to be returned. Holmes *v.* Newcastle, etc. Co., L. R. 1 Ch. D. 682 (1875). A stockholder cannot hold a corporation liable for fraud in inducing him to cancel a part of his stock upon a reduction of the capital stock, if all the other stockholders did the same, inasmuch as no actual damage resulted, each stockholder having the same proportionate interest after the reduction. Potter *v.* Necedah, etc. Co., 105 Wis. 25 (1899).

1 Harriman *v.* Northern Securities Co., 197 U. S. 244 (1905). Where a holding company has illegally purchased the stock of competing railroads and is compelled by decree of the court to return the same to its stockholders, the stockholders are not entitled to the particular stocks which they turned in, but are entitled to a *pro rata* interest in all the stocks so distributed. Such distribution may be in kind. Continental, etc. Co., *v.* Northern, etc. Co., 66 N. J. Eq. 274. (1904). In reducing its capital stock a corporation may distribute such portion of its assets as are in excess if its liabilities and remaining capital stock, and such distribution may be in kind instead of being in cash. Continental, etc. Co. *v.* Northern, etc. Co., 66 N. J. Eq. 274 (1904).

2 See § 282, *supra*, and §§ 311, 312, *infra*.

3 Strong *v.* Brooklyn Crosstown R. R., 93 N. Y. 426 (1883). Where, upon the reduction of the capital stock of a bank, certificates of deposit are issued to the stockholders to the amount of the reduction of the capital stock, such certificates of deposit can be enforced only to the extent that the actual assets of the bank exceeded its liabilities and reduced capital stock. Kassler *v.* Kyle, 28 Colo. 374 (1901).

are then placed to a fund for the benefit of the stockholders, it belongs to the stockholders then of record and not to their transferees, unless specifically transferred.[1] If the original subscriptions were not paid in full, corporate creditors who were such before the reduction may disregard the reduction and enforce payment of their debts from such original unpaid subscriptions, as though no reduction had taken place.[2] Owners of claims not yet due may, in certain circumstances, prevent a distribution of capital stock upon a reduction thereof, unless security is given.[3] But creditors whose debts were contracted subsequently to the reduction can look only to the capital stock, as reduced, for security. They will be held to have given credit upon the faith of that amount of stock alone.[4]

1 Where on a reduction of the capital stock certain bad debts are set aside for the express benefit of the then existing stockholders of record, they are entitled to the same, even though they are not stockholders of record when the corporation is dissolved later. Jerome *v.* Cogswell, 204 U. S. 1 (1907); aff'g Cogswell *v.* Second Nat. Bank, 78 Conn. 75 (1905), holding also that on a reduction of the capital stock of a national bank the Comptroller of the Currency may order that certain assets which are charged off as being worthless shall be set aside for the benefit pro rata of the then existing stockholders.

2 *Re* State Ins. Co., 14 Fed. Rep. 28 (1882); Bedford R. R. *v.* Bowser, 48 Pa. St. 29 (1864). Stockholders have no power to avoid liability on their stock by reducing either the amount of it or the par value of the shares. Dane *v.* Young, 61 Me. 160 (1872). *Cf.* Bedford R. R. *v.* Bowser, 48 Pa. St. 29 (1864). A subscriber for $1,000 of stock who pays in $200, being twenty per cent. and then transfers $200 of full-paid stock to another, is still liable for the remaining $800. It is immaterial that the old certificates, showing that twenty per cent. had been paid, were returned to the corporation, and only $200 of stock reissued. This does not amount to a reduction of the stock to twenty per cent. Putnam *v.* Hutchison, 4 Can. App. 273 (1896). Upon a reduction of the capital stock it is legal to pay to the stockholders only such part of the assets as exceeds in value the actual liabilities plus the remaining capital stock, and if the assets are overvalued and certificates of indebtedness are issued to the stockholders, they are not legal. State *v.* Bank of Ogallala, 65 Neb. 20 (1902). As to existing corporate creditors the stockholders cannot avoid liability on a part of their subscriptions by reducing the par value of the stock, but the purchaser of such reduced stock is not liable for the old par value. Cammack *v.* Levy, 45 S. Rep. 925 (La. 1908).

3 *Re* Telegraph Const. Co., L. R. 10 Eq. 384 (1870).

4 Hepburn *v.* Exchange, etc. Co., 4 La. Ann. 87 (1849); Palfrey *v.* Paulding, 7 La. Ann. 363 (1852); Cooper *v.* Frederick, 9 Ala. 738, 742 (1846). *Cf. Re* State Ins. Co., 14 Fed. Rep. 28 (1882). In the case *Re* Welsbach, etc. Co., Ltd., [1904] 1 Ch. 87, the court said: "Broadly speaking, a reduction of capital by writing off loss is, I repeat, not to the injury, but to the benefit of the shareholder. The persons whom it may injure are the creditors (if any). The result of writing off the loss is, that the company is no longer bound to keep to the balance of its debit, in respect of capital, as large a sum; but, to the

Where the preferred stock is reduced, a preferred stockholder, who accepts the reduced amount of preferred stock and turns in the old certificate, may claim the accumulated dividends on the amount canceled by the reduction, but if the reduction resulted in a surplus over the reduced capital stock, such surplus may be used for dividends on both classes of stock, because it is not "surplus profits." [1] Under the English statute a reduction of the capital stock, when approved by the court, is binding, and the court may approve a reduction which pays off the founders' shares at par, even though the reserve is more than sufficient therefor, it appearing that the founders' shares have no commercial value.[2] As between preferred and common stock where the preferred stock was to have five per cent. and the common stock seven per cent., and the remaining profits were to go equally to the common stock and to founders' shares, and a reduction of capital is made by reason of losses, the reduction may be made by cancelling the founders' shares and part of the common stock.[3] Where a part of the capital stock was issued as full paid for property, and the remaining part was issued for cash, one-half of which was paid in, the majority stockholders cannot as against the minority, reduce the capital stock by canceling one-half of the stock which was issued

extent to which it resumes paying dividends at an earlier date, of course the creditors lose assets to which they would otherwise be entitled."

1 Roberts *v.* Roberts-Wicks Co., 184 N. Y. 257 (1906).

2 Poole *v.* National Bank of China, 96 L. T. Rep. 889 (1907), disapproving *Re* Anglo-French Ex. Co., [1902] 2 Ch. 845.

3 *Re* London, etc. Inv. Corporation, [1895] 2 Ch. 860, the court saying that "where there are different classes of shares the loss on a reduction ought to fall on those who would have to bear it if there was a winding up." See also § 278, *supra*. Under the English statutes, where the capital stock consists of stock and deferred stock, the former being practically preferred stock and the latter common stock, a reduction of the whole capital stock may be effected, with the consent of the common stockholders, by canceling a part of the common stock and having the remainder become preferred stock (in other words, by wiping out all preferences), even though some of the preferred stockholders objected, there being originally no preferences as to assets. *Re* Hyderabad Co., 75 L. T. Rep. 23 (1896). Even though there are different classes of stock, a reduction of the capital may be made on a different basis from the basis specified as applicable upon a dissolution and winding up. *Re* Credit Assurance, etc. Corp., [1902] 2 Ch. 601. Where the property of the corporation consists of a mine, and it has been largely worked out, and the corporation applies to the court to sanction a reduction of both preferred and common stock by canceling one-half, the court will refuse where it is shown that a large sum had been passed to a reserve fund and profit and loss. *Re* Barrow, etc. Co., Ltd., [1902] 2 Ch. 746. Under the English statute a reduction of the capital stock reduces the preferred as well as the common

for cash. This would be unfair to the remaining stockholders.[1] The by-laws may provide that any surplus carried to the reserve may subsequently be used for dividends to make good lost capital, or to apply to any other purpose within the charter powers of the company. Such reserve need not be represented by specific property set apart, but may be a part of the general assets. In case of a loss, a part of the reserve may be used to cancel the loss, and part may be cancelled by reducing the capital stock, although this process will leave a reserve available at once for dividends after the loss has been charged off. A reserve differs from a reserve fund in that the latter represents specific property set apart and the former does not.[2]

A reduction of the capital stock is effected only when all statutory formalities have been complied with.[3] But corporate creditors who become such after a reduction of the capital stock has been made cannot claim that such reduction was irregularly made and that the holders of the canceled capital stock are consequently liable still.[4]

§ 290. *Change in the number or par value of the shares.*—It is a well-settled principle of law that the number of shares into which the capital stock has been divided, and the par value of those shares, can neither be increased nor diminished without express warrant of authority either from the legislature or the charter of the company.[5]

stock. Bannatyne *v.* Direct, etc. Co., L. R. 34 Ch. D. 287 (1886). See also § 641, *infra*.

1 Theiss *v.* Durr 125 Wis. 651 (1905).

2 *Re* Hoare & Co. Ltd., [1904] 2 Ch. 208.

3 See Moses *v.* Ocoee Bank, 1 Lea (Tenn.), 398 (1878), holding that, where a corporation has power under its charter to reduce its capital stock, it must clearly appear that it has ordered the reduction to be made; neither equivocal acts nor inferences nor unauthorized acts of a president or director will be sufficient; Ferris *v.* Ludlow, 7 Ind. 517 (1856), holding that where the records of a company showed that propositions to reduce its stock had been made, but failed to show any acceptance, there was no reduction. See also Grangers', etc. Ins. Co. *v.* Kamper, 73 Ala. 325 (1882). Where by statute an official certificate is conclusive proof that the capital stock has been regularly reduced, such certificate cannot be questioned, even though the reduction was not made in accordance with the statute. Ladies', etc. Assoc., Ltd. *v.* Pulbrook, 81 L. T. Rep. 300 (1899); aff'd, [1900] 2 Q. B. 376.

4 Gade *v.* Forest, etc. Co., 165 Ill. 367 (1897).

5 Salem Mill-dam Corp. *v.* Ropes, 23 Mass. 23 (1827); *Re* Financial Corporation (Holmes's Case), L. R. 2 Ch. App. 714, 733 (1867); Droitwich Salt Co. *v.* Curzon, L. R. 3 Exch. 35, 42 (1867); Smith *v.* Goldsworthy, 4 Q. B. 430 (1843). *Cf.* Sewell's Case, L. R. 3 Ch. App. 131 (1868). A corporation has no implied power to change the number or par value of its stock. The stock as so changed is void, and the holders are not liable thereon even to corporate creditors, and even though the money paid by them for the stock has been returned to them. Tschumi *v.* Hills, 6 Kan. App.

When, however, the charter does not fix the number or amount of the shares, it devolves upon the stockholders or directors to fix them; and in such a case it seems that the limit established might lawfully be changed without special authority.[1]

B. ILLEGAL INCREASE OF STOCK, BEING OVERISSUED STOCK.

§ 291. *Unauthorized increase of stock may amount to overissued stock.*—Where the full capital stock of a corporation has been issued, and there is no statute or charter provision authorizing an increase of the stock, it is clear that any issue of stock in excess of the capital stock is not a legitimate increase of the capital stock. It is unauthorized and illegal, and is termed in law an overissue of stock. There is a clear distinction between overissued stock and an irregular increase of stock. The former is where an attempted increase of the stock is made, although no increase is authorized by the charter or by statute. The latter occurs when there is a statutory or charter provision authorizing an increase of the stock, but the formalities prescribed for making that increase have not been strictly complied with. Overissued stock is void, while an irregular increase of stock is merely voidable.

The issue by a corporation of new certificates of stock in place of lost certificates does not constitute an overissue of stock.[2] An overissue of stock often arises by forgery on the part of an officer

549 (1897). "A corporation with a fixed capital, divided into a fixed number of shares, can have no power of its own volition, or by any act of its officers and agents, to enlarge its capital or increase the number of shares into which it is divided. The supreme legislative power of the state can alone confer that authority." It cannot be increased "by the covert or fraudulent efforts of one or more of the agents of the corporation." New York, etc. R. R. *v.* Schuyler, 34 N. Y. 30, 49 (1865). *Cf.* Scovill *v.* Thayer, 105 U. S. 143 (1881). Where all the shares are reduced in par value from $50 to $38, and the $12 difference is paid to the stockholders in cash, this is a reduction of capital stock and not a dividend, and cannot be taxed as a dividend. Commonwealth *v* Central Transp. Co., 145 Pa. St. 89 (1891). A reduction of the par value of the common stock and not of the preferred is not allowed in England. *Re* Union, etc. Co., L. R. 42 Ch. D. 513 (1889).

1 Somerset, etc. R. R. *v.* Cushing, 45 Me. 524 (1858); Ambergate, etc. Ry. *v.* Mitchell, 4 Exch. 540 (1849); *Re* European Cent. Ry., L. R. 8 Eq. 438 (1869). It has been held allowable for the company to allow the holders of paid-up shares to return them and take in exchange shares of double the par value as half paid up, and *vice versa*, both kinds of stock being authorized. Teasdale's Case, L. R. 9 Ch. App. 54 (1873).

2 Kinnan *v.* Forty-second, etc. R. R., 21 N. Y. Supp. 789 (1893); aff'd, 140 N. Y. 183. See also §§ 358–362, *infra.*

of the corporation who forges the necessary names of the corporate officers to a certificate and puts it in circulation.[1]

§ 292. *Overissued stock is absolutely void.*—By overissued stock is to be understood stock issued in excess of the amount limited and prescribed by the act of incorporation. Certificates of stock issued in excess of the certificates that represent the full authorized capital stock of the corporation represent overissued stock. Such stock is spurious and wholly void. This is the settled law, and it prevails equally whether the overissue is the result of accident or mistake, or want of knowledge of the law, or is due to fraud and intentional wrong-doing. The *animus* or intent of the parties to the overissue is not material. Overissued stock, no matter how overissued, represents nothing, and is wholly and entirely valueless and void.[2] So rigid and well established is this rule that not even a *bona fide* holder of such stock can give to it any validity or vitality. Overissued or spurious stock may, however, it seems, be legalized by a subsequent legal increase of the capital stock.[3]

§ 293. *Liability of the corporation as to overissued stock — Who is a bona fide holder.*—Although it is settled law that overissued stock is void and valueless, and that no action lies either to compel the corporation to recognize the holder as a stockholder, or to issue in place thereof a valid certificate, yet where overissued certificates of stock, signed or purporting to be signed by the corporate officers having the authority to issue stock, and actually issued by such officers, are purchased by any person, or are taken in any manner in good

1 See § 293, *infra*.

2 Quoted and approved in First Ave. etc. Co. *v.* Parker, 111 Wis. 1 (1901). The leading case on this subject is New York, etc. R. R. *v.* Schuyler, 34 N. Y. 30 (1865); Hayden *v.* Charter Oak Driving Park, 63 Conn. 142 (1893). *Cf.* Mechanics' Bank *v.* New York, etc. R. R., 13 N. Y. 599 (1856). See also as to the point that overissued stock is void even in the hands of *bona fide* holders. People's Bank *v.* Kurtz, 99 Pa. St. 344 (1882); Bruff *v.* Mali, 36 N. Y. 200 (1867); People *v.* Parker Vein Coal Co., 10 How. Pr. 543 (1854); Sewell's Case, L. R. 3 Ch. App. 131, 138 (1868); Wright's Appeal, 99 Pa. St. 425 (1882); Scovill *v.* Thayer, 105 U. S. 143 (1881). See also § 281, *supra*. A corporation cannot refuse to recognize a stockholder of record as a stockholder on the ground that the certificate to him was an over-issue where the transferrer owned that amount of stock and transferred the same to such stockholder of record, even though the corporation subsequently issued the same amount of stock to other parties on transfers from the original holder. Richardson *v.* Longmont, etc. Co., 19 Colo. App. 483 (1904).

3 Sewell's Case L. R. 3 Ch. App. 131 (1868); New York, etc. R. R. *v.* Schuyler, 34 N. Y. 30, 56, 57 (1865). A reorganized company may be charged with notice of the reorganization agreement, and may be estopped from complaining that a part of the securities issued by the old corpora-

faith and for value, such *bona fide* holder may sue the corporation and recover damages.[1]

tion were overissues. Davidson *v.* Mexican National R. R., 11 N. Y. App. Div. 28 (1896).

[1] Quoted and approved in First Ave. etc. Co. *v.* Parker, 111 Wis. 1 (1901). New York, etc. R. R. *v.* Schuyler, 34 N. Y. 30, 49, 60 (1865); Bruff *v.* Mali, 36 N. Y. 200 (1867); Titus *v.* Great Western Turnp., 5 Lans. 250 (1872); s. c., 61 N. Y. 237 (1874); Bank of Kentucky *v.* Schuykill Bank, 1 Pars. Sel. Cas. 180, 216 (1846). This was a suit in equity by a bank against another bank which, acting as its transfer agent, had made a large overissue of its stock. Tome *v.* Parkersburg Branch R. R., 39 Md. 36 (1873); Willis *v.* Philadelphia, etc. R. R., 6 W. N. Cas. 461 (1878); Willis *v.* Fry, 13 Phila. 33 (1879); People's Bank *v.* Kurtz, 99 Pa. St. 344 (1882). See also Daly *v.* Thompson, 10 M. & W. 309 (1842); *Re* Bahia, etc. Ry., L. R. 3 Q. B. 584, 595 (1868); Simm *v.* Anglo-Amer. Tel. Co., L. R. 5 Q. B. D. 188 (1879); Waterhouse *v.* London, etc. Ry., 41 L. T. Rep. 553 (1879); Mandlebaum *v.* North Am. Min. Co., 4 Mich. 465 (1857); Wright's Appeal, 99 Pa. St. 425 (1882). In many of these cases the overissue was due to a mistake of the corporation in allowing a transfer of stock. The failure to surrender an old certificate does not give a purchaser of stock notice that an overissue is being made. Allen *v.* South Boston R. R., 150 Mass. 200 (1889). A party who purchases overissued stock, but is not a purchaser in good faith for full value, cannot hold the company liable where the stock was issued by the executive committee without authority. Ryder *v.* Bushwick R. R., 134 N. Y. 83 (1892); aff'g 10 N. Y. Supp. 748. Where a party contracts to deliver notes for stock and before the delivery of the notes the stock is sent to the corporation for transfer, and the corporation refuses to transfer the same on the ground that it was overissued stock, the vendee has no recourse against the corporation if he delivers the notes to the vendor after receiving such information from the corporation. In this case the vendor was president of the corporation. Hayden *v.* Charter Oak Driving Park, 63 Conn. 142 (1893). Where the secretary of a company fraudulently makes out a transfer of stock and delivers it to a *bona fide* purchaser, and the company recognizes the transfer at a board meeting and issues a new certificate and pays dividends on the stock, the company is liable to the person to whom the stock was so issued. Dixon *v.* Kennaway & Co., [1900] 1 Ch. 833. Frequently the decision turns on the question of whether the holder is a *bona fide* holder. A bond or debenture payable to bearer, unless registered, is a negotiable instrument, and a *bona fide* pledgee of the same from the secretary of the company is protected, even though the secretary fraudulently stole the bond from the company itself. Bechuanaland, etc. Co. *v.* London, etc. Bank 2 Q. B. 658 (1898), the court refusing to follow Crouch *v.* Credit Foncier of England, L. R. 8 Q. B. Where a trustee has deposited funds with a bank as trustee for a long time, and obtains a loan as trustee and pledges bonds as security, the bank may be a *bona fide* holder of the same, even though the bonds have been stolen and have been issued twenty years prior thereto and the corners appear to have been burned. Depositing funds as "trustee" did not give notice that he was acting for others and did not require an investigation as to his authority. Manhattan Sav. Inst. *v.* N. Y. etc. Bank, 170 N. Y. 58 (1902). A purchaser with notice from a *bona fide* purchaser is

There is, however, a very important limitation to this rule. It is well established that a person dealing with an officer of a corporation in a matter in which the officer is personally interested is not a *bona fide* holder of corporate securities received by him from the officer in that transaction. He is bound to inquire into the legality of any stock or corporate note which such officer issues or transfers to him in the officer's personal business, and is chargeable with notice of illegalities in the issue.[1] This rule applies particularly to overissued or fraudulently-issued stock. A person receiving stock from a corporate officer as collateral security for a personal obligation of such officer, or purchasing stock from such officer, is bound to inquire into the legality of the issue. He is not a *bona fide* holder, and cannot hold the corporation liable on the ground that the stock was spurious.[2]

protected as a *bona fide* purchaser himself. Board of Commissioners, etc. *v.* Sutliff, 97 Fed. Rep. 270 (1899). In Montana a strange decision was rendered that a purchaser of a certificate of stock endorsed in blank, the vendor not being the original owner, was not a *bona fide* purchaser. Barker *v.* Montana, etc. Co., 89 Pac. Rep. 66 (Mont. 1907).

1 Quoted and approved in *In Re* Troy etc. Co., 136 Fed. Rep. 420, 433, (1905); aff'd 142 Fed. Rep. 1038.

2 Farrington *v.* South Boston R. R., 150 Mass. 406 (1890); Moores *v.* Citizens' Nat. Bank, 111 U. S. 156 (1884); Wilson, *v.* Metropolitan El. Ry., 120 N. Y. 145 (1890). See also §§ 727 and 766, *infra*. Where the president of a bank signs certificates of stock in blank and endorses them to the cashier and the cashier also signs them and fraudulently pledges them for his own debt, the bank is liable to the pledgee, even though the stock was made out to the cashier and was endorsed by him in blank. Havens *v.* Bank of Tarboro, 132 N. C. 214 (1903). A *bona fide* purchaser of an accommodation corporate note may enforce the same, even though it is endorsed to a co-partnership in which two of the officers are interested, and then they endorse it personally. *In Re* Troy, etc. Co., 136 Fed. Rep. 420 (1905). The holder of the personal note of the treasurer of a corporation who takes from him a corporate check in payment thereof is bound to investigate. Manhattan Web Co. *v.* Aquidneck Nat. Bank, 133 Fed. Rep. 76 (1904). Where the selling agents of a corporation, the principal partner in which agency was the president of the corporation, discounts, at a bank, drafts by the corporation on such selling agents, the bank is chargeable with notice that the paper was accommodation paper. Cook *v.* American, etc. Co., 65 Atl. Rep. 641 (R. I. 1905). Where a corporation issues a promissory note to a director, a purchaser thereof is bound to investigate. Orr *v.* South Amboy, etc. Co., 47 N. Y. Misc. Rep. 604 (1905). A bank loaning money to a firm and taking negotiable bonds as security is not chargeable with notice that the bonds were improperly issued, even though two of the members of the firm are directors in the corporation which issued the bonds. Farmers', etc. Co. *v.* Madison Mfg. Co., 153 Fed. Rep. 310 (1906). It is to be borne in mind that a certificate of stock is not a negotiable instrument like a bond or note, and although certificates of stock have been given many of the elements of negotiability in America by application of the law

It is to be borne in mind also that a purchaser of negotiable paper without notice to be entitled to protection, must not only be

of estoppel, yet there are some instances in which a certificate of stock falls short of full negotiability. See §§ 411, 412, *infra*. The corporation waives its claim against a person taking a corporate check from the president in payment of the president's personal obligation, if the corporation has settled the matter by accepting the obligation of a third person in payment of the president's obligation. Security, etc. Co. *v.* Am., etc. Bank, 118 N. Y. App. Div., 350 (1907). The rule that a person taking a corporate note from an officer in a matter personal to him is bound to investigate as to whether the papers authorize it, does not apply to a note taken from a director. Orr *v.* South Amboy, etc. Co., 113 N. Y. App. Div. 103 (1906). Where corporate officers, who are authorized to sign an issue of certificates of stock, sign them in blank and entrust them to the chief executive officer to be filled in and delivered to persons, who surrender certificates for transfer, and he fills in his own name and then pledges the certificate for a personal loan to himself, the pledgee, if *bona fide*, is protected and may hold the corporation liable for the market value of similar stock. American Exchange Nat. Bank *v.* Woodlawn Cemetery, 120 N. Y. App. Div. 119 (1907). A pledgee of bonds of a corporation from an officer of a corporation for his personal debt, is not protected and is liable if he sells the bonds to a *bona fide* purchaser. Medina, etc. Co. *v.* Buffalo, etc. Co., 119 N. Y. App. Div. 245 (1907). A person taking from the secretary of the company as security for a personal loan to him, certificates which he had forged, cannot hold the company liable, even though the certificates were regular as to form, and were sealed with the corporate seal and the secretary was the proper person to deliver certificates to shareholders. Ruben, etc. *v.* Great, etc. Co., 95 L. T. Rep. 214 (1906), aff'g [1905] 2 K. B. 712; rev'g [1904] 1 K. B. 650, and questioning Shaw *v.* Port Philip, etc. Co., 13 Q. B. D. 103. Where a corporate note signed by the president is payable to the order of the president himself this is "a danger signal which the discounter or purchaser disregards at his peril." Capital, etc. Co. *v.* Jackson, 59 S. E. Rep. 92 (Ga. 1907). The person purchasing stock from the secretary as an individual, or loaning money to the secretary as an individual on similar spurious forged stock, cannot hold the corporation liable. Lucile, etc. Co. *v.* Willard, 89 Pac. Rep. 935 (Wash. 1907). Even though the president and secretary-treasurer of a manufacturing company own all the stock, yet if the president uses a check of the corporation, payable to its own order and endorsed by it, to pay his personal debt, corporate creditors, upon the insolvency of the corporation, may compel the trust company that cashed the check to refund the money. Ward *v.* City Trust Co., 192 N. Y. 61 (1908), rev'g 117 N. Y. App. Div. 130, the court intimating that the trust company would have been protected if inquiry by it would not have resulted in developing the actual facts.

A person who accepts from the treasurer of a corporation the check of the company in payment of the treasurer's individual debts, he having no apparent authority to make such check, may be compelled to repay the money to the corporation where the payment was illegal. Rochester, etc. Co. *v.* Paviour, 164 N. Y. 281 (1900). Where the trustee of a mortgage the day after the mortgage is executed accepts some of the mortgage bonds from the secretary as

so at the time of the contract, but also at the time of the payment of the purchase money, and if he receives notice of defenses after he

collateral security for a personal loan to the secretary and it transpires that such pledge was in breach of trust by the secretary, the trustee is not protected as pledgee. Buffalo, etc. Co. *v.* Medina, etc. Co., 162 N. Y. 67 (1900). A party taking from the president, as security for a loan to him personally, warehouse receipts issued by the corporation is not a *bona fide* holder. Bank of N. Y. etc. Assoc. *v.* American Dock, etc. Co., 143 N. Y. 559 (1894). *Cf.* Hanover Nat. Bank *v.* American Dock Co., 75 Hun, 55 (1894). Where a corporate note is issued to a third person and then passes into the hands of an officer, the person taking it from the officer is not affected by the rule that a person taking corporate paper in its original issue by a corporation is bound to ascertain the facts if the officer is personally interested in the transaction. Cheever *v.* Pittsburgh, etc. R. R., 150 N. Y. 59 (1896). A purchaser or pledgee of bonds from a director may be a *bona fide* holder, even though he knew that he was dealing with a director, inasmuch as a director may be a lawful holder of such bonds. Duncomb *v.* N. Y. etc. R. R., 84 N. Y. 190 (1881). See also Claflin *v.* Farmers', etc. Bank, 25 N. Y. 293 (1862), where the certification of his personal check by the president of a bank was considered to constitute such a suspicious circumstance as should put a purchaser upon his guard and render the certification invalid even in the hands of a *bona fide* holder for value. A bank may be a *bona fide* pledgee of stock from its cashier, even though such stock is in the name of a third person and is indorsed by the latter. Brady *v.* Mount Morris Bank, 65 N. Y. App. Div. 212 (1901). Where the president pays his personal debt by a check on the corporation the payee is bound to investigate such payment. Reynolds, etc. Co. *v.* Merchants', etc. Bank, 55 N. Y. App. Div. 1 (1900). A person taking the note of a railroad company payable to the order of the private secretary of the president and indorsed by such private secretary is bound to inquire into the issue of the note. Cheever *v.* Pittsburgh, etc. R. R., 28 N. Y. App. Div. 81 (1898). A person taking bonds from a corporation to secure a private debt is bound to ascertain the right of the officer to so issue the bonds. Germania, etc. Co. *v.* Boynton, 71 Fed. Rep. 797 (1896). In the federal courts a person taking from the president of a corporation a note signed by the corporation and indorsed by him is not bound to inquire into the consideration. Doe *v.* Northwestern Coal, etc. Co., 78 Fed. Rep. 62 (1896). Bankers receiving a draft of the president of a bank on the bank itself for margins may be compelled to refund the money to the bank. Lamson *v.* Beard, 94 Fed. Rep. 30 (1899). Brokers receiving bank drafts from the president in settlement of his private account are bound to investigate. Beard *v.* Milmine, 88 Fed. Rep. 868 (1898). A person taking from the president the corporate note running to the president and indorsed by him is not a *bona fide* holder. Park Hotel Co. *v.* Fourth Nat. Bank, 86 Fed. Rep. 742 (1898). Where a purchaser of bonds knows that he is purchasing from an agent of the corporation, and that the agent intends to use the proceeds for his private purposes, he is not a *bona fide* purchaser. Chew *v.* Henrietta, etc. Co., 2 Fed. Rep. 5 (1880). A principal taking bonds as collateral security to a note sent to him by his agent is not chargeable with notice of the fact that the agent, as the agent of a corporation, has fraudulently put the bonds into circulation. Thomson-Houston Electric Co. *v.* Capitol Elec-

has partly paid the purchase price, he is protected only to the extent

tric Co., 56 Fed. Rep. 849 (1893). But overissued stock issued by the president to his private debtor, in payment of his private debt, has been held not to confer on such debtor a right to hold the corporation responsible. Wright's Appeal, 99 Pa. St. 425 (1882). In this case the court assumes that the debtor could not be heard to claim *bona fides*. Although the husband is in possession of a certificate of stock running to his wife and transferred in blank by her, yet he cannot deliver the same in payment of his personal debt. The purchaser is not a *bona fide* purchaser. Wilson *v.* Wilson-Rogers, 181 Pa. St. 80 (1897). The fact that stock stands in the name of the wife and is transferred by her in blank and is then pledged by her husband for his individual debt does not put the pledgee on notice that the husband is misappropriating the wife's stock. McManus *v.* Laughlin, 186 Pa. St. 498 (1898). A person taking from the treasurer of a corporation its check in payment of the treasurer's personal debt must inquire whether the treasurer was authorized to use the money for that purpose. Mt. Verd, etc. Co. *v.* McElwee, 42 S. W. Rep. 465 (Tenn. 1897). A person taking a corporate note from an officer for a personal liability is protected, even though the issue of the note was not legal, if it turns out that the books showed that the company authorized the note and afterwards affirmed it. St. Joe, etc. Co. *v.* First Nat. Bank, 10 Colo. App. 339 (1897). A bank taking a note of a corporation payable to its president and indorsed by him to the bank cannot collect the note as against the corporation if it was merely an accommodation note, but where the note was indorsed by two directors they are liable to the bank, even though the corporation is not. Klein *v.* German Nat. Bank, 69 Ark. 140 (1901). A bank is not liable for the proceeds of a note which it credits to an agent of a corporation on paper signed by the corporation, even though such agent is the president of the bank, and even though the agent had no right to have the proceeds so credited to him personally. City, etc. Co. *v.* First Nat. Bank, 65 Ark. 543 (1898). The fact that the treasurer of a corporation pledges certain of its bonds as security for his note is not notice that he had obtained the bonds fraudulently. Rockville, etc. Bank *v.* Citizens', etc. Co., 72 Conn. 576 (1900). A creditor of an officer of a corporation receiving the securities of such corporation as security for his debt is chargeable with notice of any fraud connected therewith. Wheeler *v.* Home, etc. Bank, 188 Ill. 34 (1900). A note of a corporation payable to the order of its president and indorsed by him is presumed to be illegal and is not binding on the corporation unless it is proved that it was for the benefit of the corporation. Porter *v.* Winona, etc. Co., 78 Minn. 210 (1899). A person taking from the treasurer a note of the corporation payable to the order of the treasurer and indorsed by him is bound to inquire into the legality of the note where such note is taken for a personal debt of the treasurer. Randall *v.* Rhode Island, etc. Co., 20 R. I. 625 (1898). Even though the president of a company is the maker of a note the holder of such note is not chargeable with notice thereby that the corporation was an accommodation indorser of the same. Hiawatha, etc. Co. *v.* John Strange, etc. Co., 106 Wis. 111 (1900). Where the president, who is also managing director, presents for discount a note running to himself and indorsed both by him and the corporation, and states that the proceeds are to be used to pay a corporate obligation, the purchaser of the note is protected. Orvis *v.* Warner & Co., 75

of the payment already made.[1] An assignment or bill of sale of bonds and coupons to a person who knows nothing thereof until nine years thereafter, the purpose being solely to enable him to bring suit in his name in the United States court, conveys no title.[2] It is a question whether a person purchasing bonds of a newly formed corporation at par, with a bonus of stock, is a *bona fide* purchaser, even though he made such purchase not from the corporation, but from a third person.[3] Where a certificate of stock is forged by persons other than the corporate officers, the corporation is of course not liable thereon unless it has recognized such certificate in some way.[4] But where the forgery was by a corporate officer, or has been recognized in some way by the corporation, difficult questions arise. The law on the subject is somewhat unsettled, and at present each case seems to turn largely on the facts in that case. In Massachusetts the rule seems to be that the corporation is not liable if forgery enters into the transaction.[5] In England the same rule seems to prevail[6] and in New York the latest decision is to the effect that the corporation is not liable.[7] Where a certificate of stock provides on its

N. Y. App. Div. 463 (1902). On this subject of notice, and who is a *bona fide* purchaser, see also §§ 473, 716, 767, *infra*.

1 Dresser *v.* Missouri, etc. Co., 93 U. S. 92 (1876); Lytle *v.* Lansing, 147 U. S. 59 (1893).

2 Lake Co., etc. *v.* Dudley, 173 U. S. 243 (1899).

3 See § 49, *supra*.

4 See § 366, *infra*.

5 Where the signatures of the president and treasurer to certificates are required, and the president issues fraudulent certificates to himself and forges the treasurer's name thereto, the corporation is not liable therefor even to *bona fide* purchasers. Hill *v.* Jewett Pub. Co., 154 Mass. 172 (1891).

6 A corporation is not liable on a certificate of stock issued by the secretary and signed by him, even though the necessary names of two directors were forged thereto and the seal was unlawfully attached, and even though the old certificate, which was purported to be transferred, was forged, and the name of the transferrer was forged, and even though the secretary borrowed money on the new certificate for his own uses, and the lender and transferee did not know that he was secretary until the new certificate was handed to them. Ruben *v.* Great Fingall, etc., [1904] 2 K. B. 712, rev'g [1904] 1 K. B. 650, *cf.* Shaw *v.* Port Philip, etc. Min. Co., L. R. 13 Q. B. D. 103 (1884), where the corporation was held liable on a certificate signed and issued by the secretary of the corporation, but who had forged thereto the names of the other corporate officers whose signatures were necessary to the issue of a certificate of stock. *Cf.* Duncan *v.* Luntley, 2 Macn. & G. 30 (1849).

7 Where a person, who formerly was a transfer agent, but has since ceased to be, takes a certificate of stock which had been signed by the former president of the company without any name being filled into the certificate, and forges the name of the former treasurer to the certificate, and fills in his own name as the stockholder, the paper is a forgery as to all of the officers, and does not render the corporation liable thereon. The fact that the party committing the forgery was the president at the time he trans-

face that it must be signed by a transfer agent the corporation is not liable on a certificate to which the transfer agent's name had

ferred the stock does not bind the corporation. In issuing the stock he was not apparently acting within the scope of his authority. Representations by him that the stock was good do not bind the company, the stock having been negotiated by him in business other than the business of the corporation. The stock was negotiated in a personal transaction of the officer. Manhattan L. Ins. Co. *v.* Forty-second, etc. R. R., 139 N. Y. 146 (1893). But where the secretary and treasurer of a corporation, who is also its agent for the transfer of stock, and authorized to countersign and issue stock when signed by the president, forges the name of the latter and fraudulently issues a certificate of stock, the corporation is liable to a bank which has accepted such certificate in good faith as security for a loan. In this case the bank caused inquiry to be made at the office of the railroad company, and was informed by the secretary and treasurer that the certificate was genuine. The bank was allowed to recover, although it had sold the forged stock, but had taken it back upon the forgery becoming known. Fifth Avenue Bank *v.* Forty-second Street, etc. R. R., 137 N. Y. 231 (1893). Where certificates of stock are to be signed by the transfer agent and secretary, and the president and treasurer, if the president signs the certificates in blank and delivers them to the secretary and transfer agent, and the latter forges the name of the treasurer to the certificate and issues the certificate, a person who loans money on the faith of such certificate after inquiring of the company whether the certificate is genuine, and being informed by the secretary that it is genuine, may hold the company liable in damages for refusal to transfer the stock. A second pledgee who inquires of the first pledgee in regard to the validity of the certificate, and is given the information which the first pledgee obtained from the corporation, may also hold the company liable, the second pledgee having taken up the loan of the first pledgee. Mutual L. Ins. Co. *v.* Forty-second, etc. R. R., 74 Hun, 505 (1893). Where corporate officers, who are authorized to sign an issue of certificates of stock, sign them in blank and entrust them to the chief executive officer to be filled in and delivered to persons, who surrender certificates for transfer, and he fills in his own name and then pledges the certificate for a personal loan to himself, the pledgee, if *bona fide*, is protected and may hold the corporation liable for the market value of similar stock. American Exchange Nat. Bank *v.* Woodlawn Cemetery, 120 N. Y. App. Div. 119 (1907). Where the treasurer of a charitable corporation forges a resolution of the board of trustees authorizing him to sell bonds registered in the name of the corporation, and he executes fraudulently a power of attorney from the corporation to him as treasurer to make such sale, the corporation which issued the bonds and then allowed a transfer on such forged resolution is liable to the charitable corporation for so doing. The charitable corporation may hold liable a broker who witnessed the power of attorney even in good faith. If the corporation which issued and registered the bonds is held liable it has recourse against the broker by reason of the stock exchange rules which renders liable a broker who witnesses signatures to transfers of stock or bonds. Clarkson Home *v.* Missouri, etc. R. R., 182 N. Y. 47 (1905). Even though by resolution of the board of directors, the signature of the general manager is necessary to a note and the treasurer

been forged by an employee of the corporation.[1] Inasmuch as the president of a corporation has no inherent authority to issue its stock, the corporation is not liable if he issues fraudulent stock, the president having kept the money received for the stock, and it appearing that the forged certificates did not even resemble the genuine stock, and the signatures of the secretary and treasurer had been forged by the president.[2] But where the treasurer is the proper agent to issue stock, and the president entrusts him with certificates signed in blank, the corporation is liable for overissued stock issued and sold by the treasurer for his own benefit, even though no old certificate was surrendered.[3]

forges such signature, yet if the secretary attaches the seal and attests to the same, the note is good in *bona fide* hands. Merchants', etc. Co. *v.* Lufkin, etc. Bank, 34 Tex. Civ. App. 551 (1904).

On this subject, see also §§ 294, 365, *infra*.

1 Dollar, etc. Co. *v.* Pittsburgh, etc. Co., 213 Pa. St. 307 (1906).

2 Rogers *v.* Southern Fiber Co., 44 S. Rep. 442 (La. 1907).

3 Allen *v.* South Boston R. R., 150 Mass. 200 (1889). See also Manhattan Beach Co. *v.* Harned, 27 Fed. Rep. 484 (1886), where the corporate officers issued stock, not in excess of the capital stock, but a part of the unissued original capital stock. They issued it for their own benefit. Where an officer of a corporation fraudulently issued stock for his own use, controlled all the books relating to the stock, and countersigned all the certificates, the corporation was held liable for the spurious stock. Tome *v.* Parkersburg Branch R. R., 39 Md. 36 (1873). So also where overissued stock is issued under the genuine seal of the corporation, the corporation is liable. People's Bank *v.* Kurtz, 99 Pa. St. 344 (1882). Where the secretary of the company has made fraudulent transfers of stock and falsified the share register, and fraudulently induced two of the directors to affix the seal of the company to the certificates, the company is liable to a purchaser of the certificates. The measure of damages is the price paid by the purchaser for the certificate with interest thereon, the application for transfer having been made to the company on that same day. *Re* Ottos, etc. Mines, [1893] 1 Ch. 618. In the case of Swain *v.* West Philadelphia Pass. Ry. (see 127 Pa. St. 616), the supreme court of Pennsylvania held a corporation liable for a fraudulent, false, spurious, and void issue of stock by its president. "The liability of the railway company arises on the principle of estoppel, which the necessities of trade and commerce require. Stock certificates issued by a corporation having power to issue are a continuing affirmation of the ownership of the special amount of stock by the person designated therein, or his assignee, and the purchaser has a right to rely thereon and claim the benefit of an estoppel in his favor as against the corporation." See also Jeanes's Appeal, 116 Pa. St. 573 (1887); Mount Holly Paper Co.'s Appeal, 99 Pa. St. 513 (1882). Where a transfer clerk of a corporation makes out a spurious and overissued certificate of stock in the name of a fictitious person, and causes the genuine signatures of the president, assistant treasurer, and registrar to be signed thereto by them, and then indorses under the blank form of transfer on the back thereof the name of the fictitious person, and attests the same himself as a witness,

And where the president signs a large number of the blank certificates of stock, and the secretary fraudulently fills in the blanks, including his own name as the owner of the stock, and signs the certificate as secretary, and attaches the corporate seal, and negotiates them by indorsing them, the corporation is liable to the *bona fide* purchaser of said stock from the secretary, although the stock is overissued and spurious.[1] But "a secretary is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all." Hence a receipt by the secretary that certificates of stock had been actually lodged in the corporate office for transfer does not bind the corporation where they were not actually lodged, and the receipt was a part of a fraud.[2] A building association is not liable on a certificate of

and then delivers the same to a broker to sell on account of such transfer clerk, and the broker, before selling, inquires of the registrar of transfers, and also of the company itself, as to whether the stock is genuine and acceptable for transfer, and is told that it is all right, such broker is protected under his sale of the stock; and where the broker sells the stock, and by the rules of the stock exchange is thereafter obliged to take it back, he may hold the corporation liable. Jarvis *v.* Manhattan Beach Co., 148 N. Y. 652 (1896). In Knox *v.* Eden Musée Co., 148 N. Y. 441 (1896), certificates of stock had been delivered to the corporation for transfer, and the new certificates had been duly issued. The old certificates were put in a safe uncanceled, and were illegally abstracted by an employee and sold. The court held that the company was not liable on such certificates to a person who took them in pledge from such employee. The court, however, based its decision, not on the fact that the pledgee took with notice, but on the principle of law that no one could acquire title to stolen certificates of stock. This case came before the court again in 17 N. Y. App. Div. 365 (1897). Where the corporation is held liable, it of course has recourse against the officer guilty of the fraud. Brooklyn Crosstown R. R. *v.* Strong, 75 N. Y. 591 (1878). Where stock is treated as canceled by all parties, including the holder, a subsequent transferee of the certificates from him cannot hold the company liable, unless the transferee is a holder in good faith for value. Miller *v.* Houston, etc. St. Ry., 69 Fed. Rep. 63 (1895). The liability of the corporation to a *bona fide* holder of overissued stock cannot be avoided by a receiver purchasing and canceling an equal amount of valid stock. Archer *v.* Dunham, 89 Hun, 387 (1895).

1 Cincinnati, etc. Ry. *v.* Citizens' Nat. Bank, 56 Ohio St. 351 (1897).

2 George Whitechurch, Ltd. *v.* Cavanagh, [1902] A. C. 117. A stockholder who sends his stock to a broker with directions to have the corporation issue new certificates, cannot hold the corporation liable if the broker embezzles the stock, even though the broker afterwards becomes secretary of the company, and issues spurious stock to such customer by forging the president's name thereto. But other similar stock which such person purchases in the open market and sends to such secretary to transfer, he may hold the corporation liable for, if the secretary embezzles the same and sends similar spurious and forged certificates in exchange therefor. As to other stock which the secretary is instructed to buy as a

its stock forged and issued by its secretary, even though the treasurer has received payments thereon, but without notice of the forgery.[1]

If an innocent holder of overissued stock brings an action in equity to compel the corporation to record the transfer, he may be denied that relief, but may have, in lieu thereof, damages at law.[2] The better remedy in such case is an action at law, and the measure of damages is the market value of the stock at the time the transfer was demanded.[3]

§ 294. *Defenses of the corporation to such actions.*—It frequently happens that an overissue of stock is made without a strict compliance with the formalities of an issue of genuine stock. Generally, certificates of stock must, according to the by-laws of the corporation, be signed by certain specified corporate officers. Accordingly, when action is brought against a corporation on overissued stock, the defense is sometimes set up that the certificates were not signed by the proper officers, or were not issued with the usual formalities, and consequently that, the purchaser having had notice of the infirmity, the corporation is not liable. Such a defense is not favored by the courts.[4] Where, however, the charter provides that certificates of stock shall be signed by the president, directors, and treasurer, fraudulent overissues signed by the president and treasurer alone are not sufficient to charge the corporation.[5]

§ 295. *Personal liability of the officers of the corporation on overissued stock.*—The officers of a corporation who take part in the issue of overissued stock are liable in tort, both to the immediate purchaser from them of spurious stock falsely and fraudulently certified by them, and also to any subsequent purchaser buying upon

broker and which is also embezzled, and for which spurious new certificates are issued, the corporation is not liable. The person purchasing stock from the secretary as an individual, or loaning money to the secretary as an individual on similar spurious forged stock, cannot hold the corporation liable. Lucile, etc. Co. *v.* Willard, 89 Pac. Rep. 935 (Wash. 1907).

1 Columbia, etc. *v.* Belmar, etc. Ass'n, 54 Atl. Rep. 142 (N. J. 1903).

2 Willis *v.* Philadelphia, etc. R. R., 6 W. N. Cas. 461 (1878); People's Bank *v.* Kurtz, 99 Pa. St. 344 (1882).

3 People's Bank *v.* Kurtz, 99 Pa. St. 344 (1882); Willis *v.* Philadelphia, etc. R. R., 6 W. N. Cas. 461 (1878); Tome *v.* Parkersburgh Branch R. R., 39 Md. 36 (1873). It is, however, a condition precedent to maintaining such an action that the holder of the overissued stock discharge any lien upon it which would have properly attached to genuine stock under the same conditions. Mount Holly Paper Co.'s Appeal, 99 Pa. St. 513 (1882).

4 See § 293, *supra*.

5 Holbrook *v.* Fauquier, etc. Turnp. Co., 3 Cranch, C. C. 425 (1829); s. c., 12 Fed. Cas. 322. See also cases in notes to § 293, *supra*.

the faith of the false certificate, and sustaining damage thereby.[1] There may be a joint action against the corporation and the corporate agents issuing the stock, or a separate action against either.[2] Moreover, the corporation may sue in *assumpsit* its treasurer, who has illegally issued excessive stock and converted the proceeds to his own use.[3]

§ 296. *Liability of the vendor of overissued stock.*—In the absence of fraud the purchaser of overissued and spurious stock cannot hold his vendor liable thereon. The *bona fide* vendor can be held to

1 Bruff *v.* Mali, 36 N. Y. 200 (1867); Seizer *v.* Mali, 41 N. Y. 619 (1869), reversing s. c., 32 Barb. 76 (1860); 11 Abb. Pr. 129; Cazeaux *v.* Mali, 25 Barb. 578 (1857). And the holder of genuine stock has an action against them for the depreciation of its value by reason of the overissue. Shotwell *v.* Mali, 38 Barb. 445 (1862). A person receiving stock from the directors of a corporation, in pledge for a loan to it, they knowing that the stock was overissued, may sue the directors for damages in an action for deceit. Whitehaven, etc. Co. *v.* Reed, 54 L. T. Rep. 360 (1886); National Exch. Bank *v.* Sibley, 71 Ga. 726 (1883). See also Daly *v.* Thompson, 10 M. & W. 309 (1842). By statute in many of the states and in England such forgeries are made a special criminal offense. Regina *v.* Nash, 2 Den. Cr. C. 493 (1852); N. Y. Pen. Code, § 591. Concerning the requirements of an indictment for issuing fraudulent stock, see West *v.* People, 137 Ill. 189 (1891). A criminal statute against fraudulently issuing stock does not apply to a transaction where the treasurer obtained a certificate which he as an individual had pledged, and after obtaining it canceled it as treasurer and issued a new certificate to himself in place thereof. State *v.* Moore, 69 N. H. 99 (1896). A member of a pool is entitled to his share of the stock upon its termination, even though he was a trustee of the pool and was an officer of the company the stock of which had been purchased, and even though there had been an overissue of stock. Cary *v.* Leszynsky, 184 Mass. 44 (1903). Even though the president sells and transfers a part of his stock to another person and then obtains from the corporation a new certificate to himself representing the stock so sold and transferred, thereby making an overissue, he is not liable as for a conversion at the instance of the first transferee. O'Dwyer *v.* Verdon, 115 N. Y. App. Div. 37 (1906).

2 Bruff *v.* Mali, 36 N. Y. 200 (1867). And when the action is against the officers responsible for the fraudulent overissue, if the evidence shows that the entire capital stock of the company had been issued prior to the dates of the certificates purchased or held by the plaintiff, and if it appears that the defendants prior thereto had, as officers of the corporation, issued spurious certificates of stock, then there is a presumption of law that the certificates in controversy are false and fraudulent, and the burden is upon the defendants to show that these particular certificates were issued, either upon the surrender of certificates of genuine stock, or upon the transfer on the books of the company of such stock—facts peculiarly within the knowledge of the corporate officers. Shotwell *v.* Mali, 38 Barb. 445, 469 (1862), a well-considered case; Bruff *v.* Mali, 36 N. Y. 200 (1867).

3 Rutland R. R. *v.* Haven, 62 Vt. 39 (1889). See also Brooklyn Crosstown R. R. *v.* Strong, 75 N. Y. 591 (1878).

warrant only his own title to the shares, not the right of the corporation to issue them. If he came by them honestly and sells them in good faith, there is no recourse to him, even though they turn out to be spurious.[1] The supreme court of the United States holds, however, that a purchaser without notice of a forged bond may recover back the price paid by him to the vendor, even though the vendor was himself a *bona fide* purchaser and without notice of the illegality of the bond. There is an implied warranty of identity of the thing sold.[2] A broker is not responsible where he in good faith loans his customers money in compliance with his authority, on certificates of stock as collateral, even though they turn out to be forged, provided he was not guilty of negligence.[3] A broker, however, who witnesses a forged signature to a transfer of registered bonds is liable to the corporation, which has allowed the transfer by reason thereof, even though the broker acted in good faith.[4]

§ 297. *Equity will enjoin voting, transferring, or dividends on such stock, and will adjust the rights of all parties.*—A court of equity will, upon a proper application, grant an injunction to prevent the transfer of illegally-issued stock, or the payment of dividends thereon, or voting thereof by the pretended owners of such stocks.[5] The most

1 State *v.* North Louisiana, etc. R. R., 34 La. Ann. 947 (1882); People's Bank *v.* Kurtz, 99 Pa. St. 344 (1882); Seizer *v.* Mali, 41 N. Y. 619 (1869), reversing 32 Barb. 76 (1860). In Titus *v.* Poole, 73 Hun, 383 (1893), there is a dictum that the vendor of a certificate of stock impliedly warrants the genuineness thereof; aff'd on the ground of an express warranty in 145 N. Y. 414.

2 Meyer *v.* Richards, 163 U. S. 385 (1896). The court said (p. 405): "Both in England and in the United States the doctrine is universally recognized that where commercial paper is sold without indorsement or without express assumption of liability on the paper itself, the contract of sale and the obligations which arise from it, as between vendor and vendee, are governed by the common law, relating to the sale of goods and chattels. So, also, the undoubted rule is that in such a sale the obligation of the vendor is not restricted to the mere question of forgery *vel non*, but depends upon whether he has delivered that which he contracted to sell, this rule being designated, in England, as a condition of the principal contract, as to the essence and substance of the thing agreed to be sold, and in this country being generally termed an implied warranty of identity of the thing sold." In Tennessee it has been held that a sale of bonds is not revocable even though the bonds are invalid and the vendor innocently stated that they were valid. Ruohs *v.* Third Nat. Bank, 94 Tenn. 57 (1894).

3 The question of negligence is a question for the jury, and the burden of proof is on the broker. The broker is not bound to present the certificates to the company for verification. Isham *v.* Post, 141 N. Y. 100 (1894). As to the liability of brokers for the forgery of their employees in delivering spurious stock to a customer, see Andrews *v.* Clark, 72 Md. 396 (1890). Compare § 366, *infra*. See also § 452, *infra*.

4 Clarkson Home *v.* Missouri, etc. R. R., 182 N. Y. 47 (1905).

5 A stockholder may object to the voting of overissued stock in the

effectual remedy in these cases is a suit in equity, instituted by the corporation, whereby, in one proceeding, the rights and liabilities of all persons concerned with the overissue of the stock are fully and finally determined and adjudicated, and the overissued stock itself is retired and destroyed. Such a proceeding is in the nature of a bill to quiet title, or to remove a cloud from the title of the genuine stock. Spurious or overissued stock, issued by corporate officers having the apparent authority, and outstanding in the hands of numerous holders, is a cloud upon the title to the genuine stock. It is a cloud which a court of equity will remove; and a suit to that end may be commenced, either by the corporation [1] or by the stockholders themselves in their own behalf, where

hands of the party to whom it was originally issued, even though he voted to issue such stock, and he may maintain an action to have the stock canceled. Haskell *v.* Read, 68 Neb. 107 (1903). Where in a suit by a stockholder to enjoin elections, etc., pending an adjustment as to what stock is genuine and what is spurious, another stockholder intervenes, the latter cannot take an appeal unless notice of the appeal is served also upon the corporation. Willard *v.* Fisher, 36 Wash. 229 (1904). Even though a court of equity has power to cancel illegal stock it cannot incidentally thereto pass upon the legality of a subsequent election. Crow *v.* Florence, etc. Co., 143 Ala. 541 (1905). A pledgee of stock may not have a receiver of stock appointed on the ground that there has been an overissue of stock. Virginia, etc. Co. *v.* Provident, etc. Soc., 126 Ga. 50 (1906). A corporation which for a long time was abandoned and which is unable to tell who its stockholders are may file a bill in equity to ascertain who its stockholders are and to cancel illegal certificates and determine the rights of conflicting claims to the stock. Geneva, etc. Co. *v.* Steele, 111 N. Y. App. Div. 706 (1906). See Kent *v.* Quicksilver Min. Co., 78 N. Y. 159 (1879). Four years after preferred stock had been issued, the common stockholders brought suit to have the preferred stock canceled, on the ground that the corporation had no power to issue such preferred stock, except by unanimous consent of the stockholders. The case involved not an overissue of stock, but an issue of preferred stock after the common stock had already been issued. The court held that the suit could have been maintained, if the stockholders had not been guilty of laches. And where a corporate officer issues illegal and unauthorized stock, he may be enjoined from allowing a transfer of it if proof is given of its illegal character and of a proposed transfer. Sherman *v.* Clark, 4 Nev. 138 (1869).

[1] New York, etc. R. R. *v.* Schuyler, 17 N. Y. 592 (1858). In this celebrated litigation $2,000,000 of overissued stock had been issued and had passed into the hands of many holders, most of whom were *bona fide* holders. Many suits were instituted against the corporation by the holders of these certificates, some claiming that they were stockholders, and others that they were either stockholders or had a cause of action against the corporation for their losses. Thereupon the corporation itself filed a bill in equity against all of the alleged owners or holders of this overissued stock, and prayed that the certificates might be ordered delivered up and canceled, and all lawsuits stayed or enjoined or consolidated with this main suit. The court sustained the

the corporation fails or refuses to institute it.[1] A court of equity has power to decree the return and cancellation of certificates of stock fraudulently issued.[2] In a suit by a corporation to cancel overissued stock, the defendant holders may counter-claim for damages.[3]

§ 298. *Subscriber's right to defeat a subscription to overissued stock, and to recover back money paid thereon.*—In addition to the remedy in equity, the holder of overissued stock has the further

bill and said (pp. 602, 603) that the corporation is "the organ through which the shareholders are to be heard when legal wrongs are to be redressed or equitable remedies are to be invoked. If, therefore, I have been successful in showing that the fraudulent certificates of stock are instruments of such annoyance and vexation, in depressing values and disturbing the fair enjoyment of rights, that they ought not to be allowed to stand, then this suit by the corporation rests firmly upon that branch of equity jurisdiction which includes the cancellation of such instruments." A suit to determine what stock is watered (alleged to be overissued stock), and also to set aside transactions by which the corporate property has been misapplied, is multifarious. Church *v.* Citizens' Street R. R., 78 Fed. Rep. 526 (1897).

1 Quoted and approved in Hutton *v.* Bancroft, etc. Co., 83 Fed. Rep. 17 (1897); Dewing *v.* Perdicaries, 96 U. S. 193 (1877), aff'g Perdicaris *v.* Charleston Gaslight Co., Chase's Dec. 435 (1869); s. c., 19 Fed. Cas. 217; Wood *v.* Union, etc. Assoc., 63 Wis. 9 (1885). *Cf.* Taylor *v.* South, etc. R. R., 13 Fed. Rep. 152 (1882), where the subscriber acquiesced ten years. The court denied any relief. In an action to cancel illegally increased stock the plaintiff must offer to surrender the part held by himself. Byers *v.* Rollins, 13 Colo. 22 (1889). In the case State *v.* Kennan, 35 Wash. 52 (1904), it appears that a mining company had a capital stock of $50,000 divided into 1,000,000 shares of the par value of five cents each and that the secretary issued over 1,000,000 spurious shares. The court sustained a bill in equity by a stockholder against the corporation and all its stockholders to determine which held the genuine stock, and enjoined any meetings or transaction of any business in the meantime.

2 Gibson *v.* Thornton, 112 Ga. 328 (1900). A stockholder may maintain a bill in equity to cancel stock issued in payment for property overvalued and also misrepresented as to the price which had been paid for it, and especially may such a bill be maintained when the stock really goes to the president of the company in order that he may maintain control, and the stock is also overissued stock. Crow *v.* Florence, etc. Co., 143 Ala. 541 (1905). A corporation may maintain a suit to cancel stock which the directors and president voted to themselves as commissions for selling the stock of the company. Central, etc. Co. *v.* Madden, 68 Atl. Rep. 777 (N. J. 1908). Where stock is issued for property and the transaction is set aside, a suit lies by the receiver of the company to have the stock canceled. McMaster *v.* Drew, 68 Atl. Rep. 771 (N. J. 1908). A corporation cannot maintain a suit for the cancellation of illegally issued certificates of stock unless it alleges that it had the right to issue certificates of stock and that the certificates complained of will injure the corporation or its *bona fide* stockholders in some way. Reno, etc. Co. *v.* Culver, 60 N. Y. App. Div. 129 (1901).

3 Lucile, etc. Co. *v.* Willard, 89 Pac. Rep. 935 (Wash. 1907).

right at law to defeat an action on his subscription therefor; and that, too, even though he knew it to be overissued at the time the subscription was made. There can be no estoppel in such a case; and not even creditors can enforce any liability on spurious or overissued stocks, inasmuch as the corporation could not perform its part of the contract and issue the stock.[1] Where also a subscriber has paid an instalment on his subscription, although he knew when he made the subscription and paid the money that it was an illegal and unauthorized issue, he may rescind, and recover back what he has paid.[2] Nevertheless, although a corporation has taken more subscriptions than its capital stock and has issued certificates therefor, yet this does not release subscribers up to the correct amount.[3] In Iowa it has been held that payment of a note given for overissued stock cannot be enforced where the consideration was expressed in the note to be the stock of the corporation to which the note was given, and the directors subsequently made an illegal and unauthorized increase in the stock, the maker of the note having had notice that a large amount of illegal stock had been issued, and that the illegal and valid stock could not be distinguished.[4] But it is held that one who subscribes for overissued stock, *bona fide,* upon discovering that the stock is spurious cannot have a receiver appointed, pending an inquiry into the legality of the stock, to the end that, in case the stock is judicially declared invalid, such subscriber may recover back from the corporation the money so paid for the spurious stock, where the money received by the company had not been kept separate from its general funds, and could not be traced and identified.[5] A holder of overissued stock is not liable on the statutory liability.[6]

1 Scovill *v.* Thayer, 105 U. S. 143 (1881); Page *v.* Austin, 10 Can. Sup. Ct. 132 (1884); Clark *v.* Turner, 73 Ga. 1 (1884).

2 Knowlton *v.* Congress, etc. Co., 14 Blatchf. 364 (1877); s. c., 14 Fed. Cas. 797; aff'd, Spring Co. *v.* Knowlton, 103 U. S. 49 (1880); Reed *v.* Boston Machine Co., 141 Mass. 454 (1886). See the dissenting opinion of Dwight, Com'r, in Knowlton *v.* Congress, etc. Co., 57 N. Y. 518, 540 (1874). This case, however, was not strictly a case of overissued stock. A different class of cases exists where an increase of capital stock is authorized, but is irregularly made. A subscriber is then liable. See § 288, *supra.*

3 Cartwright *v.* Dickinson, 88 Tenn. 476 (1890).

4 Merrill *v.* Gamble, 46 Iowa, 615 (1877); Merrill *v.* Beaver, 46 Iowa, 646 (1877); Merrill *v.* Reaver, 50 Iowa, 404 (1879).

5 Whelpley *v.* Erie Ry., 6 Blatchf. 271 (1868); s. c., 29 Fed. Cas. 918.

6 Burt *v.* Richmond, 107 Fed. Rep. 387 (1901). The holders of stock cannot escape the statutory liability thereon, even though when the transfer of the stock to them was made the old certificates were not canceled, but were abstracted by a corporate officer and hypothecated by him, thereby creating an overissue. Burt *v.* Bailey, 73 Fed. Rep. 693 (1896). See also § 281, *supra.*

PART II.

TRANSFERS OF STOCK.

CHAPTER XVIII.

LEGACIES AND GIFTS OF STOCK.

§ 299. Definitions of general, specific, and demonstrative legacies of stock.
300, 301. Importance of the difference between general and specific legacies.
302, 303. Legacies of stock are construed to be general if the language will permit.
304, 305. Amount of stock conveyed by certain legacies.
306. Ademption or revocation of a legacy of stock, and abatement.
307. Duty of executor as regards specific or general legacies.
308. Gifts of stock.

§ 299. *Definitions of general, specific, and demonstrative legacies of stock.*—A general legacy of stock is a legacy whereby it becomes the duty of the executor or administrator to give to or procure for the legatee a certain amount of stock, as indicated by the will, there being nothing in the will itself to indicate that the legacy is to be satisfied from stock actually owned by the testator. A specific legacy of stock arises when the testator, in his will, directs or clearly indicates that the legacy is to be satisfied from stock which he owns. A demonstrative legacy of stock is the same as a general legacy, except that it is to be purchased from a particular fund of the estate. Demonstrative legacies of stock are of little importance as compared with the other two kinds.[1]

[1] That a legacy of stock may be demonstrative, see Ives *v.* Canby, 48 Fed. Rep. 718 (1891). That legacies of stock may be demonstrative has been assumed by the cases. In the case, however, of Eckfeldt's Estate, 7 W. N. Cas. 19 (1879), the court says that a legacy of stock "may be either specific or general, according to the circumstances. It is never demonstrative. A demonstrative legacy is always pecuniary—differing, however, from an ordinary legacy in being referred to a particular fund or source of payment." A bequest to a wife of "the sum of $8,000 invested in stocks, the interest to be paid to her during her life," is a demonstrative legacy. Johnson *v.* Conover, 54 N. J. Eq. 333 (1896). In the case Blair *v.* Scribner, 65 N. J. Eq. 498 (1904), the court carefully considered the difference between specific, general and demonstrative legacies. The decision, however, was reversed in 67 N. J. Eq. 583.

§ 300. *Importance of the difference between general and specific legacies.*—It is frequently of the greatest importance whether a legacy be a general or a specific one. A large number of decisions, running back for nearly two hundred years, have been made in endeavoring to lay down rules on this subject. The complications, contradictions, inconsistent decisions, and doubts that have arisen from the inherent difficulties of the subject are frequently adverted to and deplored by successive generations of judges.

The importance of determining whether a legacy of stock is general or specific rests in the fact that if it is specific it is entitled to certain advantages, and, on the other hand, is exposed to certain perils, while, if it is general, it is without those advantages, but is also free from the perils. The advantages of a specific legacy of stock are that debts of the estate are to be paid from other funds; the specific legacy passes, though other legacies fail partially or wholly by reason of deficiencies in the estate,[1] and the specific legatee is entitled to all dividends declared after the testator's death, instead of losing the first year's dividends, as in case of a general legacy of stock. General legacies of stock have none of these advantages. On the other hand, a specific legacy of stock is open to the great danger of being revoked by the acts of the testator, and frequently so when the testator has no intention of revoking the legacy.[2] This revocation, arising by implication from the acts of the testator—such as selling the stock bequeathed, or using it in any

1 A specific legacy of stock is not second to a money legacy. *In re* Klenke's Estate, 210 Pa. St. 575 (1905).

2 Kenkel *v.* Macgill, 56 Md. 120 (1880), the court saying: "If the legacy is to be considered specific, then, in the event of the testator's parting with the thing or property bequeathed, or if from any cause it should be lost or destroyed, the legacy fails. Then, again, such legacies are not liable to abatement with general legacies, nor are they liable to contribution towards the payment of debts." Where evidently the intent was to give specific bonds, it was so decreed. Davies *v.* Fowler, L. R. 16 Eq. 308 (1873); Walton *v.* Walton, 7 Johns. Ch. 257 (1823); Jacques *v.* Chambers, 2 Coll. 435 (1846), holding also that the legatee may select his stock from different classes, but that he must pay calls on the stock due at the time of the testator's death, but not paid. In Mullins *v.* Smith, 1 Dr. & Sm. 204 (1860), the difference between a specific and demonstrative legacy is thus described: "The points of difference between specific and demonstrative legacies are these: A specific legacy is not liable to abatement for the payment of debts, but a demonstrative legacy is liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable. A specific legacy is liable to ademption, but a demonstrative legacy is not. A specific legacy, if of stock, carries with it the dividends which accrue from the death of the testator, while a demonstrative legacy does not carry interest from the testator's death."

way inconsistent with the idea of its passing under the will—is a danger that does not exist if the legacy is a general one, since general legacies of stock may be carried out by the executor's purchasing the stock for the purpose of the legacy.

§ 301. If a specific legacy will apply equally to paid-up stock and to stock not paid up, the legatee may take the former.[1] If the testator has made payments on the stock before calls have been made, the legatee is entitled to the benefit.[2] If there is both a specific and a general legacy of the same stock, the specific is to be first satisfied.[3] The specific legatee takes all the dividends on the stock.[4] It has been held, however, that a dividend declared before but payable after the testator's death belongs to the estate.[5] The general legatee takes only the dividends payable twelve months after the testator's death.[6] The specific legatee takes the stock, although there will then be no property left to pay pecuniary legacies.[7] However, he can have only so much stock of that kind as the testator dies possessed of;[8] and if the latter dies possessed of none, the specific legatee takes none.[9] The specific legatee does not take dividends declared and due before the testator's death, although such dividends have not been collected.[10]

§ 302. *Legacies of stock are construed to be general if the language will permit.*—It is the policy of courts of justice to uphold and carry out a legacy, and implied revocations are not looked upon with favor. Accordingly, in order to avoid the danger of ademption, to which specific legacies are subject, the rule has become established that general legacies are to be favored by the

1 Millard *v.* Bailey, L. R. 1 Eq. 378 (1866); Jacques *v.* Chambers, 2 Coll. 435 (1846).

2 Tanner *v.* Tanner, 11 Beav. 69 (1848).

3 Barton *v.* Cooke, 5 Ves. Jr. 461 (1800).

4 Loring *v.* Woodward, 41 N. H. 391 (1860), holding also that parol evidence cannot show a contrary intent of the testator. Where by a will certain specified insurance stocks are bequeathed as a trust for subsequent distribution among certain legatees, the legacy is specific and the trustee is entitled to dividends declared after the testator's death. Connecticut, etc. Co. *v.* Hollister, 74 Conn. 228 (1901).

5 De Gendre *v.* Kent, L. R. 4 Eq. 283 (1867). *Cf.* Brown *v.* Collins, L. R. 12 Eq. 586, 594 (1871); Lock *v.* Venables, 27 Beav. 598 (1859). See also Cogswell *v.* Cogswell, 2 Edw. Ch. 231 (1834); Abercrombie *v.* Riddle, 3 Md. Ch. 320 (1850); Wright *v.* Tuckett, 1 Johns. & H. 266 (1860); Furley *v.* Hyder, 42 L. J. (Ch.) 626 (1873).

6 Webster *v.* Hale, 8 Ves. Jr. 410 (1803).

7 Drinkwater *v.* Falconer, 2 Ves. Sr. 622 (1755).

8 Gordon *v.* Duff, 28 Beav. 519 (1860); Ashton *v.* Ashton, 3 P. Wms. 384 (1735).

9 Evans *v.* Tripp, 6 Mad. 91 (1821).

10 Perry *v.* Maxwell, 2 Dev. Eq. (N. C.) 488 (1834).

courts; and, if there is doubt as to whether a legacy be specific or general, it will be construed to be of the latter kind.[1]

Where, however, the intent of the testator clearly was to give particular stock owned by him, the court will declare the legacy to be a specific one.[2] Thus, where the testator gives the legacy of stock by describing it as "my" stock, the legacy is a specific one.[3] So also where the phase "standing in my name"[4] is used, or "which I hold;"[5] or a direction is given to make up the specified amount from the general fund if the testator does not hold enough;[6] or the testator describes the stock as "now lying in the three per cents;[7] or uses the word "such;"[8] or makes a legacy of stock

1 Davies *v.* Fowler, L. R. 16 Eq. 308 (1873); Tifft *v.* Porter, 8 N. Y. 516, 520 (1853); Eckfeldt's Estate, 7 W. N. Cas. (Pa.) 19 (1879).

2 A bequest of specific stock is a specific bequest, and debts of the estate must be paid from other property if possible. *In re* Noon's Estate, 88 Pac. Rep. 673 (Ore. 1907).

3 Walton *v.* Walton, 7 Johns. Ch. 258 (1823); Loring *v.* Woodward, 41 N. H. 391 (1860); Shuttleworth *v.* Greaves, 4 Myl. & Cr. 35 (1838); Miller *v.* Little, 2 Beav. 259 (1840); Hayes *v.* Hayes, 1 Keen, 97 (1836); Brainerd *v.* Cowdrey, 16 Conn. 1 (1843). The omission of the word "my" does not necessarily make the legacy a general one. Avelyn *v.* Ward, 1 Ves. Sr. 420 (1749). The word "my" does not, however, have the same significance in its application to a legacy of an annuity as it has to a legacy of stock. Kirby *v.* Potter, 4 Ves. Jr. 748 (1799). In the case of Parrott *v.* Worsfold, 1 Jac. & W. 574 (1820), a legacy of "all my stock that I may be possessed of at my decease" was held to be general, since there was no "individual thing given." Bequests in different sums to different legatees of "my" stocks and bonds at their par value, not describing them particularly, are general legacies. They are not void for uncertainty. *Re* Hadden's Will, 9 N. Y. Supp. 453 (1888).

4 Ludlam's Estate, 13 Pa. St. 188 (1850); Gordon *v.* Duff, 28 Beav. 519 (1860); Kampf *v.* Jones, 2 Keen, 756 (1837). Where, however, other parts of the will indicate that the legacy was general, it was held to be general. See Auther *v.* Auther, 13 Sim. 422 (1843), holding also that though, by the delay of the executor beyond a year in purchasing the stock, it rises, the legatee is entitled to the same amount as if it had been bought at the right time. Fidelity, etc. Co.'s Appeal, 108 Pa. St. 492 (1885).

5 Blackstone *v.* Blackstone, 3 Watts (Pa.) 335 (1834).

6 Townsend *v.* Martin, 7 Hare, 471 (1849), holding that such a legacy is specific and not demonstrative. McGuire *v.* Evans, 5 Ired. Eq. (N. C.) 269 (1848), however, holds that a legacy of stock, to take effect in case other legacies do not absorb that stock, is demonstrative; also that in case of legacies of the same stock to two different persons, each takes a moiety. The cases of Mullins *v.* Smith, 1 Dr. & Sm. 204 (1860); Fontaine *v.* Tyler, 9 Price, Exch. 94 (1821); and Queen's College *v.* Sutton, 12 Sim. 521 (1842), hold that such a legacy is specific if the testator leaves stock enough, but is general if he does not leave enough.

7 Morley *v.* Bird, 3 Ves. Jr. 628 (1798), holding that if the executor has sold the stock the legatees may hold him liable for its value one year after the testator's death.

8 Davies *v.* Fowler, L. R. 16 Eq. 308 (1873), the court saying that a

out of a quantity of stock;[1] or in another part of the will speaks of the stock as that of which the testatrix may be possessed;[2] or where, after several legacies, all apparently general, the testator bequeaths the remaining stock "standing in my name,"—the effect of all these is that the legacies are specific.[3] A legacy of all the dividends, interest, and proceeds from stock is a specific legacy, even though the testator did not own such stock at the time he made the will.[4] There has been some difference of opinion as to whether the fact that the testator, at the time of making the will, possessed an equal or greater amount of stock than that bequeathed, and of the same kind, is to be taken as evidencing an intent to make the legacy specific. The weight of authority holds that such a fact is not to be taken into consideration, and that if the words of the legacy make it general, it cannot be construed to be specific simply because by an examination of the testator's effects he is found to have possessed stock similar to that described in the will.[5]

legacy is specific when a meting out or dividing is evidently intended.

1 Hosking *v.* Nicholls, 1 Y. & C. Ch. 478 (1842). And if the administrator has paid the dividends to another, he is personally liable. A legacy of "ten shares of the stock of the W. & N. R. Co." is a specific legacy, where a subsequent clause bequeaths, "the balance of my stock as per my stock book." Harvard Unitarian Soc. *v.* Tufts, 151 Mass. 76 (1890).

2 Measure *v.* Carleton, 30 Beav. 538 (1862). This case also holds that, if an exact partition of the stock is impossible, enough will be sold to render it possible.

3 Sleech *v.* Thorington, 2 Ves. Sr. 560 (1754). A legacy of all of several articles is specific. Tomlinson *v.* Bury, 145 Mass. 346 (1887).

4 Stephenson *v.* Dowson, 3 Beav. 342 (1840). See also Fidelity Trust Co.'s Appeal, 108 Pa. St. 492 (1885).

5 Robinson *v.* Addison, 2 Beav. 515 (1840), the court holding that the legacy was general, and saying the testator "in effect gave such an indefinite sum of money as would suffice to purchase so many shares as he had given;" Davis *v.* Cain, 1 Ired. Eq. (N. C.) 304 (1840); Bronsdon *v.* Winter, Ambl. 56 (1738); Simmons *v.* Vallance, 4 Bro. Ch. 346 (1793); Bishop of Peterborough *v.* Mortlock, 1 Bro. Ch. 565 (1784); Boys *v.* Williams, 2 Russ. & M. 689 (1831); Partridge *v.* Partridge, Cas. t. Talb. 226 (1736); Tifft *v.* Porter, 8 N. Y. 516 (1853), where the court said: "The mere possession by the testator, at the date of his will, of stock of equal or larger amount than the legacy, will not of itself make the bequest specific;" Osborne *v.* McAlpine, 4 Redf. (N. Y.) 1 (1878); Eckfeldt's Estate, 7 W. N. Cas. (Pa.) 19 (1879); Sponsler's Appeal, 107 Pa. St. 95 (1884), where the court also held that a codicil repeating a general legacy of stock will entitle the legatee to both legacies. In Massachusetts a doctrine contrary to that stated in the text prevails. See White *v.* Winchester, 23 Mass. 48 (1827); Metcalf *v.* First Parish, 128 Mass. 370 (1880). To same effect, Cuthbert *v.* Cuthbert, 3 Yeates (Pa.) 486 (1803); Jeffreys *v.* Jeffreys, 3 Atk. 120 (1744). Where the will bequeaths a specified amount of stock but provides that if the testator did not have that amount on his death, the amount shall not be made up, this is a general and not a specific legacy. Hence,

§ 303. The most common form of a general bequest of stock is where the testator merely bequeaths a specified number of shares of a specified kind to the legatees, without any further words indicating that he then held or expected to hold the stock bequeathed.[1] A direction to the executors to invest a certain sum in specified stock for the benefit of the legatee is a general legacy.[2] So, also, where the executors are directed to transfer to the legatee certain stock.[3] A legacy of the residue of the testator's stock has been held to be a general legacy.[4] A legacy to be paid "out of the four per cents" is general.[5] A provision in a will that certain stock shall be sold and the proceeds divided between specified legatees is not a specific bequest of the stock, and hence does not carry the dividends declared before the sale of the stock.[6] A legacy of the entire contents of a box to several persons is general and not specific, where the securities therein cannot be divided among them.[7] A

where the will contains a further provision that the legatee shall take only such stock as the testator might leave, and he has sold a part of the stock and invested the money in other stocks, the amount will be made up out of these latter stocks. Blair *v.* Scribner, 67 N. J. Eq. 583 (1905); rev'g 65 N. J. Eq. 498. A legacy of stock is general, no particular certificates being specified, even though the testator has that amount of that particular stock in his possession at the time of his death. Matter of King, 122 N. Y. App. Div. 354 (1907).

1 Wilson *v.* Brownsmith, 9 Ves. Jr. 180 (1803), holding also that, if there is not enough of such stock among the testator's assets, the deficiency must be purchased for the legatee. Pearce *v.* Billings, 10 R. I. 102 (1871), the court saying that the evident intent of the testator was "to have the stock mentioned purchased for the legatees by his executor, or to have the legatees furnished with the means to purchase the stock for themselves." The value of the stocks one year after the testator's death is the amount to be paid to the legatees. In the case of Purse *v.* Snaplin, 1 Atk. 414 (1737), where two legacies of stock of £5,000 each were given, and the testator had but £5,000 of stock, the court held that the general estate must purchase £5,000 of the same stock.

2 Raymond *v.* Brodbelt, 5 Ves. Jr. 199 (1800).

3 Lambert *v.* Lambert, 11 Ves. Jr. 607 (1806); Sibley *v.* Perry, 7 Ves. Jr. 522 (1802), the court saying a legacy is not specific "without something marking the specific thing—the very corpus; without describing it as standing in his name, or by the expression of 'my stock,' etc."

4 Parrott *v.* Worsfold, 1 Jac. & W. 574 (1820). *Contra*, Bethune *v.* Kennedy, 1 Myl. & C. 114 (1835). A bequest of all the stock which the testator owns at the time of his death is a general legacy and if there are debts the stock must be sold to pay the debts before the real estate is sold for that purpose. The court will not order a sale, however, if there is a great depreciation in the market in the value of securities. Matter of Bergen, 56 N. Y. Misc. Rep. 92 (1907).

5 Deane *v.* Test, 9 Ves. Jr. 146 (1803).

6 Missouri, etc. *v.* McCune, 112 Mo. App. 332 (1905).

7 Matter of Fisher, 93 N. Y. App. Div., 186 (1904).

codicil which is general in form is held to be such, although it is but an increase of a previous legacy which is specific, and which is revoked by the codicil.[1]

§ 304. *Amount of stock conveyed by certain legacies.* —A legacy of "one hundred pounds, long annuities," has been held to mean, not that the legatee is entitled to an annual income from the estate of one hundred pounds, but that he was entitled to have that amount invested for him.[2] A will reciting the amount of stock held by the testatrix, and bequeathing it, or so much as should be standing in her name at her death, does not give to the legatee stock acquired after the making of the will and before the death of the testatrix.[3] A bequest of stock "that I possess" is held to mean stock possessed by the testator at the time of making the will.[4]

§ 305. There has been some controversy and doubt as to whether a legacy of the testator's "money" would give to the legatee the testator's stock in a corporation. The weight of authority holds that it does not.[5] Nor will shares of stock belong to a legatee to

1 Johnson *v.* Johnson, 14 Sim. 313 (1844).

2 Att'y Gen. *v.* Grote, 2 Russ. & M. 699 (1827); Fonnereau *v.* Poyntz, 1 Bro. Ch. 472 (1785). See Pearce *v.* Billings, 10 R. I. 102 (1871). *Contra*, Stafford *v.* Horton, 1 Bro. Ch. 482 (1785). See also § 560, *infra*.

3 Hotham *v.* Sutton, 15 Ves. Jr. 319 (1808). So, also, of a legacy of "the whole of my stock in the Housatonic Bank, amounting to $6,000." The legatee does not take stock subsequently acquired. Foote's Appeal, 39 Mass. 299 (1839); Douglas *v.* Douglas, Kay, 404 (1854). The case of Fidelity Trust Co.'s Appeal, 108 Pa. St. 492 (1885), states that at common law a specific legacy of stock spoke from the death of the testator, and that the English wills act of 1838, and the Pennsylvania act of 1879 were but declaratory in that respect. If the testator, in making a specified bequest of stock, speaks of the stock as "now standing in my name," the statute does not apply, and the bequest speaks from the date of the will. In Miller *v.* Little, 2 Beav. 259 (1840), the testator gave one share to each child him surviving. He then had eight shares and seven children. At his death he had ten shares and eleven children. Only the eight shares were held to pass.

4 Cockran *v.* Cockran, 14 Sim. 248 (1844). This rule is sometimes changed by statute. See, in England, § 24, Wills Act (1 Vict., c. 26), applied in Trinder *v.* Trinder, L. R. 1 Eq. 695 (1866), and Goodlad *v.* Burnett, 1 K. & J. 341 (1855); Hepburn *v.* Skirving, 4 Jur. (N. S.) 651 (1858); Wagstaff *v.* Wagstaff, L. R. 8 Eq. 229 (1869); Bothamley *v.* Sherson, L. R. 20 Eq. 304 (1875), and preceding note. A legacy of bank stock conveys all stock deposited in bank, there being no shares of bank stock owned by the testator. Tomlinson *v.* Bury, 145 Mass. 346 (1887). A will may bequeath not only the stock standing in the name of the testatrix, but also certificates of stock owned by her but standing in the name of others. Angell *v.* Springfield Home, 157 Mass. 241 (1892).

5 Mullins *v.* Smith, 1 Dr. & Sm. 204 (1860); Hotham *v.* Sutton, 15 Ves. Jr. 319 (1808); Lowe *v.* Thomas, Kay, 369 (1854), affirming 5 De G., M. & G. 315 (1854); Gosden *v.* Dotterill, 1

whom the testator has given, by a last will and testament, his "furniture . . . with all claims or demands of whatever nature," [1] or "every other article," [2] or "goods," [3] or "money and effects;" [4] but they will pass under a bequest of the "personal estate," [5] or "residue of money," [6] or "chattels." [7] A bequest of "all securities for money standing invested in my name" carries stocks and bonds.[8] "Gas stock to the extent of six thousand dollars" means six thousand dollars at par.[9] A bequest of stock does not carry debentures, even though the debentures after a period were to be convertible into stock.[10] If the testator, in describing the stock bequeathed, has very clearly made a mistake in the description, the legacy will be held to apply to the stock intended to be bequeathed. Thus, where the testator has "City Bank" stock, but bequeaths "Mechanics' Bank" stock, and the intent was to bequeath the former, the court will render a decree to that effect.[11] Where, subsequently to the making

Myl. & K. 56 (1832); Hudleston *v.* Gouldsbury, 10 Beav. 547 (1847); Douglas *v.* Congreve, 1 Keen, 410, 424 (1836); Willis *v.* Plaskett, 4 Beav. 208 (1841); Ogle *v.* Knipe, L. R. 8 Eq. 434 (1869); Ommanney *v.* Butcher, 1 Turn. & R. 260, 272 (1823), holding also that a bequest of stock for an indefinite charity fails; Beck *v.* McGillis, 9 Barb. 35, 59 (1850). *Contra*, Waite *v.* Combes, 5 De G. & S. 676 (1852); Chapman *v.* Reynolds, 28 Beav. 221 (1860), where the testator had no property but stock; Bescoby *v.* Pack, 1 Sim. & Stu. 500 (1823), holding that the words "securities for money" will pass the "funds," but not deciding as to stock in private corporations; Newman *v.* Newman, 26 Beav. 218 (1858), where the legacy was of "surplus money;" Jenkins *v.* Fowler, 63 N. H. 244 (1884). "All my money" may include stock. *Re* Buller, 74 L. T. Rep. 406 (1896).

1 Delamater's Estate, 1 Whart. (Pa.) 362 (1836).

2 Collier *v.* Squire, 3 Russ. 467 (1827).

3 Cowling *v.* Cowling, 26 Beav. 449 (1859). *Contra*, Kendall *v.* Kendall, 4 Russ. Ch. 360 (1828). Stock passes under a legacy of "my property at R.'s bank," the certificates being there. *Re* Prater, L. R. 37 Ch. D. 481 (1888).

4 Borton *v.* Dunbar, 30 L. J. (Ch.) 8 (1860). "Ready money" covers uncollected dividends. May *v.* Grave, 3 De G. & Sm. 462 (1849).

5 Kermode *v.* Macdonald, L. R. 3 Ch. App. 584 (1868); aff'g L. R. 1 Eq. 457.

6 Dowson *v.* Gaskoin, 2 Keen, 14 (1837); Fulkeron *v.* Chitty, 4 Jones, Eq. (N. C.) 244 (1858).

7 Kendall *v.* Kendall, 4 Russ. Ch. 360 (1828).

8 *Re* Johnson, 89 L. T. Rep. 84 (1903); aff'd, 89 L. T. Rep. 520. *Cf.* Turner *v.* Turner, 21 L. J. (Ch.) 843 (1852). See also Bescoby *v.* Pack, 1 Sim. & Stu. 500 (1823). *Re* Maitland, 74 L. T. Rep. 274 (1896). Where power is given by a will to trustees to invest money in "securities" they may invest in shares of stock in railway companies. *Re* Rayner, [1904] 1 Ch. 176.

9 *Re* Johnson's Estate, 170 Pa. St. 177 (1895). Bank stock is to be estimated at its par value in a legacy of "$500 of bank stock" and "$500 in bank stock." Partner *v.* Citizens', etc. Co., 163 Ind. 303 (1904).

10 Connecticut, etc. Co., *v.* Chase, 75 Conn. 683 (1903).

11 Roman, etc. Asylum *v.* Emmons,

of the will, and before the death of the testator, the stock bequeathed is changed in its character by operation of law, the legatee will nevertheless be entitled to the stock in its new form.[1]

In England, where "shares" corresponds to the American "stock," but "stock" is a term applicable to a paid-up interest, which, like a bank deposit, may be used in large or small quantities, a bequest of "shares" does not pass "stock" if there be any "shares" to which the legacy may apply.[2] A will giving all personal property in the United Kingdom to one party and all personal property in South Africa to another party, gives to the former legatee shares of stock in a South African corporation, where such corporation has a transfer office in London as well as in South Africa, and the certificates themselves are on deposit in London. But it was held that bonds issued by a South African company will not pass to the London legatee, even though such bonds are on deposit in London.[3] The words "funds" or "public funds" will include long annuities;[4] and "foreign funds" means securities guaranteed by foreign governments;[5] but "funds"

3 Bradf. (N. Y.) 144 (1855). A bequest to "Georgetown University" will go to "Georgetown College," a corporation, if there is no corporation of the former name. Speer *v.* Colbert, 200 U. S. 130 (1906). Where a will bequeaths all the testator's "Carthage National Bank stock" and then bequeaths twenty shares in addition, it may be shown that the testator really intended twenty shares of Central National Bank stock which he held. Waters *v.* Hatch, 181 Mo. 262 (1904). Door *v.* Geary, 1 Ves. Sr. 255 (1749), holding that a bequest of "East India stock" will apply to bank stock, when the testator had the latter but none of the former. See also Trinder *v.* Trinder, L. R. 1 Eq. 695 (1866), where a legacy of "Great Western Railway" stock was held to apply to the stock of a road absorbed by the Great Western Railway; Oakes *v.* Oakes, 9 Hare, 666 (1852), where a bequest of "shares" was held to apply to "stock;" Gallini *v.* Noble, 3 Mer. Ch. 691 (1810); Penticost *v.* Ley, 2 Jac. & W. 207 (1820); Clark *v.* Atkins, 90 N. C. 629 (1884), where "bank stock" was held to pass bonds. A palpable mistake of the testator in describing a legacy of bonds will be corrected by the court. Holt *v.* Jex, 48 Hun, 528 (1888). A legacy of "12 shares in the steam barge J." may be shown to be twelve shares in the corporation owning the steam barge J., and may be shown to intend shares worth $1,000 each, even though the par value of the shares is only $50 each, but the testator considered them as of $1,000 par value each. Oades *v.* Marsh, 111 Mich. 168 (1896). A legacy of "£400 invested in the B. Company" means 400 shares in that company, the testator having five hundred shares of £1 each and the shares being worth £1 10*s.* each. *Re* Buller, 74 L. T. Rep. 406 (1896). See 98 L. T. Rep. 745.

1 See p. 830, note 7, *infra*.

2 Oakes *v.* Oakes, 9 Hare, 666 (1852).

3 *Re* Clark, [1904] 1 Ch. 294.

4 Howard *v.* Kay, 27 L. J. (Ch.) 448 (1858).

5 Ellis *v.* Eden, 23 Beav. 543 (1857); Cadett *v.* Earle, L. R. 5 Ch. D. 710 (1877), properly holding that New York and Ohio are foreign governments. *Cf.* Langdale's Trusts, L. R. 10 Eq. 39 (1870), relative to French railway securities.

will not include bank stock,[1] nor East India stock.[2] An unconditional bequest of the dividends of stock is a bequest of the stock itself.[3] But a bequest of a specific sum to be paid from stock does not bequeath the stock itself, although amounting to a charge upon it.[4] A bequest of stock to a legatee "to draw the income arising therefrom during her life-time, and at her death to dispose of the same as she shall see fit," vests the title to the stock when it is set apart, in the legatee, even though the executors are directed to collect and pay to her the dividends.[5] A bequest of the "rest and residue after deducting" certain specific legacies of stock includes those legacies, if they have lapsed by reason of the death of the legatees.[6] A general bequest of stock applies to partly-paid as well as to full-paid stock.[7] Legacies may be made of stock over which the testator has the power of appointment,[8] and a will may provide for an annuity to be derived from stock.[9] In all these cases the intention of the testator is the "pole star" of the courts.

1 Slingsby *v.* Granger, 7 H. L. Cas. 273 (1859).

2 Brown *v.* Brown, 4 K. & J. 704 (1858).

3 A bequest of dividends and income to an institution as a permanent fund is an absolute gift of the stock. Angell *v.* Springfield Home, 157 Mass. 241 (1892); Collier *v.* Collier, 3 Ohio St. 369 (1854); Haig *v.* Swainey, 1 Sim. & Stu. 487 (1823); Page *v.* Leapingwell, 18 Ves. Jr. 463 (1812); Fox *v.* Carr, 16 Hun, 566 (1879), involving a similar question. *Cf.* Blann *v.* Bell, 2 De G., M. & G. 775 (1852), holding that this rule applies only to the "funds," but not to stock in private corporations. A legacy of stock to A., "the dividends derived from the same to be paid to her by B., whom I name as trustee for said stocks and bonds, as said dividends may accrue from time to time," passes complete title to the legatee. No trust exists. Arnold's Appeal, 6 Atl. Rep. 751 (Pa. 1886).

4 Quoted and approved in Missouri, etc. *v.* McCune, 112 Mo. App. 332 (1905). Wilson *v.* Maddison, 2 Y. & C. Ch. 372 (1843).

5 Onondaga Trust, etc. Co. *v.* Price, 87 N. Y. 542 (1882).

6 Carter *v.* Taggart, 16 Sim. 423 (1848); Shuttleworth *v.* Greaves, 4 Myl. & Cr. 35 (1838), holding that a legacy of stock lapses as to those dying before the testator, though it is given to them, "their executors, administrators, and assigns."

7 Emery *v.* Wason, 107 Mass. 507 (1871). This case holds also that, where a call on the stock becomes due the day after the testator died, it was the duty of the executor to pay it from the general fund. Where a will bequeaths one hundred and forty shares of a certain stock and the testatrix dies leaving two hundred and eighty shares of that stock, forty of which are paid up and two hundred and forty not paid, the one hundred and forty must be taken from the two hundred and forty. *Re* Cheadle, [1900] 2 Ch. 620.

8 See *Re* David's Trusts, 1 Johns. 495 (1859); Innis *v.* Sayer, 3 Mac. & G. 606 (1851); Lownds *v.* Lownds, 1 You. & Jer. 445 (1827); Nannock *v.* Horton, 7 Ves. Jr. 391 (1802); *Re* Gratwick's Trusts, L. R. 1 Eq. 177 (1865); Warren *v.* Postlethwaite, 2 Coll. Ch. 116 (1845); Walker *v.* Mackie, 4 Russ. Ch. 76 (1827), disapproved in Hughes *v.* Turner, 3 Myl. & K. 666, 697 (1835).

9 As to the construction of different

§ 306. *Ademption or revocation of a legacy of stock, and abatement.*—The ademption of a legacy is a revocation of that legacy in part or wholly, not by an express revocation in the will, but by the acts of the testator. Consequently, an ademption applies only to specific legacies.[1] An ademption of a specific legacy of stock generally arises by a sale of the stock by the testator. If the specific stock bequeathed is not owned by the testator at the time of his death, the legal conclusion is that the specific legacy is adeemed, and the legatee takes nothing.[2] A sale of the stock by the testator after the will is made revokes or adeems the legacy, and it is as if never made.[3] A codicil giving all the "personal estate" to another is a revocation of a bequest of stock in the original will.[4] Where the testator specifies the amount of his stock, the specific legatees of it abate proportionately with the residuary legatee, if upon his death it is insufficient.[5] The rule is otherwise if no mention is

provisions in wills, where an annuity on stock is created, see Innes *v.* Mitchell, 9 Ves. Jr. 212 (1803); Kerr *v.* Middlesex Hospital, 2 De G., M. & G. 576 (1852); Ross *v.* Borer, 2 John. & H. 469 (1862); Yates *v.* Maddan, 3 Mac. & G. 532 (1857); Blewitt *v.* Roberts, Craig & P. 274 (1841); Potter *v.* Baker, 13 Beav. 273 (1851); Robinson *v.* Hunt, 4 Beav. 450 (1841); Hedges *v.* Harpur, 3 De G. & J. 129 (1858); Evans *v.* Jones, 2 Coll. Ch. 516 (1846); Mansergh *v.* Campbell, 3 De G. & J. 232 (1858).

1 Where the will bequeaths a specified amount of stock but provides that if the testator did not have that amount on his death, the amount shall not be made up, this is a general and not a specific legacy. Hence, where the will contains a further provision that the legatee shall take only such stock as the testator might leave, and he has sold a part of the stock and invested the money in other stocks, the amount will be made up out of these latter stocks. Blair *v.* Scribner, 67 N. J. Eq. 583 (1905); rev'g 65 N. J. Eq. 498. A bequest of $2,000 of certain bonds is demonstrative and not specific and not adeemed where the testator had $10,000 of such bonds and sold them. Ives *v.* Canby, 48 Fed. Rep. 718 (1891). A legacy of stocks aggregating two thousand two hundred shares "now owned by me and standing in my name on the books of" the company is not specific, so as to be subject to ademption, although in the meantime the testator has sold three thousand and fifty-seven shares out of three thousand two hundred and fifty-seven. Mahoney *v.* Holt, 19 R. I. 660 (1896).

2 Ford *v.* Ford, 23 N. H. 212 (1851), although not a stock case, says in regard to this branch of the law: "It is now established in England that the only question is whether the specific thing remains at the death of the testator, and that the intention to adeem will not be considered beyond the expressions in the will. . . . The weight of American authority is in favor of the English rule."

3 Ashburner *v.* Macguire, 2 Bro. Ch. 108 (1786); White *v.* Winchester, 23 Mass. 48 (1827); Humphreys *v.* Humphreys, 2 Cox, Ch. 184 (1789); Hayes *v.* Hayes, 1 Keen, 97 (1836); Blackstone *v.* Blackstone, 3 Watts (Pa.), 335 (1834).

4 Kermode *v.* Macdonald, L. R. 1 Eq. 457 (1866); affirmed, L. R. 3 Ch. App. 584 (1868).

5 Elwes *v.* Causton, 30 Beav. 554

made of what amount of stock he owns.[1] Where the testator by his will gives two hundred shares of stock to a legatee, but has only one hundred shares when he dies, the legatee takes such one hundred shares and no more.[2] Where the testator in his will gives away thirty-six shares of stock, but he only had thirty-one shares, and at the time of his death he only had twenty-five shares, the executor is bound to purchase eleven shares, the legacy being a general one of so many shares of stock.[3] If the general property of the testator is exhausted in the payment of the debts of the estate, specific legacies of stock abate proportionately, with other specific legacies.[4] A specific legacy of stock is not adeemed by a change in the stock produced by an act of the government. Thus, where the government buys the stock, a specific legatee takes the compensation if it has not yet been collected by the testator,[5] but not if it has been collected and used by the latter.[6] A change by law of the funds into funds bearing a lower rate of interest does not adeem a specific legacy of it,[7] even though the testator sells the former and buys the latter kind of funds.[8] Even though the testator has deposited stock in exchange for bonds, yet the stock is not thereby

(1862), following Page *v.* Leapingwell, 18 Ves. 463 (1812).

1 Petre *v.* Petre, 14 Beav. 197 (1851); De Lisle *v.* Hodges, L. R. 17 Eq. 440 (1874); Vivian *v.* Mortlock, 21 Beav. 252 (1855). The debts of the estate may be directed to be paid from the residue of the stock. Choat *v.* Yeates, 1 Jac. & W. 102 (1819).

2 New Albany, etc. Co. *v.* Powell, 29 Ind. App. 494 (1902). Where the testatrix owns twenty shares of stock and by her will gives ten shares each to two persons, and then sells ten shares, they take but five shares each. Drake *v.* True, 72 N. H. 322 (1903).

3 Slade *v.* Talbot, 182 Mass. 256 (1902).

4 Sparks *v.* Weedon, 21 Md. 156 (1864). When general legacies of stock abate proportionately with other general legacies, the stock is estimated at its value twelve months after the testator's death. Blackshaw *v.* Rogers (1780), cited in 4 Bro. Ch. 349.

5 Walton *v.* Walton, 7 Johns. Ch. 258 (1823). Where after a bequest is made and before the testator's death, stock bequeathed by it passes out of existence by reason of the municipality taking over the property of the corporation, the bequest fails. *Re* Slater, 97 L. T. Rep. 74 (1907).

6 Ludlam's Estate, 13 Pa. St. 188 (1850).

7 Brown *v.* McGuire, 1 Beatty, Ir. Ch. 358 (1829). But a legacy of stock in an incorporated unlimited company which, after the making of the will, is incorporated as a limited company, and the value of the stock changed, which change the testator accepts, fails, whether considered as a specific legacy adeemed or a general legacy impossible of fulfillment. *Re* Gray, L. R. 36 Ch. D. 205 (1887).

8 Partridge *v.* Partridge, Cas. t. Talb. 226 (1736). Roper, Legacies, p. 331, 2d ed. (1848), is inclined to the opinion that a specific legacy of stock is not revived by a purchase of similar stock after a sale of the stock bequeathed.

adeemed, if he dies before the exchange is made.[1] But where the will gave seventy-five shares of stock in a company, which has been merged into another company, and after the merger twenty-five shares were sold by the testatrix, the remaining fifty shares will pass, and the balance will not be made up out of the assets, even though the intent was to substitute the new stock for the old.[2] Even though a corporation is consolidated with another corporation and new stock is taken in exchange, yet this is not an ademption.[3] Yet where a will makes a bequest to a church corporation, and after its execution and before the death of the testator the corporation is consolidated with another one having broader purposes, the bequest fails.[4] A specific legacy of stock by a *feme covert,* who had the power to bequeath it, is not adeemed by the fact that she had the stock transferred into her own name after the death of her husband.[5] A specific legacy which has been adeemed is not revived by a republication of the will after the ademption.[6]

§ 307. *Duty of executor or administrator as regards a specific or general legacy of stock.*—Where a legacy of stock is made, it is the duty of the executor or administrator to carry into effect the wishes of the testator by turning over to the legatee the stock bequeathed, if the legacy be specific; or, if the legacy be general, by either setting aside for the legatee the required amount of stock from the testator's effects, or purchasing the same for the legatee. The specific legacy of stock vests in the legatee as soon as the executor is satisfied that the general fund will pay the debts of the estate and consents to such vesting. When once given the consent of the executor is irrevocable, and only a court of chancery can reach the stock and subject it to the testator's debts.[7] The liability of the

1 *In re* Frahm's Estate, 120 Iowa, 85 (1903).

2 Gardner *v.* Gardner, 72 N. H. 257 (1903).

3 *In re* Peirce, 25 R. I. 34 (1903).

4 Gladding *v.* St. Matthew's Church, 25 R. I. 628 (1904).

5 Dingwell *v.* Askew, 1 Cox, Ch. 427 (1788).

6 Harvard Unitarian Soc. *v.* Tufts, 151 Mass. 76 (1890).

7 Onondaga Trust, etc. Co. *v.* Price, 87 N. Y. 542 (1882); Hill *v.* Rockingham Bank, 44 N. H. 567 (1863), holding that the legatee should sue the corporation at law for refusing transfer, where the parties interested in the will assent; and in equity, if both the corporation and such parties do not assent. A decree of a probate court that the legacy of stock shall be turned over to the legatee cannot be required by the corporation. Under the Vermont statute it is the duty of the executor to transfer stock to the residuary legatee. Witters *v.* Sowles, 25 Fed. Rep. 168 (1885). As regards sales of stock by an executor, see § 329, *infra.* If stock specifically bequeathed is not given to the legatee, but is used for other purposes, the other legatees must make good its value. Tomlinson *v.* Bury, 145 Mass. 346 (1887). Executors in New York

legatee to pay calls on the stock is discussed elsewhere.[1] Where stock in a Maryland bank is owned by a citizen of Delaware, the law of Delaware governs a legacy of such stock.[2]

§ 308. *Gifts of stock.*—Shares of stock in a corporation may be the subject of a gift. No formal method of completing the gift is necessary. A formal instrument of transfer, duly delivered to an agent with directions to deliver to the donee, vests title in the donee, though no certificates are transferred.[3] A gift of stock, vested by a due transfer into the name of the donee, cannot be revoked by the donor.[4] In order to constitute a gift a perfectly clear intent so to do must be proved.[5] A gift of stock may be made by

are not entitled to commissions on transfers of stock specifically bequeathed. Schenck *v.* Dart, 22 N. Y. 420 (1860). A legacy may be paid by the stock of the decedent at a valuation agreed upon. Chase *v.* Burritt, 14 Atl. Rep. 212 (Conn. 1888).

1 See § 560, *infra.*

2 Lowndes *v.* Cooch, 87 Md. 478 (1898). Where a citizen of Tennessee is a stockholder in a Mississippi corporation and he dies and his will is probated in Tennessee and he gives his stock to a certain person, that person can compel the Mississippi corporation to transfer it, even though the will would not be good in Mississippi. Delta, etc. Co. *v.* Pearce, 45 S. Rep. 981 (Miss. 1908). See also § 330, *infra*, and § 12 *supra.*

3 De Caumont *v.* Bogert, 36 Hun, 382 (1885), treating also a gift as an advancement. See s. c., *Re* Morgan, 104 N. Y. 74 (1887). In England, under the statutes, it is held that a gift of stock does not vest in the donee until registry on the corporate books. Nanney *v.* Morgan, L. R. 35 Ch. D. 598 (1887). Where a person buys stock through a broker on the stock exchange, and the day before his death gives to the broker his wife's name as transferee, the gift to her is complete, although he died before the transfers were executed. Bull *v.* Smith, 84 L. T. Rep. 835 (1901).

4 Standing *v.* Bowring, L. R. 27 Ch. D. 341 (1884), where the donor transferred into the joint names of donor and donee, and afterwards attempted to dispose of the whole stock. A gift of stock fully made and accepted cannot be retracted. Walker *v.* Joseph, etc. Co., 47 N. J. Eq. 342 (1890). A father who takes stock in the name of a son in order to qualify him as a director, and takes back the certificates, does not thereby make a gift of the stock. *Re* Gooch, 62 L. T. Rep. 384 (1890). A person transferring stock in trust, the dividends to be paid to him during life, and also such part of the principal as the trustee deems best, and the stock to go to his heirs upon his death, the trustee to have power to sell and reinvest the fund, cannot be revoked by the person creating the trust. Sands *v.* Old Colony, etc. Co., 81 N. E. Rep. 300 (Mass. 1907).

5 Where, however, the stock is purchased by one in the name of another, it may be shown, as against the creditors of the former, that he intended the stock as a gift to the latter. Rider *v.* Kidder, 10 Ves. Jr. 360 (1805). A gift of stock to take effect only upon the death of the donor is not absolute, and is subject to the payment of his debts existing at the time of his death. Sterling *v.* Wilkinson, 83 Va. 791 (1887). A gift of stock whereby the owner makes himself a trustee of it for his donee is complete, and a recognition of the trust in his will does not render the stock a part of

delivering to the donee the certificates indorsed in blank on the back thereof.[1] A gift of stock completed by the delivery thereof is not revoked by the fact that the donee hands it back to the donor to pledge for the benefit of the company.[2] Where the gift is made in gratitude for care to be bestowed on another, the gift will fail upon the death of the donee, if it is proved that the stock had not been fully and finally delivered.[3] A gift of the dividends on stock is a gift of the stock itself.[4] A gift of stock by one legatee to another, in the belief that the testator so intended the stock to be disposed of, cannot be revoked after an instrument of transfer is signed

his estate, subject to the dower right of his wife. Dickerson's Appeal, 115 Pa. St. 198 (1887); Stone *v.* Hackett, 78 Mass. 227 (1858). Although a person buys stock as trustee, and charges the price on his books against his daughters and credits them with dividends, yet if he sold the stock and used the money the stock was not an advancement to them. Herkimer *v.* McGregor, 126 Ind. 247 (1890). Where a stockholder transfers the certificate on the back to a person and leaves it in his own safe-deposit box, and writes a letter to such person, directing him to distribute it among a list of charitable corporations, but no list is attached, the latter takes no title, and the executors may compel him to transfer the certificate to them. Bliss *v.* Fosdick, 76 Hun, 508 (1894).

1 Coffey *v.* Coffey, 179 Ill. 285 (1899). In Maryland it is held that a mere transfer of the certificates of stock, without a registry on the corporate book, is incomplete as a gift, and cannot be enforced against the personal representatives of the deceased donor. Baltimore Retort, etc. Co. *v.* Mali, 65 Md. 93 (1886). The delivery of a certificate of stock by a husband to his wife with intent to give the stock to her may constitute a complete gift, even though the stock is not transferred by him on the back for several years thereafter. First Nat. Bank *v.* Holland, 99 Va. 495 (1901). Where the owner of stock signs the transfer on the back and fills in the name of a person and afterwards dies, and the person to whom it is transferred is in possession of the certificate and claims that the stock was given to her, such possession is *prima facie* evidence of a gift and delivery. Liscomb *v.* Manchester, etc. R. R., 70 N. H. 312 (1900). Under the New York statute, prohibiting testimony by an interested party as to conversations with a deceased party, a person claiming stock by gift cannot so prove delivery by the deceased person. Richardson *v.* Emmett, 170 N. Y. 412 (1902). Where a stockholder holds the note of an employee, secured by stock, which the former had sold to the latter, and the former gave up the certificate and tears up the note and states that the transaction is a gift, it is a gift *inter vivos*. Denunzio's Receiver *v.* Scholtz, 117 Ky. 182 (1903).

2 Goodwin *v.* Hampton, etc. Co., 133 Mich. 229 (1903).

3 Jackson *v.* Twenty-third St. Ry., 88 N. Y. 520 (1882). When a gift of stock is made in accordance with an agreement to compensate the donee for taking care of the donor, a delivery of the certificate without any transfer suffices. Reed *v.* Copeland, 50 Conn. 472 (1883). But the contract to make the gift must not be in opposition to public policy, nor in fraud of the rights of other stockholders. Nickerson *v.* English, 142 Mass. 267 (1886).

4 See § 305, *supra*.

and actual transfer made, even though it is afterwards found that the testator had no such intent.[1] A stockholder who has transferred his stock into the joint names of himself and his wife cannot dispose of his interest by a last will and testament. It passes to the wife as the survivor.[2] A gift of stock *causa mortis* may be made by a mere delivery of the certificate to the donee.[3] The delivery and accept-

1 Delamater's Estate, 1 Whart. (Pa.) 362 (1836).

2 Dummer *v.* Pitcher, 5 Sim. 35 (1831); aff'd, 2 M. & K. 262 (1832). A gift of stock direct from the husband to the wife is legal. She thereupon takes a sole and separate estate therein. Deming *v.* Williams, 26 Conn. 226 (1857). The case of Francis *v.* New York, etc. R. R., 17 Abb. N. Cas. 1 (N. Y. 1885), aff'd, 108 N. Y. 93, holds that, when a gift of stock is made to a minor, it is complete and irrevocable, so far as the donor is concerned; but the minor may, upon attaining majority, either accept or refuse it.

3 Grymes *v.* Hone, 49 N. Y. 17 (1872); Walsh *v.* Sexton, 55 Barb. 251 (1869); Allerton *v.* Lang, 10 Bosw. 362 (1863). The last two cases hold that the certificates need not even be indorsed or transferred, but that a mere delivery without any writing is sufficient. *Cf.* §§ 375, 465, *infra*. A delivery of a certificate of stock without written assignment is not a good gift *inter vivos*. Matthews *v.* Hoagland, 48 N. J. Eq. 455 (1891). No delivery of stock to a wife as a gift exists where, after the husband's death, the stock is found among his papers in her possession and not indorsed. Morse *v.* Meston, 152 Mass. 5 (1890). Although no transfer is made of the certificate, yet if it is found among the papers of a deceased person it will be presumed to be his, though standing in the name of his sister, who also is dead, the stock having been considered of little value by them. *Re* Mapes's Estate, 12 N. Y. Supp. 9 (1890). A *donatio causa mortis* of stock is revoked by the recovery of the donor, even though it is registered. Staniland *v.* Willott, 3 Macn. & G. 664 (1850). In England railway stock is not the subject of a *donatio causa mortis* by a delivery of the certificate, since the transfer can be by deed only. Moore *v.* Moore, 43 L. J. (Ch.) 617 (1874). A delivery of certificates of stock is not a good *donatio mortis causa*. *Re* Weston, [1902] 1 Ch. 680. Delivery of an investment certificate is not a valid *donatio mortis causa* of the stock itself. *Re* Andrews, [1902] 2 Ch. 394. A gift *causa mortis* of stock in a bank by mere manual delivery of the certificate, without any signature to the transfer thereof, is good where there is clear proof of the intent of the donor to make the gift. Leyson *v.* Davis, 17 Mont. 220 (1895). A decision of a state court that a *donatio causa mortis* of bank stock was effective, although the donor merely delivered the certificates of stock without transferring the same on the back thereof, does not raise a federal question, even though the stock was national-bank stock. Leyson *v.* Davis, 170 U. S. 36 (1898). A common-law donation *causa mortis* differs from a civil-law donation *mortis causa* in that the former was a gift during life, but in expectation of death, and not to take effect until death, while the latter, although in prospect of death, to take effect upon death, is revocable and under the Louisiana code cannot be made except by last will and testament. Hence a delivery of certificates of stock not indorsed is not a good donation *mortis causa*. A

ance of a gift of stock is held to be effectual, where the donor had the stock transferred into the name of the donee and took out certificates in the donee's name, even though the donor died before the donee knew of the gift.[1] Where a father assigns stock to his son and such stock is recognized and treated as the son's property for several years, the gift is a completed gift *inter vivos*.[2] If a person transfers stock on the corporate books to another person and the latter collects the dividends, and the former states to others that he had given such stock to the latter, such gift may be effective, even though the new certificates were not delivered to the donee.[3] Where the owner of a certificate of stock indorses it to a specified person, the indorsement containing also the words, "reserving to myself the dividends declared upon the same during my life," and the certificate of stock is then placed in an envelope which is sealed and delivered to the donee with instructions not to open it until the death of the donor, this is an executed gift, except as to the dividends during the life of the donee.[4] A gift of bonds *inter vivos* is not good unless there is actual delivery. Even though the donor gives the donee a key to the box in which the bonds are placed, and even though he had declared that he had given the bonds to the donee, yet this is not sufficient if there was no actual delivery. A gift *inter vivos* is the same as a gift *causa mortis* in this respect.[5] A gift of stock,

common-law donation *causa mortis* is not valid in Louisiana. Succession of Sinnott *v.* Hibernia Nat. Bank, 105 La. 705 (1901). A gift of stock is one *inter vivos*, even though it was made just before death, such gift being to complete what the donor believed had been an insufficient delivery of such stock at a prior time. Coffey *v.* Coffey, 179 Ill. 283 (1899).

1 Roberts's Appeal, 85 Pa. St. 84 (1877).

2 Jennings *v.* Neville, 180 Ill. 270 (1899).

3 Richardson *v.* Emmett, 61 N. Y. App. Div. 205 (1901); rev'd on another point in 170 N. Y. 412. Even though a husband buys stock in his own name and causes the certificates to be made out in the name of his wife, yet, if he does not deliver them to her or declare a trust in her favor, the title does not vest in her. Getchell *v.* Biddeford, etc. Bank, 94 Me. 452 (1900).

4 Calkins *v.* Equitable, etc. Assoc., 126 Cal. 531 (1899). In the case State *v.* Probate Court, etc. County, 113 N. W. Rep. 888 (Minn. 1907), a stockholder transferred title to his children and the children then leased to him the use of the stock during his life and the transaction was upheld by the court.

5 Chambers *v.* M'Creery, 106 Fed. Rep. 364 (1901). In the case of Gilkinson *v.* Third, etc. R. R., 47 N. Y. App. Div. 472 (1900), where a stockholder during his life took the donee to a deposit company and rented a deposit box in both of their names and placed therein stock certificates running to him and gave the donee one key, he retaining the other, and stated that he gave the donee the stock, it was held that this amounted to a gift *inter vivos*. Where a hus-

bonds, etc., may be by a separate bill of sale or assignment, but if the donee immediately gives back a power of attorney authorizing the donor to keep the property and take the income and sell it if he wishes, the gift is not complete, and temporary possession by the donee subsequently of the key to the safe in which the property is deposited is immaterial.[1] Where a man buys stock and has it issued in the name of his infant daughter and states that it is a gift to her and places it in his safe-deposit box with other articles belonging to his family, this is a sufficient delivery.[2] A delivery of a transfer of stock does not complete the gift, where the donor retains the certificate of stock, especially where thereafter he votes the stock and receives the dividends, and hence such a delivery by a man to his wife while he is solvent is not good after he becomes insolvent.[3] Where a husband gives stock to his wife, but afterwards, with her consent, sells it, she cannot after his death claim that it was a completed gift.[4] Even though the wife, after the death of the husband, is in possession of certificates of stock made out in his name but enclosed in an envelope on which he had written the words "the property of Electa C. Bean," yet if the certificates were not endorsed and delivery of the gift cannot be proved except by her testimony, the gift is not valid as a gift *inter vivos* or *causa mortis*.[5] Under the California statute requiring a verbal gift to be completed by an actual or symbolic delivery, a gift whereby the donor assigns the certificates to the donees and delivers them to the secretary to be delivered to the donees on his death is not a valid gift. Neither is it a gift *donatio mortis causa*.[6] To make a gift of stock *inter vivos*, absolute delivery is necessary, although after delivery the donee may leave the certificates with the donor. Clear proof in such a case

band who is about to use his wife's bonds without her consent executes, in the presence of a witness, an assignment to her of certain stocks of his own, the certificates of the same being attached thereto, to secure her from loss by reason of his use of her securities, and his paper is found at his death in his tin box with the stocks, it amounts to a declaration of trust, and is legal, even though thereafter he amended it by substituting other securities. Collins *v.* Steuart, 58 N. J. Eq. 392 (1899). But a written memorandum left by a decedent to the effect that he thereby gives certain stock to a person, but retains the same during life in order that he, the donor, may have the dividends, is not a valid gift. *Re* Shield, 53 L. T. Rep. 5 (1885). Even though a certificate of stock is found in the deposit box of the deceased person, yet there may be a question as to whether it had been given to her. Hastings *v.* Tousey, 123 N. Y. App. Div. 480 (1908).

1 Brown *v.* Crafts, 98 Me. 40 (1903).

2 Crouse *v.* Judson, 41 N. Y. Misc. Rep. 338 (1903).

3 Allen, etc. Co. *v.* Grumbles, 129 Fed. Rep. 287 (1904).

4 Bauernschmidt *v.* Bauernschmidt, 97 Md. 35 (1903).

5 Bean *v.* Bean, 71 N. H. 538 (1902).

6 Noble *v.* Garden, 146 Cal. 225 (1905).

is required, and hence where a person purchases stock and puts it in the name of an agent and then deposits the stock in the former's safe-deposit box, the agent may be compelled to execute a transfer, even though he claims that the stock had been given to him.[1] A person may make a gift of stock by executing and delivering the certificates to a third person with a writing attached thereto stating that the donor held the stock in trust for the donee to be delivered to her upon his death, he retaining the right to the dividends during his lifetime.[2] Where a woman takes her securities from a box and transfers them in blank and hands them to her nephew and states in his presence and in the presence of an officer of the safe-deposit company that she is thereby giving the securities to the nephew, and then she surrenders her box and her nephew takes out a box in his own name and deposits the securities therein, this is a complete gift, even though the nephew gave her access to the box and she thereafter sold some of the securities and collected dividends and interest from others and used the money.[3]

A stockholder who assigns certificates of stock to his wife and places them in a box in his possession in which he keeps her papers, is not guilty of a fraud as against his subsequent creditors, even though he did not actually deliver the certificates to her and she did not know of the assignment.[4]

Even though a man writes to his son that he had acquired certain stock from the deceased mother, and that he had transferred a portion of it to his son, yet if he keeps the stock and afterwards denies that it belongs to the son, the son is not entitled to it.[5]

Even though the owner of the stock transfers it to another person and delivers it to the latter, yet if the latter a year afterwards returns it to the former and the former puts it in her deposit box where it is found at the time of her death, this is not a valid gift *inter vivos,* there being proof that the owner intended title to pass only after her death.[6]

But where the owner of bonds, who holds the certificate of the

1 Bowron *v.* De Selding, 105 N. Y. App. Div. 500 (1905).

2 Matter of King, 115 N. Y. App. Div. 751 (1906); aff'd, 188 N. Y. 626.

3 Reese *v.* Philadelphia, etc. Co., 67 Atl. Rep. 124 (Pa. 1907). Even though a stockholder endorses his stock to various persons and delivers it to a third person to be delivered to such persons after her death, yet if she reserves the right to change her mind and does in fact modify the certificates before her death, the gift is not completed by delivery after her death. Noble *v.* Learned, 94 Pac. Rep. 1047 (Cal. 1908).

4 *In re* Hedley, 156 Fed. Rep. 314 (1907).

5 Paine *v.* Paine, 67 Atl. Rep. 127 (R. I. 1907).

6 Bone *v.* Holmes, 81 N. E Rep. 290 (Mass. 1907).

depository therefor, indorses such certificate to a person and delivers it, this is a gift *inter vivos*.[1] The owner of bonds may deposit them in trust with a trustee, with directions in writing to deliver them to certain persons upon the donor's death. Such persons are then entitled to them, although the donor collected the coupons during his life.[2] Stock may be given away in trust, with the donor himself as a trustee, although no transfer is made on the corporate books.[3] A stockholder in a national bank many donate his stock to his children by putting it in trust for them, and he is not then liable on the stock where it is clear that his acts were not for the purpose of avoiding liability.[4] Certificates of stock transferred to a trustee to pay the income to the donor during life and upon his death to be delivered in a certain way to another party, is a completed gift *inter vivos* and is not revoked by the trustee delivering his stock back to the donor.[5] A gift of stock on condition that the dividends should all go to the owner and that he should vote it is a gift of a remainder with a life interest in the donor.[6] Where a person indorses certificates of stock and delivers them to donees, it is a complete gift, even though he thereafter takes the dividends and continues to be president.[7] A gift of stock, the donee to have the possession and management of the same, but the donor to have the income during his life, makes the donee trustee, until the death of the donor, and hence such gift is taxable under the New York statutes as a transfer to take effect on his death.[8] Where a person, who is under contract to deliver certain stock, gives the stock to a relative for nothing, the party entitled to the stock by contract may compel such relative to give up the stock.[9]

1 McGavic *v.* Cossum, 72 N. Y. App. Div. 35 (1902).

2 Green *v.* Tulane, 52 N. J. Eq. 169 (1893).

3 Locke *v.* Farmers' L. & T. Co., 140 N. Y. 135 (1893).

4 Fowler *v.* Gowing, 152 Fed. Rep. 801 (1907).

5 Larimer *v.* Beardsley, 130 Iowa, 706 (1906).

6 Matter of Brandreth, 169 N. Y. 437 (1902).

7 Matter of Bullard, 76 N. Y. App. Div. 207 (1902).

8 Matter of Cornell, 170 N. Y. 423 (1902). A sale of stock in consideration of an annuity is not subject to the New York inheritance tax. Matter of Edgerton, 35 N. Y. App. Div. 125 (1898); aff'd, 158 N. Y. 671.

9 Graham *v.* O'Connor, 73 L. T. Rep. 712 (1896).

CHAPTER XIX.

WHO MAY BUY AND SELL STOCK.

§§ 309, 310. Competency of a corporation to purchase shares of its own capital stock.
311, 312. Rule in the United States.
313. The stock is not merged, and it may be sold by the corporation.
314. Purchase by a corporation of stock in another corporation —Purchase by railroad.
315. Purchases of stock by banks, and pledges to banks.
316. Purchases of stock by insurance, manufacturing, and other corporations.
317. Stockholding corporations, known as "holding corporations"—Mortgages by stockholding corporations.
318. Infants as purchasers of stock.
319. Married women as purchasers, owners, or vendors of stock.
§ 320. Competency of miscellaneous parties—Joint operation.
321. Sales, purchases, and transfers by agents.
322. Purchase of stock by guardians, executors, and trustees.
323, 324. Sale or pledge of stock by trustee legally or in breach of his trust.
325, 326. Transferee of stock from trustee is protected, when.
327. Rights and liability of the corporation allowing a transfer by a trustee in breach of his trust.
328. Sales of stock by a guardian.
329. Sales by executor or administrator.
330. Duty and liability of the corporation in sales by an executor or administrator.

§ 309. *Competency of a corporation to purchase shares of its own capital stock.*—In England a long line of decisions has established the rule that, at common law, a corporation cannot purchase shares of its own capital stock.[1] This rule is clear and decisive in that country and is closely adhered to.[2] The corporation may be given

1 Trevor *v.* Whitworth, L. R. 12 App. Cas. 409 (H. L. 1887), reviewing many cases; *Re* Marseilles Extension Ry., L. R. 7 Ch. App. 161 (1871); Evans *v.* Coventry, 25 L. J. (Ch.) 489, 501 (1856); Cross's Case, 38 L. J. (Ch.) 583 (1869); Morgan's Case, 1 De G. & Sm. 750 (1849); *Ex parte* Morgan, 1 Macn. & G. 225 (1849); Eyre's Case, 31 Beav. 177 (1862). See also 3 Ry. & Corp. L. J. 169. *Cf.* Taylor, *v.* Hughes, 2 Jones & Lat. (Ir. Ch.) 24 (1844), holding that a banking company at common law may buy its own stock the same as a copartnership may buy out a partner. Where a director buys merchandise of his corporation, and pays for it in stock of the corporation, and the transaction is ratified in general meeting, the director, on a winding up, is not liable for the value of the merchandise. Weekes's Case, 17 L. R. (Ir.) 239 (1885). A purchase by a corporation of its own stock and payment by debentures is void, and a resale of the stock at a discount is void. *Re* London Celluloid Co., 39 Ch. D. 190 (1888).

2 Zulueta's Claim, L. R. 5 Ch. App. 444 (1870); Hope *v.* International Fin. Soc., L. R. 4 Ch. D. 327 (1876), hold-

an express power for this purpose, but, unless so given, the purchase is held to be beyond the legal powers of the directors and stockholders.[1] The object of the rule is to preserve the rights of the corporate creditors, and also to confine the corporation within the express powers given it, and the implied powers necessary to its transaction of business.[2] If the sale is completed, and the corporation afterwards becomes insolvent, the stockholder who sold the stock to the corporation is liable, on the winding up, as though he never had made such a sale.[3] If, however, the stockholder sells to a person, not knowing that the latter is purchasing as a trustee for the corporation, the vendor is not liable on such stock.[4] The directors

ing also that a stockholder may enjoin the purchase; distinguishing Teasdale's Case, L. R. 9 Ch. App. 54 (1873).

1 Zulueta's Claim, L. R. 5 Ch. App. 444 (1870); Hope *v.* International Financial Soc., L. R. 4 Ch. D. 327 (1876). See also Lindley, Partn., p. 739 (ed. 1881). Under an express power to the directors to enter into any contract and engagement that seemed best for the company, such a purchase was upheld. Singer's Case, 4 W. N. 206 (1869); Cockburn's Case, 4 De G. & Sm. 177 (1850), where power was given by the deed of settlement. See, however, *Re* Dronfield Silkstone Coal Co., L. R. 17 Ch. D. 76 (1880), where an express power to purchase its own stock was held not to authorize a trafficking in that stock—the buying and selling for purposes of gain. Where a company has power to purchase its own stock and does purchase stock which has not been paid up, the liability on that stock cannot be included as among the debts of the company. *Re* Sovereign, etc. Co., [1892] 3 Ch. 279. Having purchased its own stock from profits, a company may reduce its capital stock to that extent. *Re* York Glass Co., 60 L. T. Rep. 744 (1889). The corporation may purchase its own stock from a part of the stockholders as a means of reducing its capital stock. British, etc. Corp. *v.* Couper, [1894] A. C. 399. Companies with unlimited liability may, under the English statute, provide for the retirement of stock by the company and the repayment of the money paid. *Re* Borough, etc. Soc., [1893] 2 Ch. 242.

2 Compare with the cases in the previous note, *Re* Dronfield Silkstone Coal Co., L. R. 17 Ch. D. 76 (1880), where the court said: "If the company could not question it, neither can a creditor; for he can obtain nothing but what the company can get from the shareholders."

3 Walters's Second Case, 3 De G. & Sm. 244 (1850); Richmond's Case, 3 De G. & Sm. 96 (1849); Munt's Case, 22 Beav. 55 (1856), where the stockholders disagreed, and the corporation bought out one faction; Daniell's Case, 22 Beav. 43 (1856); Bennett's Case, 5 De G., M. & G. 284 (1854), where the stockholders disagreed concerning the validity of a lease, and the corporation bought out part. If, however, the corporation, six years after the transfer, discovers that the transfer was invalid, and summarily retransfers to the vendor, the latter may apply to a court of equity to compel the corporation to keep the stock. Gardiner *v.* Victoria Estates Co., 12 Ct. of Sess. (Sc. 4th ser.) 1356 (1885). See also § 251, *supra*.

4 Nicol's Case, 3 De G. & J. 387 (1859); Grady's Case, 1 De G., J. & S. 488 (1863), where the vendee was managing agent of the corporation, and the sale of the stock was to stop

authorizing or directing a purchase for the corporation of shares of its own capital stock are liable personally to the same extent that the selling stockholder would have been had the sale not taken place.[1] Generally the transfer is made, not to the corporation directly, but to a trustee on behalf of or for the benefit of the corporation. This practice is not at all necessary,[2] and has no effect other than a transfer direct to the corporation itself, unless it be that the vendor of the stock may not know that his vendee purchases for the corporation, and hence may thereby escape liability on the winding up. If the contract is executory, the corporation may repudiate it and refuse to pay the purchase price of the stock.[3] If, however, the sale is completed, the stock belongs to the corporation, and does not pass to the vendor's assignee in bankruptcy.[4]

§ 310. Where the transfer of stock to the corporation is made by one of the original subscribers for stock, it frequently becomes a difficult question to decide whether the transaction was a cancellation of the subscription contract or was a sale of the stock to the corporation. Each case turns largely on its own peculiar facts and circumstances. If the transaction is a cancellation, it may be legal. A cancellation or surrender of a stock subscription, however, is legal only when a forfeiture of the same would be legal, and is the same as a purchase by the company of its own stock, and hence is illegal, and the subscriber still remains liable.[5] In England, if it is a sale, it is illegal. The courts seem to favor a construction whereby the transaction is held to be a sale, and the stockholder made liable on the winding up.[6] A donation of partially paid-up

litigation. Richmond's Case, 3 De G. & Sm. 96 (1849), holds, however, that if the vendor's selling agent, his solicitor, knew that the sale was for the benefit of the corporation, the stockholder himself is chargeable with knowledge. See *Re* Orpen, 32 L. J. (Ch.) 633 (1863), holding that it is a question for the jury whether the vendee purchased for the corporation or for himself. See also § 251, *supra*.

1 Evans *v.* Coventry, 25 L. J. (Ch.) 489, 501 (1856); Marzetti's Case, 42 L. T. Rep. 206 (1880). *Cf.* Land Credit Co. *v.* Fermay, L. R. 5 Ch. App. 763 (1870); rev'g L. R. 8 Eq. 7. The directors may have contributions from each other for sums paid out by their authority for such purchases, and for which one or more has been held liable to the corporation. Ashhurst *v.* Mason, L. R. 20 Eq. 225 (1875).

2 See § 46, *supra*.

3 The corporation may even refuse to pay the price to the brokers employed by its directors to buy its stock. Zulueta's Claim, L. R. 5 Ch. App. 444 (1870). This, of course, does not authorize the corporation to retain the stock so purchased.

4 Great Eastern Ry. *v.* Turner, 42 L. J. (Ch.) 83 (1872).

5 Bellerby *v.* Rowland, etc. Co., [1902] 2 Ch. 14. See §§ 167–170, *supra*.

6 *Re* United Service Co., L. R. 5 Ch. App. 707 (1870), distinguishing Snell's Case, L. R. 5 Ch. App. 22 (1869). See also Thomas's Case, L. R. 13 Eq. 437 (1872); Teasdale's Case,

stock may be illegal and may be repudiated by the donor.[1]

§ 311. *Rule in the United States.*—In this country there has been a difference of opinion as to whether a corporation may purchase shares of its own stock. In Illinois, Massachusetts, and other states such a purchase is legal and allowable.[2] And, indeed, if there

L. R. 9 Ch. App. 54 (1873); Duke's Case, L. R. 1 Ch. D. 620 (1876). See also §§ 167–170, *supra*.

1 Where, in consequence of losses by the company, some of the directors make a gift of a portion of their partially paid-up stock to the company, they may, seven years thereafter, have the stock delivered back to them, the company having become prosperous, inasmuch as by the surrender they were relieved from further liability on the stock. It amounted to a purchase by the company of its own stock, and that being illegal the directors could reclaim the stock, although seven years had elapsed. A surrender of stock is similar to a purchase of its own stock by a company. Bellerby *v.* Rowland, etc. Co., [1902] 2 Ch. 14.

2 First Nat. Bank *v.* Salem, etc. Co., 39 Fed. Rep. 89 (1889). At common law a corporation may buy and retire or sell shares of its own stock. Burnes *v.* Burnes, 137 Fed. Rep. 781 (1905). Where all the stockholders assent thereto and creditors are not affected, a corporation may purchase shares of its own stock and agree to pay an annuity therefor, the corporation being entirely solvent, and especially will a transaction be upheld when it has been carried out for several years. Burnes *v.* Burnes, 132 Fed. Rep. 485 (1904); aff'd, 137 Fed. Rep. 781. A contract by which a corporation purchases the stock of some of the stockholders with the unanimous consent of all the stockholders, in order to dispose of dissentions and litigation, the vendors agreeing not to engage in a competing business for three years, is *prima facie* valid under New York law, and will be sustained, although the corporation becomes bankrupt, there being no proof that it was insolvent at the time of the transaction, even though the purchase was from officers and directors. *In re* Castle, etc. Co., 145 Fed. Rep. 224 (1906). A going corporation may purchase stock owned by its president in order to terminate his contract of employment and obtain his resignation as president, where the contract is a fair one and another party had agreed to purchase such stock from the corporation at once and subscribe for further capital stock. Joseph *v.* Raff, 82 N. Y. App. Div. 47 (1903); aff'd, 176 N. Y. 611. A corporation may purchase its own stock, but if it purchases such stock from a director the sale may be valid, but the price is not binding and the director will be allowed only what the stock is reasonably worth. Even though the stockholders for two years, with full knowledge of the facts, do not object, the corporation may defend against the agreed price, but may be obliged to pay what the stock was worth. Oliver *v.* Rahway, etc. Co., 64 N. J. Eq. 596 (1903). Where a New Jersey corporation having power to purchase its own stock and issue its bonds in payment therefor has made such an issue, the bonds may be enforced in *bona fide* hands, even though the stock so purchased was worthless. Hoskins *v.* Seaside, etc. Co., 68 N. J. Eq., 476 (1905). "The power of a corporation to purchase shares in its own capital stock is settled, as also is its power to agree with a stockholder that his shares shall be transferred to the corporation under certain circumstances." Lindsay *v.* Arlington, etc. Assoc., 186 Mass. 371 (1904). A street railway company which has purchased shares of its own stock is liable for the price,

is no statutory liability on stock, and if stockholders do not object, even though the stock turned out to be worthless. Stock so purchased by the company may be reissued and does not amount to a reduction of the capital stock. A statute prohibiting street railways from owning stock relates to stock in other companies. Leonard *v.* Draper, 187 Mass. 536 (1905). A by-law authorizing a corporation to buy the stock of a member who wishes to sell is a contract binding on a stockholder who wishes to sell, the corporation having been organized to purchase household supplies for the members and interest being paid instead of dividends. Such a purchase by the corporation is legal, even though it has no profits, it being practically not a purchase but a repayment. Lindsay *v.* Arlington, etc. Assoc., 186 Mass. 371 (1904). A corporation may purchase its own stock if the stockholders assent and the creditors are not injured. Rogers *v.* Ogden, etc., 30 Utah 188 (1905). A solvent corporation may purchase its own stock and keep it alive and treat it as an asset. Pabst *v.* Goodrich, 113 N. W. Rep. 398 (Wis. 1907). A mining company may purchase its own stock held by a superintendent, the purpose being to get rid of him on account of his bad management, the officers believing that the company is solvent. Copper, etc. Co. *v.* Costello, 95 Pac. Rep. 94 (Ariz. 1908). "A corporation may, if it acts in good faith, buy and sell shares of its own stock." Republic L. Ins. Co. *v.* Swigert, 135 Ill. 150 (1890); First, etc. Bank *v.* Peoria Watch Co., 191 Ill. 128 (1901). In Chicago, etc. R. R., *v.* Marseilles, 84 Ill. 145 (1876), the court said: "We entertain no doubt that a railroad company may, for legitimate purposes, purchase shares of stock which have been issued to individuals. Such is believed to have been the general custom of such bodies; nor have we known the power to have been questioned." A contract whereby the corporation agreed to take back the stock unless certain things were done within a certain time was sustained. Chicago, etc. R. R. *v.* Marseilles, 84 Ill. 643 (1877), where the court says, "the power of the directors of a company, when not prohibited by their charter to purchase shares of stock of their company," is well recognized; Clapp *v.* Peterson, 104 Ill. 26 (1882); Chetlain *v.* Republic L. Ins. Co. 86 Ill. 220 (1877); Havemeyer *v.* Bordeaux Co., 8 Nat. Corp. Rep. 127 (Ill. C. C. 1894); Fraser *v.* Ritchie, 8 Ill. App. 554 (1881), where a perfectly solvent concern sold certain property and took its own stock in payment. Under the decisions of Iowa a private corporation may purchase shares of its own capital stock. West *v.* Averill, etc. Co., 109 Iowa, 488 (1899).

A by-law allowing a stockholder to return his stock to the corporation at a fixed value is illegal. Vercoutere *v.* Golden State Land Co., 116 Cal. 410 (1897). See § 170, *supra*. Although a corporation has purchased its own stock, it cannot rescind the purchase and recover back the price unless it tenders back the stock. Bank of San Luis Obispo, etc. *v.* Wickersham, 99 Cal. 655 (1893). Where the majority stockholders cause the directors to purchase stock of them for the corporation at a price higher than the market price, the minority may cause the transaction to be set aside. Woodroof *v.* Howes, 88 Cal. 184 (1891). A corporation which has agreed to pay a person a certain sum for his stock in the corporation, if he will transfer it to a corporate creditor in payment of the corporate debt, is liable for that sum to the stockholder. Snyder *v.* Tunitas Petrol. Co., 72 Cal. 194 (1887).

In Georgia, in the case of Hartridge *v.* Rockwell, R. M. Charlt. 260 (1828), the court said: "If from the course of business or the state of things the capital of the bank cannot be use-

there is no reason why the *net profits* of a corporation should not

fully employed in loans, there can, I think, be no objection against the purchase of its own stock." The legislature, however, thought differently, and by the Penal Code of 1833 made such purchases a penal offense. In Robison *v.* Beall, 26 Ga. 17 (1858), the purchase was held to be authorized under a power to purchase goods, etc.

The directors are personally liable where they advance corporate funds to the vendee of stock of the company in order to enable him to purchase the stock. Green *v.* Hedenberg, 159 Ill. 489 (1896).

Where all the stockholders and all the directors cause the corporation to sign a note which is given to one of the stockholders in consideration of the sale of his stock to another stockholder, the corporation is bound. Solomon Co. *v.* Barber, 58 Kan. 419 (1897). The directors are not liable to the vendor of the stock for the failure of the corporation to complete their purchase for it of its own stock. Abeles *v.* Cochran, 22 Kan. 405 (1879).

Where, according to contract, stock sold to the corporation is appraised by the corporation, and the appraised price is actually paid to and received by the stockholder, he cannot maintain a bill to obtain a larger price, but must either rescind or sue at law. Tuttle *v.* Batchelder, etc. Co., 170 Mass. 315 (1898). A corporation, unless prohibited by statute, may purchase its own stock. New Eng. Trust Co., *v.* Abbott, 162 Mass. 148 (1894). In Dupee *v.* Boston Water-Power Co., 114 Mass. 37 (1873), it was held that a stockholder could not enjoin the purchase, the court saying: "In the absence of legislative provision to the contrary, a corporation may hold and sell its own stock, and may receive it in pledge or in payment in the lawful exercise of its corporate powers." See also Leland *v.* Hayden, 102 Mass. 542 (1869); Crease *v.* Babcock, 51 Mass. 525, 557 (1846), holding that the stockholders are not liable for the deficiency caused by part of the stock being owned by the corporation. Where, in order "to enable the company to keep its stock in the ownership of stockholders of its own choosing," each stockholder enters into an agreement with the corporation that in case he wishes to sell his stock it shall first be appraised and then offered to the corporation before it is offered to any one else, the refusal of the board of directors to make an appraisal, in accordance with the agreement, does not render the corporation liable in damages, inasmuch as it is clear that, even though the stock were appraised, the corporation would not buy it. Whiton *v.* Batchelder, etc. Corp., 179 Mass. 169 (1901).

Instead of subscribing for stock, a party may make a contract with a corporation to take the stock with the right to return it and receive back the purchase price within a certain time. Such a contract is legal, and the stock may be returned and the money recovered if corporate creditors' rights do not intervene. Vent *v.* Duluth, etc. Co., 64 Minn. 307 (1896). Where a corporation issues stock in payment for a patent-right, and agrees to take back the stock and pay the par value thereof at the end of five years if the purchaser so wishes, the purchaser may enforce the agreement. Browne *v.* St. Paul Plow Works, 62 Minn. 90 (1895). See also § 339, *infra*. *Cf.* § 170, *supra*. *Quo warranto* does not lie against a corporation for purchasing its own stock. State *v.* Minnesota, etc. Co., 40 Minn. 213 (1889). In the case of Costello *v.* Portsmouth, etc. Co., 69 N. H. 405 (1899), the court upheld a by-law of a brewing company which gave the corporation a lien on the stock of its stockholders for any debts due from them to the corporation, and also gave the corporation a right to

be applied to purchasing its stock, instead of being used for a divi-

appropriate such stock at its par value in liquidation of such debts when overdue three months. The corporation actually did so appropriate the stock of one of its stockholders in that manner and afterwards sold the stock to a third party, and the court upheld the transaction.

An agreement of a corporation to accept its own stock in payment for land sold by it is not *per se* an *ultra vires* contract. Thompson *v.* Moxey, 47 N. J. Eq. 538 (1890). A contract between a corporation and an employee that he should purchase eighty shares of stock in the former, and in case of his discharge the corporation would buy said stock from the employee, is enforceable against the corporation. Chapman *v.* Iron, etc. Co., 62 N. J. L. 497 (1898). A corporation may purchase shares of its own stock, subject to the right of creditors to object thereto if the capital stock is impaired thereby. Blalock *v.* Kernersville Mfg. Co., 110 N. C., 99 (1892).

In Ohio the early case of Taylor *v.* Miami Exporting Co., 6 Ohio, 176 (1883), held that a bank may receive from the stockholders transfers of stock in payment of debts previously contracted by them. See also State *v.* Franklin Bank, 10 Ohio, 91, 97 (1840). But in Coppin *v.* Greenlees, etc. Co., 38 Ohio St. 275 (1882), the court refused to enforce an executory contract for the sale to the corporation of its own stock. The proposed purchase was held to be invalid under the constitutional provision imposing a personal liability on all stockholders. But see Morgan *v.* Lewis, 46 Ohio St. 1 (1888).

In Pennsylvania, in Eby *v.* Guest, 94 Pa. St. 160 (1880), and Early & Lane's Appeal, 89 Pa. St. 411 (1879), it was held that "the assignment of the stock of a corporation to itself, as collateral security for a loan, divests the title of the assignor so far as to prevent a sale of it under a fi. fa. against the assignor." But in Coleman *v.* Columbia Oil Co., 51 Pa. St. 74 (1865), where a stockholder had accepted the benefit of the purchase and then objected to its legality, the court said: "The employment of corporate funds to speculate in the stock of the company to which the funds belong is not a practice to be encouraged; but the present plaintiff is not in position to censure the practice." He "should have sought an injunction against the company to restrain the purchase, or to cancel it if done before he had knowledge of it; or if he would bring an action at law, he should have declared for his share of the funds which he complains were misapplied in buying the shares." A by-law of a corporation, organized by farmers to deal in grain and merchandise, may provide that on the decease of any stockholder the corporation shall buy his stock, and such provision may be enforced where the corporation has undivided profits sufficient to purchase the stock of a deceased stockholder. Howe, etc. Co. *v.* Jones, 21 Tex. Civ. App. 198 (1899).

Where by unanimous consent a corporation buys shares of its own stock and issues notes therefor, such notes may be enforced after all other creditors have been paid. Van Brocklin *v.* Queen, etc. Co., 19 Wash. 552 (1898). A person who buys out and assumes the liabilities of a corporation cannot repudiate its note in payment for some of its own stock, he knowing of the transaction when he assumed the debts. Miller *v.* Washington Southern Ry., 11 Wash. 414 (1895). Stockholders cannot defeat their liability on stock by setting up that they subscribed in behalf of the corporation itself and on the secret agreement that they should not be held liable. Barto *v.* Nix, 15 Wash. 563 (1896). A

dend.[1] The federal court has said: "It is a mooted question in this country as to whether a corporation may purchase shares of its own stock. Many states forbid it. In the absence of a charter prohibition or a statute forbidding it, there is no reason why the stock should not be purchased, at least with the profits derived from the business of the corporation, where all the stockholders assent thereto." [2] The cases which appear to uphold a contrary rule are found, upon close examination, to come within the exceptions given above.[3] Under the reserved right to amend charters, the legisla-

corporation may issue stock to an employee on an agreement to buy it back in case he is discharged. Yeaton *v.* Eagle, etc. Co., 4 Wash. St. 183 (1892).

Where a corporation has power to reduce its capital stock, it may purchase from one of its stockholders his stock and give him in payment therefor his *pro rata* share of the assets of the corporation, the corporation being solvent. This amounts to a reduction of the capital stock, and a subsequent creditor of the corporation cannot complain. Shoemaker *v.* Washburn, etc. Co., 97 Wis. 585 (1897). A manufacturing corporation has power to buy its own stock, but its business manager has no inherent authority to make such purchase. Calteaux *v.* Mueller, 102 Wis. 525 (1899). Where, by reason of dissensions, a solvent corporation buys the stock which a director holds in the company and for two years continues the business and then becomes insolvent, the trustee in bankruptcy cannot attack the transaction, all creditors at the time of the transaction having been paid. The property of the corporation is not a trust fund for creditors except for those who are interested at the time of the transaction. Marvin *v.* Anderson, 111 Wis. 387 (1901). See also, as supporting the doctrine, Farmers', etc. Bank *v.* Champlain Transp. Co., 18 Vt. 131, 139 (1846); Iowa Lumber Co. *v.* Foster, 49 Iowa, 25 (1878), under a power to purchase "property that may be deemed desirable in the transaction of its business." A purchaser of stock which has assented to the corporation purchasing its own stock cannot complain. Where by statute the preferred stock shall not exceed two-thirds of the capital stock paid in for cash or property, a preferred stockholder cannot question the value of property received in payment for the preferred stock in a suit instituted by him to enjoin the corporation purchasing its own stock, as allowed by statute, where the assets, less the debts, equal the preferred stock outstanding. Hodge *v.* United States Steel Corp., 53 Atl. Rep. 601 (N. J. 1902). This decision was reversed on other points in 64 N. J. Eq. 807 (1903).

1 Quoted and approved in Dacovich *v.* Canizas, 44 S. Rep. 473 (Ala. 1907). In the preceding case after the corporation had purchased shares of the stock, the directors transferred it to themselves for a consideration, but the court at the instance of other stockholders set aside the latter transfers and enjoined the voting of the stock.

2 The court, however, enjoined the company from transferring nearly all of its property to a few stockholders in purchase of their stock, but refused to appoint a receiver. Lowe *v.* Pioneer Threshing Co., 70 Fed. Rep. 646 (1895).

3 Thus, in German Sav. Bank *v.* Wulfekuhler, 19 Kan. 60 (1877), the bank was insolvent when the stock was purchased by it. The purchase was declared illegal. In Bent *v.* Hart,

ture may authorize a corporation to reduce its capital stock and issue bonds in exchange for such part of the capital stock as is retired, especially where the original charter authorized the corporation to decrease its capital stock by purchasing its own stock.[1] All of the American courts coincide in the view that a corporation may take shares of its own stock in payment of or security for

10 Mo. App. 143 (1881), the corporation did not purchase its own stock. The stock was purchased by another corporation, and the transaction was sustained. In St. Louis, etc. Co. *v.* Hilbert, 24 Mo. App. 338 (1887), the stock purchased by the corporation was not paid-up stock. In State *v.* Oberlin Building Assoc., 35 Ohio St. 258 (1880), the peculiar purposes and articles of association of a building association governed the decision. In Barton *v.* Port Jackson, etc. Co., 17 Barb. 397 (1854), the company mortgaged its road in order to raise money to buy the stock. Where a corporation buys shares of its own stock from one of its stockholders, it may repudiate the transaction and defend a suit by the stockholder on a note given for the stock. The court said that such a purchase should not be to the advantage of a few favored stockholders, to the injury of the great body of them. Price *v.* Pine Mountain, etc. Co., 32 S. W. Rep. 267 (Ky. 1895). In Crandall *v.* Lincoln, 52 Conn. 73, 99, 100 (1884), where stock was bought for the corporation by a corporate agent, the latter was held liable to the receiver of the corporation for the money so expended. The court said: "The statute forbidding the company to make dividends payable from the stock, and to loan money upon a pledge of its stock, by necessary implication forbids the company from purchasing its stock. . . . As a rule, to which there are few, if any, exceptions, when a stockholder conveys his stock to the company and receives in return a portion of the capital, he holds the money so received subject to the superior equities of creditors." A party who loans money to a corporation knowing that the money is to be used by the company to buy shares of its own capital stock cannot collect his debt, the act being *ultra vires*. Adams, etc. Co. *v.* Deyette, 8 S. D. 119 (1895). A by-law that a land company will accept its stock in payment for land will not sustain a suit for specific performance brought by a purchaser of land who wishes to pay in stock, the by-law having been practically disregarded. Kelley *v.* York, etc. Co., 94 Me. 374 (1900). A corporation has no power to *traffic* in its own stock. Herring *v.* Ruskin, etc. Assoc., 52 S. W. Rep. 327 (Tenn. 1899). Even though the company's name is signed to a contract by which the owners of the stock sell the stock, yet the company is not liable for a breach of the contract on the part of either party, or for fraudulent representations made in connection with it. Home, etc. Co. *v.* Collins, 31 Ind. App. 493 (1903).

[1] Venner Co. *v.* United States, etc. Corp., 116 Fed. Rep. 1012 (1902). By its certificate of incorporation a New Jersey corporation may have power to purchase and retire part or all of its preferred stock, and to issue in payment therefor its bonds or to sell its bonds and use the proceeds to retire such preferred stock, or it may purchase and hold such stock for re-issue. The offer to purchase must be made *pro rata* to all the preferred stockholders. Under the reserved rights to amend, alter, or repeal charters, the rights of stockholders among themselves cannot be impaired, except as required by public interests; but, while it is true that the charter con-

antecedent debts due to the corporation.[1] A corporation may take its own stock by way of gift[2] or bequest.[3] Inasmuch as a corpora-

stitutes a contract between the stockholders, yet under this reserved power the legislature may authorize existing corporations to purchase and retire preferred stock and issue in lieu thereof mortgage bonds, such amendment being construed to be in behalf of the public interest. Where a corporation has charter authority to retire its preferred stock and issue mortgage bonds in lieu thereof, on a vote of the directors and stockholders, a minority stockholder cannot enjoin such action on the ground that it would be disastrous in its effect on the corporation. Berger *v.* United States Steel Corp., 63 N. J. Eq. 809 (1902).

1 The leading case is City Bank *v.* Bruce, 17 N. Y. 507 (1858), where a corporation received $133,000 of its own stock in payment of debts due the corporation, the court saying it is "not aware of any common-law principle which forbids it." See also Verplanck *v.* Mercantile Ins. Co., 1 Edw. Ch. 84 (1831); Chillicothe, etc. Bank *v.* Fox, 3 Blatchf. 431 (1856); s. c., 5 Fed. Cas. 632, where the stock was taken in payment of a debt due the corporation. A solvent bank may as against its creditors receive its own stock in payment of a debt due to it. Draper *v.* Blackwell, etc. 138 Ala. 182 (1903.) In Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418, 451 (1851), the debtor who had given stock to a corporation in payment of a debt was allowed to deny the amount of the debt and to take back the stock upon payment of the amount actually due. A company may receive its own stock in satisfaction of a debt where it is necessary in order to protect the corporation from loss. Barto *v.* Nix, 15 Wash. 563 (1896). Where a bank desires to take its own stock from one of its debtors in payment of the debt, and in order to do so one of its directors takes the stock and gives his note to the bank on the understanding that he is not to be liable thereon, a receiver of the bank may enforce the note. Atwater *v.* Smith, 73 Minn. 507 (1898). A college corporation may, while solvent, receive its own stock in payment of a debt. Roach *v.* Burgess, 62 S. W. Rep. 803 (Tex. 1901).

2 Lake Superior Iron Co. *v.* Drexel, 90 N. Y. 87 (1882), where its legality was assumed. Where a corporation purchases its own stock such stock cannot be taxed. City of Worcester *v.* Board of Appeal, 184 Mass. 460 (1904). A tax on stock "issued and outstanding" applies to treasury stock. Knickerbocker, etc. Co. *v.* State Board, etc., 65 Atl. Rep. 913 (N. J. 1907). The court in the preceding case intimated that the treasury stock was illegally acquired by the corporation as a gift because it was originally illegally issued, there being no proof that it was issued for full value, but the reasoning of the opinion in that respect can hardly be commended. Stock purchased by the corporation itself and then re-issued is entitled to all dividends subsequently declared and this result cannot be avoided by the dividend being declared as payable to stockholders at a preceding date. Hartley *v.* Pioneer Iron Works, 181 N. Y. 73 (1905). Stock purchased by a corporation and then sold is issued stock. Hartley *v.* Pioneer Iron Works, 181 N. Y. 73 (1905). A corporation which holds stock in another corporation may agree to surrender a part of such stock in order to enable the latter company to proceed with its business, and such surrender is not *ultra vires*. Thomson *v.* Trustees, [1895] 2 Ch. 454. See also § 46, ch. III, *supra*.

3 Rivanna Nav. Co. *v.* Dawsons, 3 Gratt. (Va.) 19 (1846).

tion has power to buy its own stock, it may take a subscription for stock at par, and agree to repurchase the stock, no creditors or stockholders objecting thereto.[1]

The objection usually made to allowing a corporation to purchase its own stock is that thereby the corporate funds are expended and no property is received by the corporation, except the right to resell. This objection is merely a limit to the power of the corporation to purchase. In Illinois, the state where the right of the corporation to make such purchases is most clearly and decisively established, the collateral principle that such purchases are to be declared illegal and voidable at the instance of corporate creditors who are injured thereby is distinctly stated and rigidly applied.[2] If the corporation is insolvent at the time of the purchase, it is clearly an invalid transaction, and will be set aside.[3] The rule

1 Freemont Carriage, etc. Co. *v.* Thomsen, 65 Neb. 370 (1902). A corporation in selling its stock may agree to repurchase it at a specified time if the vendee so desires and if the president also makes such agreement he also may be held liable. Ophir, etc. Co. *v.* Brynteson, 143 Fed. Rep. 829 (1906). The agreement of a corporation to take back its stock at cost at the expiration of two years if the purchaser wishes, becomes void if the corporation is insolvent at that time. McIntyre *v.* Bement's Sons, 146 Mich. 74 (1906). A corporation may agree with a subscriber to its stock that it will repurchase the same in case it sells its franchises, the corporation being solvent. Wisconsin Lumber Co. *v.* Greene, etc. Co., 127 Iowa 350 (1904). A corporation may issue its stock in payment for property and agree to buy the stock back within four months at its par value. United States, etc. Co. *v.* Camden, etc., 106 Va. 663 (1907). A private corporation may purchase its own stock if the purchase is fair and free from fraud, if the corporation is not insolvent or being dissolved and creditors are not affected. Under such power the corporation may issue stock and agree to take it back in six months, if the purchaser so desires. Porter *v.* Plymouth, etc. Co., 29 Mont. 347 (1904). *Cf.* §§ 167–170, *supra.*

2 Clapp *v.* Peterson, 104 Ill. 26 (1882); Peterson *v.* Illinois Land, etc. Co., 6 Ill. App. 257 (1880). Where a corporation is insolvent and a stockholder knows that fact, he cannot sell his stock to the corporation in exchange for corporate property, and he will be compelled by the court, in behalf of then existing creditors, to return the property. Commercial Nat. Bank *v.* Burch, 141 Ill. 519 (1892); Butler, etc. Co. *v.* Robbins, 151 Ill. 588 (1894). But the selling stockholder, not knowing that his vendee buys for the corporation, is not liable. Johnson *v.* Laflin, 5 Dill. 65 (1878); s. c., 13 Fed. Cas. 758; aff'd 103 U. S. 800.

3 Currier *v.* Lebanon Slate Co., 56 N. H. 262 (1875); Alexander *v.* Relfe, 74 Mo. 495 (1881). Where a trust company, in order to carry through its consolidation with another trust company, causes a national bank to purchase in its behalf some of its stock, the money being advanced by the bank and the obligations of trust company employees guaranteed by the trust company being taken therefor, and the trust company fails, the bank cannot recover back the money from the assets of the trust company. It

goes still further, and declares that if a corporation, by a purchase of shares of its own capital stock, thereby reduces its actual assets below its capital stock and debts, or if the actual assets at that time are less than the capital stock and debts, such purchase may be set aside, and the guilty corporate officers, as well as the vendor of the stock, may be rendered liable thereon at the instance of a corporate creditor.[1] A stockholder in a bank however, who sells his stock to the cashier of the bank in the usual course of trade, and

was an illegal purchase by the trust company of its own stock, there being no express statutory authority to make such purchases. The bank being equally guilty cannot recover back its money. Maryland Trust Co. *v.* National Mechanics' Bank, 102 Md. 608 (1906). Notes given by an insolvent corporation in purchase of its own stock are invalid and cannot be enforced. *In re* Smith Lumber Co., 132 Fed. Rep. 618 (1904); aff'd 140 Fed. Rep. 988. A purchase by an insolvent bank of shares of its own stock from one who had just resigned as vice-president is illegal, and he cannot collect a certificate of indebtedness given him therefor. *Re* Columbian Bank, 147 Pa. St. 422 (1892). So also of a sale by the president even though he held the stock as executor of an estate. *Re* Columbian Bank, 147 Pa. St. 422 (1892). Where a manufacturing company, four months before it is adjudged insolvent and a receiver appointed, purchases shares of its own stock and gives its note in payment, such note cannot be enforced against the corporation, there being no proof that there were any net profits at the time of the transaction. Hamor *v.* Taylor, etc. Co., 84 Fed. Rep. 392 (1897); Roan *v.* Winn, 93 Mo. 503 (1887). Where a corporation which has no profits on hand issues its bonds in payment for its stock, the party so receiving the bonds cannot enforce them, but on the contrary remains liable for the unpaid subscription price of the stock, it not having been properly issued as paid-up stock, and he not being a *bona fide* holder. Hebberd *v.* Southwestern, etc. Co., 55 N. J. Eq. 18 (1896). Where a corporation uses its assets to buy its own stock, corporate creditors may follow such assets. Henderson *v.* Hall, 134 Ala. 455 (1900). An insolvent corporation cannot purchase shares of its own stock. Adams, etc. Co. *v.* Deyette, 5 S. D. 418 (1894); s. c., 8 S. D. 119. Where a corporation is in process of dissolution the directors have no power to use the corporate funds to purchase shares of its stock. Augsburg Land, etc. Co. *v.* Pepper, 95 Va. 92 (1897).

[1] A stockholder who sells his stock to the corporation itself, the latter being insolvent, may be compelled to restore the consideration received by him. Buck *v.* Ross, 68 Conn. 29 (1896), quoting and approving the text herein. Where a cashier sells his holdings of stock in the bank to the bank itself, and takes out the money, he may be compelled to repay the money. Central Bank, etc. *v.* Thayer, 184 Mo. 61 (1904). An insolvent corporation cannot turn over its property to one of its stockholders for his interest in the company. Howell *v.* Crawford, 77 Ark. 12 (1905). A judgment creditor of a corporation may object to a previous purchase by the corporation of its own stock, and may hold the person selling the stock liable for the amount received therefor, and the suit may be in equity. Hall & Farley *v.* Alabama, etc. Co. 143 Ala. 464 (1905). Even though a corporation purchases shares of its

has no reason to suppose that the cashier used bank funds to pay for the stock, is not liable to the bank for the money, even though it be-

own stock, which are but partially paid, this does not render the remaining stockholders liable for the balance due on such unpaid shares so purchased. Crawford *v.* Roney, 126 Ga. 763 (1906). A sale by a stockholder of his stock to the corporation may be set aside at the instance of a receiver, even though the corporation was not insolvent at the time of the sale, but the price was paid from the capital stock in violation of a statute. Tait *v.* Pigott, 32 Wash. 344 (1903). A receiver in behalf of corporate creditors can recover back money paid by the corporation out of its capital stock in purchase of its own stock. Tait *v.* Pigott, 38 Wash. 59 (1905). Where a corporation purchases its own capital stock, the subscription price of which has not been paid in full, and the other stockholders take it from the corporation, they are liable for the unpaid subscription price. Crawford *v.* Roney, 61 S. E. Rep. 117 (Ga. 1908). Where all the stockholders consent to some of them selling their stock to the corporation they cannot afterwards object, and if part of it is resold by the corporation, the corporate creditors cannot object except to the extent that the price received on the resale does not equal the price paid for all the stock so purchased. Clark *v.* Clark, etc. Co., 115 N. W. Rep. 416 (Mich. 1908). A receiver of an insolvent bank may file a bill in equity to compel its president and another bank to pay back the price of stock in the insolvent bank which the insolvent bank, through the instrumentality of its president, who was also cashier of the other bank, had purchased of the other bank on the eve of the insolvency of the former. Bridgens *v.* Dollar Sav. Bank, 66 Fed. Rep. 9 (1895). Even though a receiver is in charge, yet a judgment creditor may file a bill to compel a stockholder to pay back an illegal dividend and also to account for property transferred to him by the corporation for a portion of his stock, the receiver being made a party defendant. Bowker *v.* Hill, 115 Fed. Rep. 528 (1879). A corporation having no surplus profits cannot purchase shares of its own stock, and where a director sells his stock ostensibly to the president, but really to the corporation itself, a judgment creditor of the corporation may compel him to refund the price, even though the director took in payment the notes of the president, which notes were afterwards paid by the checks of the corporation, the books of the company showing that the purchase as originally made was in fact for the corporation. Hall *v.* Henderson, 126 Ala. 449 (1900). Where a bank illegally holds its own stock and induces a person to take it and give his own note therefor, on the understanding that such note is merely for the accommodation of the bank and is not to be collected, a receiver of the bank cannot enforce the note, unless it is shown that the bank is insolvent or that debts exist. Shuey *v.* Holmes, 20 Wash. 13 (1898); s. c., 22 Wash. 193. Where the treasurer uses the funds of the corporation to pay for stock in the corporation itself, which he and other stockholders have purchased, he may be compelled, upon corporate insolvency, to refund the money, even though he took the funds from the treasury with the consent of all the stockholders. *Re* Brockway Mfg. Co., 89 Me. 121 (1896). Fraser *v.* Ritchie, 8 Ill. App. 554 (1881), holds that the right of the corporation to purchase its own stock is subject to certain restrictions, "one of which is that it shall not be done at such

comes insolvent.[1] Where bonds are issued to the stockholders for their stock, such bonds will be paid only after other creditors have been paid.[2] Subject to the above conditions, not even a dissenting stockholder can complain of the purchase by a corporation of shares of its own stock.[3] Although a company buys its own stock from a stockholder, subsequent creditors cannot complain.[4]

time and in such manner as to take away the security upon which the creditors of the corporation have the right to rely for the payment of their claims; or, in other words, so as not to diminish the fund created for their benefit. Each case must therefore depend upon and be determined by its own facts and circumstances." See also Gillet *v.* Moody, 3 N. Y. 479 (1850). Where directors and stockholders desire to sell the enterprise, and do so by paying for their stock out of the corporate funds, and then reinsuring all risks in another company, and turning over everything to the latter, a receiver of the company so sold out may hold a director liable for moneys so paid out. Guild *v.* Parker, 43 N. J. L. 430 (1881). A receiver of a corporation seeking to set aside a purchase of stock by the corporation itself must tender back the stock before suing to recover the money. Pierson *v.* McCurdy, 33 Hun, 520 (1884); aff'd 100 N. Y. 608. In *Re* Republic Insurance Co., 3 Biss. 452 (1873); s. c., 20 Fed. Cas. 544, where the insolvent corporation had, some three years previously, when the corporation was solvent, purchased stock of various stockholders and still held it, the court held that these old stockholders were not liable for the unpaid subscription price thereof. In Farnsworth *v.* Robbins, 36 Minn. 369 (1887), the receiver of an insolvent company recovered from a stockholder whose stock the company had purchased. A scheme whereby the corporation takes back the stock and issues certificates of indebtedness for it is invalid as against creditors. The latter are entitled to the assets in preference to the former. Heggie *v.* People's, etc. Assoc., 107 N. C. 581 (1890). Although a company buys its own stock from a stockholder, subsequent creditors cannot complain. Rollins *v.* Shaver, etc. Co., 80 Iowa, 380 (1890). Where a corporation uses its profits to buy its own stock, the remaining stockholders are not liable on the statutory liability attaching to the stock so purchased by the corporation. Moon, etc. Co. *v.* Waxahachie, etc. Co., 13 Tex. Civ. App. 103 (1896); aff'd 89 Tex. 511 (1896). Even though the directors have sold preferred stock held by them to the corporation and taken its notes therefor when the corporation was insolvent, yet a receiver should not be appointed at the instance of a stockholder. The remedy is an injunction and accounting. Empire Hotel Co. *v.* Main, 98 Ga. 176 (1896). A judgment creditor's bill is multifarious where it asks to hold the defendant liable on a subscription for stock, and as an officer for causing the corporation to buy its own stock, and as an outsider for obtaining real estate of the company without consideration, and as an outsider misrepresenting the condition of the company. First Nat. Bank *v.* Peavey, 75 Fed. Rep. 154 (1896).

1 Corn *v.* Skillern, 75 Ark. 148 (1905).

2 *In re* Estate, etc., 202 Pa. St. 589 (1902).

3 Dupee *v.* Boston Water-Power Co., 114 Mass. 37 (1873). See § 282 as to the power of a corporation to purchase stock in order to reduce its capital stock.

4 Rollins *v.* Shaver, etc. Co., 80 Iowa, 380 (1890). Where the incorporators

§ 312. Frequently statutes are passed expressly prohibiting a corporation from purchasing shares of its own stock. The national banks in this country are prohibited from so doing by the statutes of the federal government.[1] In New York, by statute, certain cor-

organize before the minimum capital is subscribed, they are liable to corporate creditors under the Georgia statute up to the amount of such minimum capital, and it is no defense that before debts were incurred they sold their stock back to the corporation. Walters *v.* Porter, 59 S. E. Rep. 452 (Ga. 1907). A scheme by which a corporation purchases its own stock from the subscribers therefor may upon corporate insolvency be attacked by existing creditors or subsequent creditors who had no knowledge of the scheme. Alabama, etc. Co. *v.* Hall, 44 S. Rep. 592 (Ala. 1907). *Cf.* § 46 and §§ 167–170, *supra.*

1 U. S. Rev. Stat., § 5201. See Johnson *v.* Laflin, 5 Dill. 65 (1878); s. c., 13 Fed. Cas. 758; aff'd 103 U. S. 800, holding that, if a stockholder in good faith and without notice that the purchase is for the bank sells his stock to one who purchases for the bank, the sale is valid so far as he is concerned, and he is not liable thereon. See also Bank *v.* Lanier, 11 Wall. 369 (1870), holding that the bank cannot take its own stock in pledge. A national bank has no power to purchase its own stock except to prevent a loss on an existing debt. The bank may by a suit at law recover back the money paid for the stock without tendering the stock. Burrows *v.* Niblack, 84 Fed. Rep. 111 (1898).

When the president of a bank buys its stock for the bank itself, taking title in his own name, he is liable as a stockholder. The purchase for the bank, however, is void. Bundy *v.* Jackson, 24 Fed. Rep. 628 (1885). Although a national bank must sell its stock taken in payment of a debt within six months, it may sell on credit, taking a note in payment and the stock as collateral. Union Nat. Bank *v.* Hunt, 76 Mo. 439 (1882). The question whether a note given by a bank was in payment of its own stock is not a question giving jurisdiction to the federal courts. Chemical Bank *v.* City Bank, 160 U. S. 646 (1896). Where a national bank receives its own stock in pledge at the time of making the loan, and sells the stock as collateral, on failure of the debtor to pay, the latter cannot complain that the statute has been violated. National Bank of Xenia *v.* Stewart, 107 U. S. 676 (1882). See also Gold Min. Co. *v.* National Bank, 96 U. S. 640 (1877); Shoemaker *v.* National Mech. Bank, 31 Md. 396 (1869); O'Hare *v.* Second Nat. Bank, 77 Pa. St. 96 (1874); Stewart *v.* National Union Bank, 2 Abb. (U. S.) 424 (1869); s. c., 23 Fed. Cas. 68. Although a national bank is prohibited from taking its own stock as security, yet if it does so, the stock being taken in the name of the cashier, it may enforce the security. Only the government can object after the transaction has been completed. It is immaterial that the stock was transferred to the cashier individually and not "as cashier." Walden Nat. Bank *v.* Birch, 130 N. Y. 221 (1891). A transfer of the stock of a national bank to the bank in payment of a debt will not be set aside at the instance of the vendor as being in violation of the statute. Chapin *v.* Merchants' Nat. Bank, 14 N. Y. St. Rep. 272 (1888). A person who allows stock to stand in his name on the books of a national bank is liable on the statutory liability therefor, even though he held the stock as trustee for the bank itself. Lewis *v.* Switz, 74 Fed. Rep. 381 (1896). A national bank president and directors are not liable criminally for purchasing the stock of the bank

porations are prohibited from purchasing shares of their own capital stock.[1]

§ 313. *The stock is not merged, and it may be sold by the corporation.*—When a corporation buys shares of its own capital stock, the capital stock is not reduced by that amount, nor is the stock merged.[2] So long, however, as the corporation retains the ownership, the stock is lifeless, without rights or powers. It cannot be voted nor can it draw dividends, even though it is held in the name of a

for the bank itself. United States *v.* Britton, 107 U. S. 655 (1882); United States *v.* Britton, 108 U. S. 192 (1883). A stockholder in an insolvent national bank cannot avoid the statutory liability on the ground that he purchased the stock from the bank and that the bank prior to that time had purchased it, *ultra vires*. Lantry *v.* Wallace, 182 U. S. 536 (1901); Wallace *v.* Hood, 89 Fed. Rep. 11 (1898); aff'd, 182 U. S. 555.

1 "The evident intention was to prohibit a division of the capital, or any portion of it, among the stockholders, by whatever instrumentality the powers of the corporation in doing the act might be exerted." Gillet *v.* Moody, 3 N. Y. 479, 487 (1850). See also United States Trust Co. *v.* United States F. Ins. Co., 18 N. Y. 199, 226 (1858); Tracy *v.* Talmage, 14 N. Y. 162 (1856). But purchasers of stock from a banking corporation that had purchased it in violation of the statute cannot complain. They cannot impeach their own title. *Re* Reciprocity Bank, 22 N. Y. 9, 17 (1860). Nor can the vendor of the stock to the bank claim that the sale was invalid. He is estopped. United States Trust Co. *v.* Harris, 2 Bosw. 75, 91 (1857). See, in general, Barton *v.* Port Jackson, etc. Co., 17 Barb. 397 (1854). A statute giving a bank a lien on its stock for debts due to the bank from the stockholder is not nullified by another statutory provision prohibiting the bank from loaning money on its stock. Battey *v.* Eureka Bank, 62 Kan. 384 (1901).

2 State *v.* Smith, 48 Vt. 266 (1876); Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418, 451 (1851); City Bank *v.* Bruce, 17 N. Y. 507 (1858); Chillicothe, etc. Bank *v.* Fox, 3 Blatchf. 431 (1856); s. c., 5 Fed. Cas. 632, the court saying: "The stock was not extinguished or destroyed by the purchase thereof by the corporation;" Vail *v.* Hamilton, 85 N. Y. 453 (1881); American Ry. Frog Co. *v.* Haven, 101 Mass. 398 (1869); Commonwealth *v.* Boston, etc. R. R., 142 Mass. 146 (1886); *Ex parte* Holmes, 5 Cow. 426 (1826). A solvent corporation may purchase its own stock and keep it alive and treat it as an asset. Pabst *v.* Goodrich, 113 N. W. Rep. 398 (Wis. 1907). The fact that a corporation buys its own stock does not necessarily reduce the capital stock, inasmuch as the stock so purchased may be re-issued. Ralston *v.* Bank of California, 112 Cal. 208 (1896); Bank of San Luis Obispo *v.* Wickersham, 99 Cal. 655 (1893). A sale by a corporation of all its property does not entitle the vendee to stock in the corporation which the corporation itself has purchased on a sale for a delinquent assessment and not re-issued. Tulare, etc. Dist. *v.* Kaweah, etc. Co., 44 Pac. Rep. 662 (Cal. 1896).

An unincorporated association may purchase its own stock, and a question of whether a reduction of the capital stock is thereby effected is a question of intention. Booth *v.* Dodge, 60 N. Y. App. Div. 23 (1901). See also §§ 251, 282, *supra*.

trustee for the benefit of the corporation.[1] But at any time the corporation may resuscitate it by selling it and transferring it to the purchaser. Such sale may be made upon the authority of the board of directors.[2] It may be sold at its market value, and need not be held for its par value, as is necessary in an original issue of stock.[3] The question whether a director may buy the stock from the corporation is considered elsewhere.[4]

§ 314. *Purchase by a corporation of stock in another corporation—Purchase by a railroad.*—It may be stated as a general rule that a corporation has no implied power to purchase shares of the capital stock of another corporation. This rule has often been applied to railroad corporations. It has been firmly settled by well-considered cases that a railroad company, unless expressly authorized so to do, cannot purchase shares of stock in another railroad company.[5] If the rule were otherwise a railroad might practically

1 Quoted and approved in O'Connor *v.* International, etc. Co., 68 N. J. Eq. 67 (1904); aff'd, 68 N. J. Eq. 680. See § 613, *infra.*

2 Chillicothe Bank *v.* Fox, 3 Blatchf. 431 (1856); s. c., 5 Fed. Cas. 632; State *v.* Smith, 48 Vt. 266 (1876). See also § 282, *supra.* Stockholders cannot enjoin the corporate officers from selling shares of its own stock which it has purchased. Jefferson *v.* Burford, 17 S. W. Rep. 855 (Ky. 1891).

3 See § 46, ch. III, *supra.* It may be issued by way of a stock dividend. See ch. XXXII, *infra.* In Louisiana the purchase by a corporation of its own stock cancels the stock until re-issued. If, however, in the re-issue the corporation gives away the stock, the parties receiving it are liable to subsequent corporate creditors. No formal contract of subscription is necessary, but the mere taking of the stock is sufficient to render them liable. Belknap *v.* Adams, 49 La. Ann. 1350 (1897).

4 See § 70, *supra.*

5 See § 64, *supra.* The most important case is Central R. R. *v.* Collins, 40 Ga. 582, 636 (1869), where a stockholder in one railroad obtained an injunction against its purchase, for purposes of consolidation, of stock in a rival and competing railroad. The court declared the purchase to be beyond the corporate powers and contrary to public policy, and says, "it is a general principle that a railroad company, without express authority given by the legislature to make the purchase, cannot purchase stock in another railroad company." See also Angell & Ames, Corp., § 392. To same effect, Hazlehurst *v.* Savannah, etc. R. R., 43 Ga. 13, 57 (1871), the court saying: "If one railroad may, at its option, buy the stock of another, it practically undertakes a new enterprise not contemplated by its charter. This it cannot do by any implication. The power so to do must be clear." Eleven years' delay is fatal to a complaint that another corporation has purchased a majority of the stock of the corporation in which the complainant stockholder holds stock, and that such purchaser is diverting the traffic to its own line and is wrecking the corporation which it controls. Alexander *v.* Searcy, 81 Ga. 536 (1889). In Elkins *v.* Camden, etc. R. R., 36 N. J. Eq. 5 (1882), a similar injunction was granted. The court said (pp. 12, 14): "The purchase of a rival railroad is (not to speak of public policy) foreign to the objects

extend its road beyond its chartered limits by controlling another railroad corporation. The supreme court of the United States has

for which the defendant was incorporated. . . . As a purchase with a view to extinguishing competition, the transaction is clearly *ultra vires*." To same effect, Salomons *v.* Laing, 12 Beav. 339, 353, 377 (1850); Great Northern Ry. *v.* Eastern Counties Ry., 9 Hare 306 (1851), where the object was to control the corporation. The court said it was an "attempt to carry into effect, without the intervention of parliament, what cannot lawfully be done except by parliament in the exercise of its discretion with reference to the interest of the public." See also Maunsell *v.* Midland, etc. Ry., 1 Hem. & M. 130 (1863), relative to the power of a railroad company to subscribe for the stock of another railroad. In Central R. R. *v.* Pennsylvania R. R., 31 N. J. Eq. 475, 494 (1879), the defendant was enjoined from building another railroad by means of an independent corporation operated by "dummies." The court said: "A corporation cannot in its own name subscribe for stock or be a corporator under the general railroad law, nor can it do so by a simulated compliance with the provisions of the law through its agents as pretended corporators and subscribers of stock." Pearson *v.* Concord R. R., 62 N. H. 537 (1883), was a case where a railroad had purchased the controlling interest in the stock of a connecting railroad and was managing it in the interest of the former road. A suit by a stockholder of the defrauded road to enjoin such act was sustained. A foreign corporation cannot buy railroad stocks for the purpose of uniting competing lines, where domestic corporations are prohibited from so doing. Clarke *v.* Central R. R., 50 Fed. Rep. 338 (1892). In this case, however, on the final hearing the bill was dismissed. 62 Fed. Rep. 328 (1894). Where a railroad president uses its funds to purchase the stock of a construction company that has the stocks and bonds of a contemplated competing line which the construction company has agreed to build, the sale of the stock to such president may be attacked by parties who were defrauded by the party who sold the stock of the construction company. Langdon *v.* Branch, 37 Fed. Rep. 449 (1888). A railroad corporation which is advancing money to another corporation may take the bonds and stock of the latter as security. The West Virginia statutes do not prevent such act. Taylor County Court *v.* Baltimore, etc. R. R., 35 Fed. Rep. 161 (1888). Where the state has brought suit to forfeit the charter of a railroad company on the ground that a majority of its stock is held contrary to the statutes and constitution of the state by another railroad company, the case may be removed to the federal court if the latter company is an instrument of interstate commerce and purchased the stock for interstate-commerce purposes. It is also removable where the latter company claims that its charter existed before such constitution and statutes, and gives it a right to own such stock. State *v.* Port Royal, etc. Ry., 56 Fed. Rep. 333 (1893).

A railroad has no power to buy the stock of another railroad. Hamilton *v.* Savannah, etc. Ry., 49 Fed. Rep. 412 (1892); Mackintosh *v.* Flint, etc. R. R., 34 Fed. Rep. 582 (1888). See also Green's Brice's Ultra Vires, 91 (2d ed.). Where a railroad company, in the name of one of its leased lines, contracted to purchase a majority of the stock of still another line, the vendor representing that the last line was unincumbered, the first-mentioned company may avoid the contract by proving that an incumbrance rested on the road to be sold. Southwestern R. R. *v.* Papot, 67 Ga. 675

said that "not only is the purchase of stock in another company beyond the power of a railroad corporation, in the absence of an express stipulation in the charter, but the purchase of such stock in a rival and competing line is held to be contrary to public policy and void."[1] Where one railroad company illegally buys from an individual the stock of another railroad company, and pays partly in cash and partly by note, and the note is paid by a sale of the stock at pledgee's sale, the former company cannot hold the individual liable for the money so paid. Both parties are guilty of the illegality, and the contract being executed will not be disturbed.[2] The directors may be liable for causing the railroad company to purchase the stock of another railroad company, but the six years' statute of limitations is a bar to a stock-

(1881). A bondholder cannot object. Matthews *v.* Murchison, 15 Fed. Rep. 691 (1883). A suit by a state to enjoin the defendant railroad company from being managed by directors elected by the votes of stock of the company owned by a foreign railroad corporation *ultra vires*, and also to declare such votes and elections void, and also for a receiver, or, in lieu of all this, for a forfeiture of the charter, is not demurrable. State *v.* Port Royal, etc. Ry., 45 S. C. 470 (1895). One railroad corporation has no power to acquire the bonds of another railroad corporation in order to control the elections of the latter, such bonds having a voting power. State *v.* McDaniel, 22 Ohio St. 354, 368 (1872). A controlling stockholder in one railroad corporation may become the controlling stockholder in another railroad corporation. Havemeyer *v.* Havemeyer, 43 Super. Ct. (N. Y.) 506 (1878); 45 Super. Ct. (N. Y.) 464; aff'd 86 N. Y. 618. Even though a railroad which owns stock in another railroad sells such stock to a copartnership in which one of the directors is a partner, yet the court will not enjoin the sale if it is a fair one. Ryan *v.* Williams, 100 Fed. Rep. 172 (1900). Even though one railroad company owns the majority of the stock of another railroad company and purchases the property of the latter at a foreclosure sale thereof, yet, if there was no actual fraud, the minority stockholders of the insolvent company cannot complain, especially where they waited seventeen months and allowed large expenditures to be made in reliance on the sale. Rothchild *v.* Memphis, etc. R. R., 113 Fed. Rep. 476 (1902). Stock held by one corporation in another cannot be voted where its charter has been forfeited and a proxy given by its directors had been revoked by a part of them leaving the remainder in minority and the stock held by it had been returned to the corporation and canceled. *In re* Delaware River, etc. R. R., 68 Atl. Rep. 1104 (N. J. 1908).

1 Louisville, etc. R. R. *v.* Kentucky, 161 U. S. 677, 698 (1896), citing the above text. See also note 5, p. 876, *infra*. Where one corporation purchases a majority of the stock of another corporation, thereby creating a tendency to restrain competition, the purchase is illegal, even though a complete monopoly would not result. Minority stockholders of the purchasing corporation may enjoin the purchase. Dunbar *v.* American, etc. Co., 224 Ill. 9 (1906).

2 Cincinnati, etc R. R. *v.* McKeen, 64 Fed. Rep. 36 (1894).

holder's suit to hold them liable, no fraud being alleged.[1] In some instances, particular corporations, by their charters, are given the power to purchase other railroad stocks, and in other instances general statutes to that effect prevail.[2] In Pennsylvania by statute one railroad may purchase stock in another railroad, if the two are not parallel or competing.[3] Under a statute authorizing the stockholders by an amended certificate to change the objects of the corporation, the certificate may be amended so as to give a corporation power to purchase stock in other corporations.[4] In some of the states, prohibitions against such purchases are placed in the constitution of the state.[5] Even though a railroad purchases the stock of another

1 Whitwam *v.* Watkin, 78 L. T. Rep. 188 (1898).

2 See Baltimore *v.* Baltimore, etc. R. R., 21 Md. 50 (1863); Columbus, etc. Ry. *v.* Burke, 19 Week. L. Bull. 27 (Ohio, 1887); Zabriskie *v.* Cleveland, etc. R. R., 23 How. 381 (1859), as to the Ohio statute. In White *v.* Syracuse, etc. R. R., 14 Barb. 559 (1853), a general law allowing any New York railroad to *subscribe* to the stock of the Great Western Railroad, Canada West, was held constitutional and valid. See also Matthews *v.* Murchison, 17 Fed. Rep. 760 (1883), on the North Carolina act. As to the Kansas act allowing such purchases, see Atchison, etc. R. R. *v.* Fletcher, 35 Kan. 236 (1886); Atchison, etc. R. R. *v.* Cochran, 43 Kan. 225 (1890). In the case of Ryan *v.* Leavenworth, etc. Ry. Co., 21 Kan. 365 (1879), the court held that a railroad company having the power "of acquiring by purchase and otherwise and of holding or conveying real and personal estate which may be needful to carry into effect fully the purposes and objects of this act," might buy the stock of a connecting railroad company. This was approved by the circuit court of the United States in Venner *v.* Atchison, etc. R. R. Co., 28 Fed. Rep. 584 (1886). In Kimball *v.* Atchison, etc. R. R., 46 Fed. Rep. 888 (1891), the court held that the Atchison, Topeka, & Santa Fé Railroad Company had power under its charter to buy a majority of the stock of the St. Louis & San Francisco Railway, a partially competing line. Under the statutes of Pennsylvania it is legal for a railroad company to own all the stock of a mining company which owns land, and such land does not escheat. Commonwealth *v.* New York, etc. R. R., 132 Pa. St. 591; 139 Pa. St. 457 (1891). In New York, by statute, a railroad company may purchase shares of stock in another railroad company. Oelbermann *v.* New York & Northern R. R., 77 Hun, 332 (1894). Under the statutes of New Jersey a steam railroad company may acquire the stock and bonds of a street railway company. State *v.* Atlantic City, etc. R. R., 69 Atl. Rep. 468 (N. J. 1908).

3 Northern, etc. R. R. *v.* Walworth, 193 Pa. St. 207 (1899).

4 Meredith *v.* New Jersey, etc. Co., 59 N. J. Eq. 257 (1899); aff'd, 60 N. J. Eq. 445.

5 By the constitution of Pennsylvania any railroad corporation is forbidden to control any other railroad corporation owning or having under its control a parallel or competing line. Under this provision the Pennsylvania Railroad Company was enjoined from purchasing a majority of the stock of the South Pennsylvania

railroad in violation of the charter of the former, yet, if subsequently the legislature passes a law authorizing any corporation to purchase and own the stock of other corporations, the illegality of the above-mentioned purchase is cured and the disability to hold such stock is removed, there being no longer any statute, rule of law, or principle of public policy forbidding such purchase.[1]

Where a railroad company has power to purchase, lease or consolidate with another railroad company, it may buy the stock of the latter company with a view to such consolidation, lease or sale.[2]

Railroad Company. In this noted case (Pennsylvania R. R. *v.* Commonwealth, 7 Atl. Rep. 368—1886), the court said that the ownership of a majority of the stock gave "control" in the sense of that word as used in the constitution. *Cf.* Pullman Palace Car Co. *v.* Missouri Pac. R. R., 11 Fed. Rep. 634 (1882); affirmed, 115 U. S. 587 (1885), construing the word "control" differently in a contract whereby the defendant was to use the plaintiff's cars over roads under the defendant's control. The supreme court of Pennsylvania, in Pennsylvania R. R. *v.* Commonwealth, 7 Atl. Rep. 368 (Pa. 1886), also sustained an injunction enjoining a corporation, a majority of whose stock was owned by the Pennsylvania Railroad Company from purchasing a majority of the stock of a road competing with the Pennsylvania Railroad Company. The constitution of Georgia forbids and prevents one railroad from buying the stock and control of a competing railroad scheme, even though the railroad of the latter is not even commenced and there is no intention of building it. Hamilton *v.* Savannah, etc. Ry., 49 Fed. Rep. 412 (1892). This constitutional provision applies only to roads competing in the state. Clarke *v.* Richmond, etc. Co., 62 Fed. Rep. 328 (1894). The constitutional provision in Georgia against the consolidation of competing lines of railroad does not necessarily apply to a consolidation, even though the two roads compete at certain points. Each case is decided on its own facts, and if on the whole the public is benefited rather than injured by the consolidation, it is not illegal under this constitutional provision. State *v.* Central, etc. Ry., 109 Ga. 716 (1900). Even though a railroad company owns stock in a coal company contrary to the statute, yet a person contracting with a coal company cannot raise that question. Hill *v.* Rich Hill, etc. Co., 119 Mo. 9 (1893). Under the Massachusetts statute prohibiting railroads from holding directly or indirectly the stock of any other corporation, a steam railroad cannot indirectly hold the stock of a street railroad by having a holding company as an intermediary. Attorney-General *v.* New York, etc. R. R., 84 N. E. Rep. 737 (Mass. 1908).

[1] *In re* Buffalo, etc. R. R., 37 N. Y. Supp. 1048 (1896), involving the same transaction as was involved in Milbank *v.* N. Y. etc. R. R., 64 How. Pr. 20. See also Joseph Bancroft, etc. Co. *v.* Bloede, 106 Fed. Rep. 396 (1901).

[2] Where a railroad corporation has power to consolidate with another, it may purchase the stock of that other in contemplation of the consolidation. Hill *v.* Nisbet, 100 Ind. 341 (1884). In the case Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497, 510 (1899), where one Indiana railroad purchased the stock of another, as a preliminary to consolidation, the court considered the two roads as being consolidated, even though the technical consolidation had not been carried out, on account of the possible effect upon certain municipal sub-

Even though the purchase by one corporation of the stock of another corporation is *ultra vires* of the former, yet a stockholder of the latter corporation cannot ordinarily object.[1] Where a street railway company employs a person as its agent to purchase a majority of the stock of another street railway company, and he does so, and the former pays him for the stock and for his services, he cannot refuse to deliver the stock on the ground that the company had no power to purchase.[2] A person who sells his stock in a ferry company to a trust company cannot repudiate the sale on the ground that the trust company purchased it for a foreign railroad company, which was not entitled to do business in the state, the stockholder not knowing that the purchase was for the railroad company.[3]

A railroad company owning all the stock and bonds of another company does not own the property of the latter. It cannot sue on a cause of action belonging to the latter.[4]

scriptions. A railroad corporation may purchase the stock of another railroad with a view to buying the railroad itself, where the sale of the railroad is authorized. Dewey *v.* Toledo, etc. Ry., 91 Mich. 351 (1892). Where a railroad company has power to lease another company's road, it may buy all the stock of the latter instead of taking a lease. Atchison, etc. R. R. *v.* Fletcher, 35 Kan. 236, 247 (1886). A railroad corporation having the power to buy or consolidate with other railroads may buy a controlling interest in the stock of another railroad. Wehrhane *v.* Nashville, etc. R. R., 4 N. Y. St. Rep. 541 (1886). But where one company buys the stock of another with no declaration of purpose of leasing the road, although the power to lease exists, a stockholder may enjoin the purchase of stock. Elkins *v.* Camden, etc. R. R., 36 N. J. Eq. 5 (1882). See also § 316, *infra*.

1 Oelbermann *v.* N. Y. etc. Ry., 77 Hun, 332 (1894); Milbank *v.* N. Y. etc. R. R., 64 How. Pr. 20, 27 (1882); excepting, of course, where the former corporation thereby controls the latter corporation and is misusing such control. Great Western Ry. *v.* Metropolitan Ry., 32 L. J. (Ch.) 382 (1863). Where a railroad buys a controlling interest in the stock of a competing railroad, it and its officers and dummies will be enjoined from voting such stock at the instance of minority stockholders, it being clear that if allowed to control the latter corporation the former corporation can enhance its profits at the expense of the latter corporation, by diversion of traffic. Memphis, etc. R. R. *v.* Woods, 88 Ala. 630 (1889).

The New Jersey chancery court will at the instance of a stockholder enjoin a New Jersey corporation from owning and voting stock in a Washington corporation, inasmuch as the Washington courts hold that a Washington corporation has no power to own stock in another Washington corporation, and may be enjoined from voting such stock. Coler *v.* Tacoma, etc. Co., 65 N. J. Eq. 347; rev'g 64 N. J. Eq. 117 (1903). *Cf.* §§ 615, 662, *infra*.

2 Nor on the ground that it had passed no resolutions authorizing him to purchase, and the former may recover the stock from a transferee with notice from the agent. Manchester St. Ry. *v.* Williams, 71 N. H. 312 (1902).

3 Newman *v.* Mercantile T. Co., 189 Mo. 423 (1905).

4 Fitzgerald *v.* Missouri Pac. Ry.,

Notwithstanding the above rules the savings, profits and advantages flowing from consolidation of railroad companies have been such as to lead to other devices for bringing about the same result. The laws of trade eliminating wasteful competition have been stronger than the laws of men.[1]

In England, for more than thirty years, parliament legislated against the consolidation of railroads. This legislation proved to be utterly ineffective, and in 1872 a parliamentary committee made an elaborate and exhaustive report on the subject, and said, among other things, that consolidation "had not brought with it the evils that were anticipated, but that in any event, long and varied experience had fully demonstrated the fact that, while parliament might hinder and thwart it, it could not prevent it." In the United States the holding company has been resorted to.[2] Some of the states have done the same as was done in England, namely, recognized the inevitable tendency and have regulated rather than prohibited. In Connecticut the legislature has gone so far as to even authorize the great railroad company, which owns practically all the railroads in that

45 Fed. Rep. 812 (1891). Although one railroad company owns a majority of the stock of another railroad company, yet the identity of the two is separate as regards being parties to suits. Jessup *v.* Illinois Cent. R. R., 36 Fed. Rep. 735 (1888). A corporation which owns a majority of the stock of another corporation, and buys goods of it, is not bound to see that the latter turns the funds over to a party who owned the goods and consigned them for sale. Wheeler *v.* New Haven Wire Co., 16 Atl. Rep. 393 (Conn. 1889). See on this subject § 6, *supra*, and §§ 663, 664, 709, *infra*.

1 In 1908 a special commission on commerce and industry in Massachusetts made a report on the question of allowing the New York, New Haven & Hartford R. R. Co. to own a majority of the stock of the Boston & Maine R. R. Co., and the following summary of its report is taken from the Railroad Gazette of March 27, 1908:

"The proposals for safeguarding the merger of the two large railroad systems, which combined, create a unique and firm railroad monopoly in the six New England states, are naturally the real nucleus of this important report. They can be summarized almost in a single sentence. They allow well-nigh free control and operation by the New Haven of the Boston & Maine—the localization features not being important—but subject to some pretty radical restrictions based on new and contingent conditions. Those restrictions are twofold: (1) The right of the state, if the merger in a public sense after five years is unsatisfactory, to buy in the New Haven's Boston & Maine shares, and (2) suspensive repeal of the voting power on Boston & Maine shares if control of the New Haven itself passes to an outside interest. On their face these provisions look severe; striking at a principle of ownership and opening a vista of future legislative interference. . . . To the twofold conditions named of Boston & Maine control, should be added a third one suggested by the commission for control by the New Haven of its Massachusetts trolley system by a Massachusetts corporation in which the state shall be represented on the board of directors with provision for sale of control if the plan after ten years works out badly for the public. This applies to the trolleys substantially the same policy as that outlined for the steam railroad merger and with the same arguments in its favor."

2 See § 317, *infra*.

state to condemn the stock held by minority stockholders in another railroad corporation, the majority of the stock of which was held by the main railroad company, and the Supreme Court of the United States has upheld this statute.[1]

§ 315. *Purchases of stock by banks, and pledges to banks.*—A banking corporation has at common law no power to purchase or invest in the stock of another corporation, whether that other corporation be itself a bank or of a different business.[2] A bank is

[1] A state may enact a statute authorizing a railroad corporation to condemn a minority of the stock in another company, the former company being already the owner of the majority of the stock, it being shown that the public interest so demands and the improvement of the railroad itself being of sufficient public interest. Offield *v.* N. Y., etc. R. R., 203 U. S. 372 (1906).

[2] Cited and approved in California Bank *v.* Kennedy, 167 U. S. 362, 369 (1897); Talmage *v.* Pell, 7 N. Y. 328, 347 (1852); Nassau Bank *v.* Jones, 95 N. Y. 115, 120 (1884); First Nat. Bank *v.* National Exch. Bank, 92 U. S. 122, 128 (1875), where, in reference to national banks, the court said: "Dealing in stocks is not expressly prohibited, but such a prohibition is implied from the failure to grant the power." Tracy *v.* Talmage, 14 N. Y. 162 (1856); Royal Bank of India's Case, L. R. 4 Ch. App. 252 (1869); Franklin Co. *v.* Lewiston Sav. Inst., 68 Me. 43 (1877). Where a bank desires to subscribe to the stock of a trust company, but cannot legally do so, and its directors give their note in payment, they are liable on the note to the receiver of the trust company. Adams *v.* Kennedy, 34 Atl. Rep. 659 (Pa. 1896). A bank has no power to buy stock in an insurance company, and the cashier of the bank has no authority to take stock in payment of a debt. Bank of Commerce *v.* Hart, 37 Neb. 197 (1893). A state bank has no power to purchase stock in a national bank as an investment, and hence is not liable on such stock in case the national bank becomes insolvent. Schofield *v.* Goodrich, etc. Co., 98 Fed. Rep. 271 (1899). *Contra*, Citizens' State Bank *v.* Hawkins, 71 Fed. Rep. 369 (1896); qualified in 92 Fed. Rep. 744. A bank may buy the stock of another bank under the express power of the former to discount securities, and as a stockholder is liable on the stock. Latimer *v.* Citizens' State Bank, 102 Iowa 162 (1897). Where the cashier uses the bank's funds to buy stock in another bank, the court will hold that such stock belongs to the first-mentioned bank except as against *bona fide* purchasers of such stock. Tecumseh, etc. Bank *v.* Russell, 50 Neb. 277 (1897). Where a bank buys wall paper at a sheriff's sale and organizes a corporation to sell the paper, all the stock of the corporation being owned by the bank, and guarantees debts thereafter incurred by such corporation, the bank is liable on such debts. American Nat. Bank *v.* National Wall Paper Co., 77 Fed. Rep. 85 (1896). Even though a bank, in order to handle real estate which it acquires on foreclosure, organizes a corporation and owns all the stock and is the sole creditor of such corporation, yet it cannot ignore the corporate existence and convey, encumber or deal with the property as its own. Watson *v.* Bonfils, 116 Fed. Rep. 157 (1902). Under a charter power to receive, in payment for stock, property "for the advancement of the purposes for which" the corporation was organized, a trust company may receive stock in a savings association, and

organized for the purpose of receiving deposits and loaning money, not for the purpose of dealing in stocks. Any attempt to engage in such transaction is a violation of its charter rights and of its duty towards the stockholders and the public. Thus, where a national bank invests its money in the stock of a savings bank, the investment is *ultra vires,* even though the savings bank becomes insolvent. The national bank is not liable on the statutory liability attached to such savings bank stock, even though the national bank received dividends on the stock.[1] So also where a national bank invests its money in the stock of another national bank the investment is *ultra vires,* and the former bank is not liable on such stock, even though the latter bank becomes insolvent.[2] A national bank cannot be compelled to carry out a contract in respect to stock in a rubber com-

even though by statute the payment of stock by property must first be authorized by the stockholders, yet if the corporation receives the stock and pledges it and receives a dividend thereon and retains it two years until it depreciates in value, it cannot then repudiate the transaction. Southern Trust, etc. Co. *v.* Yeatman, 130 Fed. Rep. 798 (1904); aff'd, 134 Fed. Rep. 810.

1 California Bank *v.* Kennedy, 167 U. S. 362 (1897), rev'g Kennedy *v.* California Sav. Bank, 101 Cal. 495. It is illegal for a national bank to purchase stock in a savings bank, and hence a national bank is not liable by reason of the statutory liability attached to such stock in the savings bank. Chemical Nat. Bank *v.* Havermale, 120 Cal. 601 (1898). Where a trust company, in order to carry through its consolidation with another trust company, causes a national bank to purchase in its behalf some of its stock, the money being advanced by the bank and the obligations of trust company employees guaranteed by the trust company being taken therefor, and the trust company fails, the bank cannot recover back the money from the assets of the trust company. It was an illegal purchase by the trust company of its own stock, there being no express statutory authority to make such purchases. The bank being equally guilty cannot recover back its money. Maryland Trust Co. *v.* National Mechanics' Bank, 102 Md. 608 (1906).

2 Concord First National Bank *v.* Hawkins, 174 U. S. 364 (1899), rev'g First Nat. Bank *v.* Hawkins, 79 Fed. Rep. 51; and 82 Fed. Rep. 301. Even though a national bank, as pledgee of national bank stock which stands on the books of the latter bank in the name of the pledgor, sells the stock on notice and buys it in at a nominal figure, yet if the pledgee does not have the stock transferred to himself on the books of the bank he cannot be held liable thereon, the pledgee having soon after the sale waived its rights as a purchaser at such sale. Robinson *v.* Southern, etc. Bank, 180 U. S. 295 (1901). A national bank has no power to invest its surplus funds in the stock of another national bank, and hence cannot be taxed as a stockholder. Shaw *v.* National, etc. Bank, 132 Fed. Rep. 658 (1904); aff'd, 199 U. S. 603. A stockholder in a national bank who is sued on the statutory liability cannot set up the defense that the money is to be used to pay a liability of such bank, as a stockholder in another insolvent national bank. Martin *v.* Wilson, 120 Fed. Rep. 202 (1903). One national bank has no power to purchase stock in another national bank, and if such

pany.[1] But it has been held in Pennsylvania that a national bank may be liable for losses on purchases and sales of stock by its cashier made with its consent and for its benefit, where it has received large profits therefrom.[2]

A pledge of stock to a bank as collateral security for a loan made by the bank at the time is of course legal. Such a pledge of stock is valid and may be enforced.[3] So also as regards a pledge of stock to a bank to secure a debt previously contracted and as regards the sale of stock to a bank in payment of a doubtful debt. Such transactions are of constant occurrence and are legal.[4] But a national

purchase is made in the name of a person who gets the money from the first-named bank in order to pay for the stock and gives his note to such bank for the money, he is liable to the receiver of the first-named bank on such note. Tillinghast *v.* Carr, 82 Fed. Rep. 298 (1897). See § 252, *supra.*

1 Metropolitan, etc. *v.* Lyndonville Nat. Bank, 76 Vt. 303 (1904). In this case the court stated that Wiley *v.* National Bank of Brattleboro, 47 Vt. 546, and Whitney *v.* National Bank of Brattleboro, 50 Vt. 389, had been disapproved by the supreme court of the United States.

2 National Bank, etc. *v.* Fridenberg, 206 Pa. St. 243 (1903).

3 Royal Bank of India's Case, L. R. 4 Ch. App. 252 (1869). "Making advances upon shares in public companies is within the ordinary course of the dealing of bankers." The stock pledged was stock in another bank. To same effect, *Re* Barned's Banking Co., L. R. 3 Ch. App. 105 (1867); Shoemaker *v.* National Mech. Bank, 1 Hughes, 101 (1869); s. c., 21 Fed. Cas. 1331, as applicable to national banks; also National Bank *v.* Case, 99 U. S. 628 (1878). Such a pledge to a national bank is not prohibited by the statutory provision that the bank shall not take a real-estate mortgage as security, although the property of the corporation whose stock was pledged consisted only of real estate. Baldwin *v.* Canfield, 26 Minn. 43 (1879). See also Sistare *v.* Best, 88 N. Y. 527 (1882). *Contra*, Franklin Bank *v.* Commercial Bank, 36 Ohio St. 350 (1881), where the legality of the pledge was denied, and the right of the pledgee to have the stock registered in its name not granted. On a reorganization it is legal for a bank owning some of the bonds to take part in such organization and accept stock in the new company. Deposit Bank *v.* Barrett, 13 S. W. Rep. 337 (Ky. 1890).

4 A national bank may accept railroad and other stocks in satisfaction of a doubtful debt and may also in compromising a contested claim pay additional money in order to acquire such stocks, if the transaction is in good faith, and with a view to avoid loss, and with a view also to a subsequent sale of such stocks. First National Bank *v.* National Exchange Bank, 92 U. S. 122 (1875). "No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may in the usual course of doing such business accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders." California Bank *v.* Kennedy, 167 U. S. 362, 366 (1897). A national bank holding stock as security may acquire title thereto by a sale. Westminster, etc. Bank *v.* New England, etc. Works, 73 N. H. 465 (1906). A savings

bank which has taken as security for a debt and then acquired shares of stock in an unincorporated association, formed for speculative purposes, is not liable on said stock, its acquisition having been *ultra vires*.[1] A national bank, which is a creditor of an insolvent manufacturing company, has no power to join in a reorganization plan by which it turns over its claim to a new corporation and takes stock of the new corporation in payment therefor, and hence if the new corporation fails the bank is not liable as a stockholder on a statutory double liability attaching to such stock.[2] Where a bank holds stock as collateral, and on sale purchases the same, the stock being in a coal company, it should sell the stock within a reasonable time. If it continues to hold it and a large loss results, the president is personally liable.[3]

Under a charter power to receive, in payment for stock, property "for the advancement of the purposes for which" the corporation was organized, a trust company may receive stock in a savings association.[4]

§ 316. *Purchases of stock by insurance, manufacturing, and other companies.*—The surplus of a company may be invested in such securities as the board of directors may deem best, and the board is not confined to securities in which a trustee may invest.[5] In Pennsylvania by statute corporations may invest their surplus in "good stocks or securities."[6] But "unless express permission be given to do so, it is not within the general powers of a corporation to purchase the stock of other corporations for the purpose of controlling their management." Such is the language of the supreme court of the

bank may accept stock in another corporation in settlement of a debt and may be held liable on such stock. Hill *v.* Shilling, 69 Neb. 152 (1903). A national bank may receive mining stock in payment of a bad debt. Morgan *v.* King, 27 Colo. 539 (1900). In the case of Tourtelot *v.* Whithed, 84 N. W. Rep. 8 (Dak. 1900), where a national bank canceled a debt of an embarrassed milling company in consideration of preferred stock of the latter, the court upheld the transaction.

1 Merchants' National Bank *v.* Wehrmann, 202 U. S. 295 (1906).

2 First National Bank *v.* Converse, 200 U. S. 425 (1906).

3 Stone *v.* Rottman, 183 Mo. 552 (1904).

4 And even though by statute the payment of stock by property must first be authorized by the stockholders, yet if the corporation receives the stock and pledges it and receives a dividend thereon and retains it two years until it depreciates in value, it cannot then repudiate the transaction. Southern Trust, etc. Co. *v.* Yeatman, 130 Fed. Rep. 798 (1904); aff'd, 134 Fed. Rep. 810.

5 Burland, etc. *v.* Earle, etc., [1902] A. C. 83. In this case the surplus was invested in bank shares and mortgages, and such investment was made in the name of a director. The court further stated that such investments should not be in speculative securities.

6 Act of March 31, 1868. P. L. 50, § 1.

United States.[1] An insurance company has no power or legal right to subscribe for stock in a savings bank and building association,[2] nor to purchase stock in another insurance company.[3] It is difficult to state any general rule as regards the right of a manufacturing or

1 De La Vergne, etc. Co. *v.* German, etc. Inst., 175 U. S. 40, 55 (1899). In this case a contract was made by which the president of an Illinois manufacturing corporation sold all its assets to a rival New York corporation and all the shares of stock in the Illinois corporation were also delivered to the New York corporation. The court held the transaction to be illegal on the ground that the president was not authorized to sell the assets, and on the further ground that the New York corporation was prohibited by its charter from purchasing stock in other corporations.

2 Mechanics', etc. Assoc. *v.* Meriden Agency Co., 24 Conn. 159 (1855), holding the insurance company not liable on the stock. An insurance company cannot invest in the stock of a bank. State *v.* Butler, 86 Tenn. 614 (1888). An insurance company holding stock in a national bank is liable thereon. Cooper Ins. Co. *v.* Hawkins, 71 Fed. Rep. 372 (1896). An insurance company may receive bank stock as the purchase price of a claim which it holds against an insolvent corporation, even though the statute prohibited the investment of the funds in stock. Moreover the transaction could not be rescinded without returning the stock. Fidelity Ins. Co. *v.* German Sav. Bank, 127 Iowa, 591 (1905).

An able New Jersey court has recently held that a scheme whereby an insurance company purchased a majority of the stock of a trust company, and the trust company purchased a majority of the stock of the insurance company, was illegal, and would be set aside at the instance of a dissenting stockholder, inasmuch as it resulted in self-perpetuating boards of directors, without the responsibility which would exist if those directors represented their own stock; and the court pointed out that the "Voting Trust Cases" in New Jersey had established the principle of law that agreements which sever the ownership of stock from the voting power are, in many instances, a violation of another principle of law, that "every stockholder is entitled to the benefit of the judgment of every other stockholder in the management of the affairs of the corporation." Robotham *v.* Prudential Ins. Co., 64 N. J. Eq. 673 (1903).

Although the statute exempts capital "invested in property which is otherwise taxed as property," yet an insurance company cannot claim any exemption because it owns stock in a bank, inasmuch as it had no power to subscribe for such stock. Commercial F. Ins. Co. *v.* Board of Revenue, 99 Ala. 1 (1892). Where in order to increase its apparent reserve directors of an insurance company borrow money and purchase worthless stock of another corporation, they are personally liable therefor to a receiver of the former, even though the stockholders ratified the transaction, it appearing that the directors controlled the stockholders' meeting. Bowers *v.* Male, 111 N. Y. App. Div. 209 (1906); aff'd, 186 N. Y. 28. A statute prohibiting insurance companies from investing in stocks of other corporations does not prevent it voting stock which it already holds in favor of a consolidation, which will give it stock in a consolidated company in exchange for the stock which it already holds and is voting. Morse *v.* Equitable, etc. Soc., 124 N. Y. App. Div. 235 (1908).

3 *Ex parte* British Nation, etc. Assoc., L. R. 8 Ch. D. 679 (1878), the court refusing to hold the former liable on a winding up; Berry *v.* Yates,

trading corporation to purchase shares of the capital stock of another corporation. It has been held that neither a note-selling company [1] nor a lumber company [2] has power to invest in the shares of a bank, nor a steamship company to subscribe for stock in a dry-dock company.[3] But a manufacturing company which buys bank stock and for several years receives dividends thereon with the knowledge of all its stockholders, is liable on a statutory liability attached to such stock.[4] On the other hand, it has been held that a steamboat company may purchase stock in another rival line.[5] It is clearly legal for a manufacturing corporation to take the stock of another in payment of a debt.[6] A manufacturing corporation has no implied power to buy the stock of another manufacturing corporation for the pur-

24 Barb. 199 (1857); Pierson *v.* McCurdy, 33 Hun, 520 (1884); aff'd on another point, 100 N. Y. 608.

1 Joint-stock Discount Co. *v.* Brown, L. R. 8 Eq. 381 (1869).

2 Sumner *v.* Marcy, 3 Woodb. & M. 105 (1847); s. c., 23 Fed. Cas. 384.

3 New Orleans, etc. Co. *v.* Ocean Dry-dock Co., 28 La. Ann. 173 (1876). Although a corporation purchases stock in another corporation contrary to statute, yet a *bona fide* holder of a note given in payment therefor may collect the note. Wright *v.* Pipe Line Co., 101 Pa. St. 204 (1882).

4 Hunt *v.* Hauser, etc. Co., 90 Minn. 282 (1903).

5 Booth *v.* Robinson, 55 Md. 419 (1880). This decision goes to the extreme length in allowing one corporation to invest in the stock of another. A manufacturing corporation is not presumed to be incapable of purchasing stock in another corporation. Evans *v.* Bailey, 66 Cal. 112 (1884).

6 Howe *v.* Boston Carpet Co., 82 Mass. 493 (1860). Where an iron company sells iron to a railway company, to be paid for in stock of the latter, the contract is void, and the iron company cannot, it seems, even recover the value of the goods delivered. Valley Ry. *v.* Lake Erie Iron Co., 46 Ohio St. 44 (1888). Where one telegraph corporation holds the bonds of another and exchanges the bonds for the stock of the latter corporation, a subsequent mortgagee of the first corporation cannot attack the validity of the bonds and mortgage on the property of the second corporation. Boston, etc. Co. *v.* Bankers', etc. Co., 36 Fed. Rep. 288 (1888). This case was affirmed *sub nom.* United Lines Tel. Co. *v.* Boston, etc. Co., 147 U. S. 431. The court said, in regard to this method of issuing the stocks and bonds, "it violated no principle of law, and no rule of good morals." In this case the usual and simple process of one company selling all its property to the other company and taking purchase-money mortgage bonds in payment, and then distributing the bonds among its stockholders, was not adopted, but the mortgage was given by the vendor company, the object being not to have the mortgage cover existing property of the vendee company. The vendee company at the same time agreed to construct new lines and place them under the mortgage. The whole scheme was awkward, and was sustained by the courts only after prolonged litigation. A corporation dealing in jewelry may sell its goods and take in payment stock in a park company. White *v.* Marquardt, 70 N. W. Rep. 193 (Iowa, 1897); s. c., 105 Iowa, 145 (1898). A corporation having power to buy and hold securities may take stock

pose of holding the stock permanently.[1] A company chartered to manufacture cars has no power to purchase stock of other corporations. The state may file *quo warranto* proceedings to forfeit the charter.[2] A construction company is not presumed to have power to hold stock in a railroad company.[3]

A land and lumber company having power to consolidate with a railroad company may own the stock and guarantee the bonds and preferred stock of such railroad company, the railroad of which is beneficial to the land company in its mining, manufacturing, and lumbering business.[4] One building association has no power to

in another company as collateral security. Calumet Paper Co. *v.* Stotts Inv. Co., 96 Iowa, 147 (1895).

1 Byrne *v.* Schuyler, etc. Co., 65 Conn. 336 (1895). Where the directors of a failing linen manufacturing corporation sell a part of the plant for stock of a knit-goods manufacturing corporation, a stockholder who does not complain for two years cannot hold the directors liable for his share of the property so exchanged for stock. Pinkus *v.* Minneapolis Linen Mills, 65 Minn. 40 (1896). A member of a mercantile firm cannot bind the firm by a subscription to the capital stock of a milling corporation. Patty *v.* Hillsboro, etc. Co., 4 Tex. Civ. App. 224 (1893). A furniture manufacturing company is not liable on a statutory liability on stock which it has subscribed and paid for in a hotel company. Knowles *v.* Sandercock, 107 Cal. 629 (1895). A lien of a corporation on stock for debts due it from its stockholders does not attach to stock purchased by another corporation, the latter having no power to purchase. Lanier Lumber Co. *v.* Rees, 103 Ala. 622 (1894). A company organized to manufacture, bleach, and dye cottons has power to issue its stock in exchange for and payment of stock in a dyeing corporation which had been organized by the consulting chemist of the former company for the purpose of exchanging the stock as above set forth. Joseph Bancroft, etc. Co. *v.* Bloede, 106 Fed. Rep. 396 (1901). An oil refining company may purchase stock in other oil refining companies. Patterson *v.* Tide Water Pipe Co., 12 Weekly Notes Cases, 452 (1882). A smelting company has no inherent power to purchase stock in another smelting company and hence may be enjoined by a stockholder of the latter company from voting such stock. Parsons *v.* Tacoma, etc. Co., 25 Wash. 492 (1901).

2 People *v.* Pullman's Palace Car Co., 175 Ill. 125 (1898).

3 In a suit by the receiver of an insolvent street railway company to hold a construction company liable on stock which, together with bonds, was issued for the construction of a street railway, the claim being that there was no consideration received for the stock, the bill in equity must allege that the construction company had power to acquire such stock. Doak *v.* Stahlman, 58 S. W. Rep. 741 (Tenn. 1899). *Cf.* § 64, *supra.*

4 Marbury *v.* Kentucky, etc. Co., 62 Fed. Rep. 335 (1894), holding also that it is not necessary that an actual consolidation be made (aff'g, on this point, Tod *v.* Kentucky, etc. Co., 57 Fed. Rep. 47). If the guaranty is within the power of the company, and no stockholder objects, it is not necessary to show that it was beneficial to the stockholders, nor to show any special consideration, other than the money paid for the securities having the guaranty. Marbury *v.* Kentucky, etc. Co., 62 Fed. Rep. 335 (1894). A land company may purchase the stock of a railroad company when the power

accept stock of another building association in payment for stock of the former.[1] A corporation formed to manufacture and sell gas has no power to buy shares of stock in other gas companies,[2] but of course the statutes may expressly allow it.[3] Where the statutes authorize mining corporations to consolidate or to sell their property one to the other for stock of the other, a mining corporation may purchase stock in another mining corporation.[4]

A steel spring company may use its surplus earnings to purchase shares of stock in an iron and steel company for the purpose of purchasing steel cheaply from the latter company, especially where there is a combination which has put up the price of steel.[5] A trust company may have power to hold as trustee and vote the majority of the stock of a railroad system.[6] An investment trust company has no power to purchase all the capital stock of another trust company unless expressly authorized so to do, and a statute authorizing it to purchase all kinds of stocks and other investment securi-

to do so is expressly stated in a special charter of the former company. Tod *v.* Kentucky, etc. Co., 57 Fed. Rep. 47 (1893). A corporation organized to buy, improve, and sell a certain piece of land has no power to subscribe for stock in a manufacturing corporation. Pauly *v.* Coronado Beach Co., 56 Fed. Rep. 428 (1893). Payment for stock in a lumber company cannot be made by turning in the stock of another lumber company, and where the stock of the latter was issued for property at a palpable overvaluation the subscriber to the former is entitled only to credit for the actual value of the latter stock. Lester, etc. *v.* Bemis, etc. Co., 71 Ark. 379 (1903).

1 German-American, etc. Assoc. *v.* Droge, 14 Ind. App. 691 (1895).

2 People *v.* Chicago Gas T. Co., 130 Ill. 268 (1889). While negotiations were pending between two gas companies for their consolidation by one company buying the stock of the other, upon a certain basis of capital and indebtedness, one of them, without the knowledge of the other, passed a resolution declaring a scrip dividend of ten per cent. on its capital stock, thus increasing its indebtedness by that amount. The certificates were accordingly issued; but after the consolidation, upon a bill filed for that purpose, the scrip was declared void. Bailey *v.* Citizens' Gas Light Co., 27 N. J. Eq. 196 (1876).

3 In the case Attorney-General *v.* Consolidated Gas. Co., 124 N. Y. App. Div. 421 (1908), it is held that the purchase by one gas company of the stock of other gas companies to prevent competition is legal, if it does not result in limiting the supply and increasing the cost of gas, inasmuch as a new competing company might be organized, and the court held that combinations controlling commercial commodities are different, inasmuch as a new competitor could not compete.

4 MacGinniss *v.* Boston, etc. Co., 29 Mont. 428 (1904). Vendors of all the stock of a mining company to an individual cannot attack the sale on the ground that the purchaser represented a corporation that had no power to purchase such stock. O'Brien *v.* Dunn, etc. Co., 141 Mich. 616 (1905).

5 Layng *v.* A. French Spring Co., 149 Pa. St. 308 (1892).

6 Clarke *v.* Richmond, etc. Co., 62 Fed. Rep. 328 (1894), dismissing the

ties does not sustain such a purchase.[1] Even though a statute prohibits a corporation from buying the stock of another corporation, yet if the purchase is made and partly paid for and a note given for the balance the corporation is liable on the note.[2]

It is not every one who may complain. A stockholder who participated cannot.[3] Neither may the purchasing corporation itself in most instances.[4] Where a corporation owns stock in another corporation and sells it and takes a note in payment, it is no defense to a suit on the note to set up the *ultra vires* of the above act.[5]

bill involved in Clarke *v.* Central R. R., etc. Co., 50 Fed. Rep. 338 (1892).

1 Anglo-American, etc. Co. *v.* Lombard, 132 Fed. Rep. 721 (1904), holding also that where an insolvent Kansas corporation transfers all its assets to a Missouri corporation, and at the same time all the stock of the former is transferred to the latter, the transaction is *ultra vires* and fraudulent, and the statutory liability of the stockholders in the Kansas corporation continues.

2 Watts Mercantile Co. *v.* Buchanan, 46 S. Rep. 66 (Miss. 1908).

3 Where the owner of all the stock of two mining corporations assigns the stock of the first to the second and then has the second corporation turn over the stock of the first corporation to a partnership in which he is interested, he cannot afterwards attack the transaction on the ground that the second corporation had no power to take the stock of the first corporation. Whalen *v.* Stephens, 193 Ill. 121 (1901). Where an iron manufacturing concern owns an iron manufacturing plant and stocks in an ore company and a railway company and a steamboat company and other corporations, and also a farm, and by consent of all the partners the firm is transformed into a corporation which takes all the property, including the stocks and the farm, one of the participants cannot afterwards complain that it was illegal for the corporation to acquire such stocks and the farm. Burden *v.* Burden, 159 N. Y. Rep. 287 (1899).

4 See § 681, *infra*. Although a hardware corporation has no power to become a stockholder in and borrower from a building association, yet if it does so it cannot repudiate a mortgage which it gave in connection with the transaction. Bowman *v.* Foster, etc. Co., 94 Fed. Rep. 592 (1899). An opera house company which has taken stock in a building association, in order to obtain a loan, cannot repudiate the loan on the ground that it was not authorized to take such stock. Blue, etc. Co. *v.* Mercantile, etc. Assoc., 53 Pac. Rep. 761 (Kan. 1898). A company organized to deal in jewelry and which takes stock of another company in exchange for its merchandise and then sells the stock cannot avoid liability on such stock by the plea of *ultra vires*. White *v.* Marquardt & Sons, 105 Iowa, 145 (1898). Where by statute one corporation cannot purchase stock in another corporation, except by unanimous consent of the stockholders, a note given by the corporation in payment for stock purchased without such consent cannot be enforced. Midland, etc. Co. *v.* Citizens', etc. Bank, 26 Ind. App. 71 (1901). A corporation may defend against an *ultra vires* purchase of stock by it and may recover back money paid therefor. Guarantee, etc. Co. *v.* Moore, 35 N. Y. App. Div. 421 (1898).

5 Holmes, etc. Co. *v.* Holmes, etc. Co., 53 Hun, 52 (1889); aff'd, 127

In a suit by a bridge company against a street railway for tolls, in accordance with a contract, the street railway cannot set up that all the stock of the bridge company has been purchased by the city and that the purchase was *ultra vires*.[1] A water-works company's charter will not be forfeited because another company has purchased a majority of its stock and illegally placed a mortgage upon its property.[2] Where one corporation subscribes for stock in another corporation and pays for such stock, and dividends are declared, the latter cannot refuse to pay the dividends to the former on the ground that the former had no power to subscribe for the stock.[3]

If the statutes do not prohibit one corporation buying the stock of another, and such a purchase is made by a corporation and subsequently the statutes expressly allow such purchase, the purchase will not be held void as against public policy, and may be held to have been legalized, even though of doubtful validity at the time of purchase.[4] In a few extreme instances it has been held that one company may be enjoined from voting stock in a rival corporation

N. Y. 252. See also § 312, *supra*. Even though a corporation has no power to purchase stocks, yet if stocks are sold to it in payment for its own stock, the purchase is legal as against everybody excepting the state, and especially as against parties who participated in the act. Burden *v.* Burden, 8 N. Y. App. Div. 160 (1896); aff'd, 159 N. Y. 287 (1899). Even though it be illegal for an irrigation company to subscribe for the stock of a land company, yet where it does so subscribe and turns in property in payment, and the stock is taken in the name of its secretary individually and not as secretary, the company may compel him to turn over the stock, even though he has pledged it for his personal debt, the pledgee, however, having taken with knowledge of all the facts. Bear River, etc. Co. *v.* Hanley, 15 Utah, 506 (1897). Where a gas company buys the stock of an electric light company and gives a mortgage upon its property as security for the payment of the purchase price, and this mortgage passes into the hands of another person, such last-named person cannot rescind the transaction on the ground that it was *ultra vires*. Woodcock *v.* First Nat. Bank, 113 Mich. 236 (1897). Nine years' delay on the part of a minority stockholder in complaining of the act of the directors in causing the corporation to purchase stock upon which they received a secret profit is fatal to the suit. Cullen *v.* Coal Creek, etc. Co., 42 S. W. Rep. 693 (Tenn. 1897).

1 Monongahela, etc. Co. *v.* Pittsburgh, etc. Co., 196 Pa. St. 25 (1900).

2 Commonwealth *v.* Punxsutawney, etc. Co., 197 Pa. St. 569 (1901).

3 Bigbee, etc. Co. *v.* Moore, 121 Ala. 379 (1899). In Louisiana it is held that where one corporation acquires stock in another corporation without authority so to do, the former may collect the dividends on such stock and may sell it, but cannot vote it, and hence that directors elected by such vote may be ousted by *quo warranto* proceedings. State *v.* Newman, 51 La. Ann. 833 (1899). As to voting, see § 615, *infra*.

4 Joseph Bancroft, etc. Co. *v.* Bloede, 106 Fed. Rep. 396 (1901). See also § 315, *supra*, on this point.

where such ownership of stock is illegal and controls the second corporation, and such control will be inequitably used.[1]

Where the statutes of a state authorize incorporation for any legal purpose, incorporation may be had for buying and selling shares of stock in other corporations.[2] Under a statute authoriz-

1 See § 315, *supra;* also § 615, *infra.* Where a consolidation is effected by one company buying all the stock of another company, and just before the transaction is completed the company whose stock is thus sold issues a dividend of interest-bearing securities in order to defraud the purchasing company, the latter may, by a bill in equity, have such securities canceled. Bailey *v.* Citizens' Gas, etc. Co., 27 N. J. Eq. 196 (1876).

2 Quoted and approved in Edmunds *v.* Illinois Central R. R., 36 Natl. Corp. Rep. (Chicago) 50 (1908). A stockholder in the corporation cannot enjoin it from purchasing stock in accordance with its articles of incorporation. Willoughby *v.* Chicago, etc. Co., 50 N. J. Eq. 656 (1892). A minority stockholder cannot enjoin the company from issuing its stock in payment for the stock of other similar companies on the ground that the price to be paid is excessive and that three of the directors are interested as stockholders in the other companies, where he does not prove that the price is excessive, and it appears that the stockholders will have to approve the transaction before the directors can issue the stock, and it appears also that the plaintiff owns but a very small amount of the stock. Geer *v.* Amalgamated, etc. Co., 61 N. J. Eq. 364 (1901). A corporation organized to deal in the stock of a stock-yard corporation and hold personal and real estate may buy competing stock yards; also buy the stock of a contemplated competing company; also buy, guaranty, and sell the bonds of such competing company; also pay money to settle suits against the first-named stock-yard company, and to bind stock-yard men not to erect competing yards for a specified term of years, within a certain territory; and may sell any or all of the above property and right to the first-named company. Ellerman *v.* Chicago, etc. Co., 49 N. J. Eq. 217 (1891). It is not for a creditor of the vendor of stock to raise the question whether the vendee—a corporation—had power to purchase the stock. Kern *v.* Day, 45 La. Ann. 71 (1893). The provision in the constitution of Georgia against the legislature authorizing any corporation to purchase the stock of another corporation does not apply except in cases where such purchase lessens competition, and hence does not prevent a trust company being given the power to purchase the stock of street railway companies, and hence such purchase cannot be enjoined at the instance of the state. Trust Co., etc. *v.* State, 109 Ga. 736 (1900). The statute of New York prohibiting the issue of stock at less than par, and of bonds at less than their fair market value, does not prohibit the issue of stock and bonds by a gas company in payment for the stock and bonds of a competing gas company, even though a high value is placed upon the franchise of such competing company as a part of the purchase price. Such a transaction is not illegal on the ground of creating a monopoly, nor is it *ultra vires*, provided the charter of the first company allowed it to purchase stock and bonds, as provided in the New York statutes. Rafferty *v.* Buffalo, etc. Co., 37 N. Y. App. Div. 618 (1899). A stockholder cannot maintain a suit against the corporation to enjoin other stockholders from selling their stock to a second corporation, such second corporation and the other stockholders not being par-

ing the stockholders by an amended certificate to change the objects of the corporation, the certificate may be amended so as to give a corporation power to purchase stock in other corporations.[1] A corporation having the charter power to purchase the stock of another corporation has power to guarantee dividends on such stock in selling it.[2]

Where a statute authorizes one corporation to "invest" in the stock of another corporation, this, by implication, prevents the former from purchasing the stock of the latter for the purpose of *control,* such purpose not being to "invest." [3]

Religious and charitable and other corporations, not for profit, have, it seems, implied power to invest their funds in stock of other corporations.[4]

ties to the suit. Ingraham *v.* National Salt Co., 36 N. Y. Misc. Rep. 646 (1902); aff'd, 72 N. Y. App. Div. 582; appeal dismissed, 172 N. Y. 644. As to corporations organized to deal in the stock of other corporations, see § 317, *infra.*

1 Meredith *v.* New Jersey, etc. Co., 59 N. J. Eq. 257 (1899); aff'd, 60 N. J. Eq. 445. A New Jersey corporation, having corporate power so to do, may purchase stock in another corporation in a similar business, and as a part of the purchase price may guarantee and agree to pay dividends on certain outstanding preferred stock of the latter company. Such a contract is not illegal, immoral or against public policy. Windmuller *v.* Standard, etc. Co., 106 N. Y. App. Div. 246 (1905). Where by its charter a corporation may sell all its property and deal in stocks, it may sell all its property for stock. Traer *v.* Lucas, etc. Co., 124 Iowa, 107 (1904). Where by its charter a corporation has a right to purchase stock in other corporations the corporation may subscribe for stock in another corporation to be formed to carry on a similar business, and the court will not, at the instance of a stockholder, review the discretion of the directors in making such investment. Rubino *v.* Pressed, etc. Co., 53 Atl. Rep. 1050 (N. J. 1903). It being illegal in Washington for one corporation to own stock in another corporation, a New Jersey corporation cannot legally own stock in a Washington street railway company. Coler *v.* Tacoma Ry. etc. 65 N. J. Eq. 347 (1903). Under the Mississippi statutes a corporation cannot be organized to deal in the stock of other corporations. Woodbury *v.* McClurg, 78 Miss. 831 (1901). See § 317, *infra.*

2 Mason *v.* Standard, etc. Co., 85 N. Y. App. Div. 520 (1903).

3 Robotham *v.* Prudential Ins. Co., 64 N. J. Eq. 673 (1903), holding, also, that where an insurance company has power to invest in the stock of another company which has paid dividends for five years, the fact that the latter company increases its stock does not extend the time for five years more.

4 Pearson *v.* Concord R. R., 62 N. H. 537 (1883). In this case the court said (p. 549): "Certain classes of corporations, such as religious and charitable corporations, and corporations for literary purposes, may rightfully invest their moneys in the stock of other corporations. The power, if not expressly mentioned in their charters, is necessarily implied, for the preservation of the funds with which such institutions are endowed, and to render their funds productive." To same effect, Hodges *v.* New England Screw Co., 1 R. I. 312 (1850).

There has been some controversy whether one corporation could sell all its property to another corporation, taking pay in stock of the latter, and dividing such stock among the stockholders of the selling corporation. The weight of authority holds that such a transaction is legal if all the stockholders assent, but may be prevented by any stockholder of the former corporation.[1] Where a corporation owns stock in the name of a trustee for the corporation it is obliged to indemnify such trustee for calls paid by him.[2] The stock owned by a corporation may be sold by its general business agent and financial manager and representative, he having apparent power to sell, and the governing body not objecting.[3] The plan of having one "parent" company own a majority of the stock of many subsidiary companies is legal where the parent company has power to own stocks such as those of the subsidiary companies.[4] Where one cor-

1 See § 671, *infra*. Although a corporation is authorized by its charter "to take stock" in other corporations, this does not authorize it to sell all its property to another corporation in payment for stock of that corporation to be distributed among the stockholders of the vendor corporation. Elyton Land Co. *v.* Dowdell, 113 Ala. 177 (1896). In M'Cutcheon *v.* Merz Capsule Co., 71 Fed. Rep. 787 (1896), several corporations agreed to turn over their property to one corporation and to take stock and bonds in payment, the price to be thereafter fixed by appraisers. After the stock was issued one of the companies withdrew, and the court held that the company withdrawing could file a bill to cancel the agreement on the ground that the company had no power to hold stock in other corporations and that the agreement was not yet executed. A Michigan capsule company has no right or power to sell all its property to a New Jersey capsule company—a combination company—in exchange for or payment of stock of such New Jersey company. The agreement so to do cannot be enforced, even though every stockholder assented to it. Merz Capsule Co. *v.* U. S. Capsule Co., 67 Fed. Rep. 414 (1895).

2 Goodson's Claim, 28 W. R. 760 (1880). Where one company takes shares of stock in another company and puts such stock in the name of its treasurer and president as "trustees for the stockholders of the A. Co.," and the treasurer afterwards sells the stock and converts the money to his own use, he may be compelled to account for the same. Murray *v.* Aiken, etc. Co., 37 S. C. 468 (1892).

3 Walker *v.* Detroit Transit Ry., 47 Mich. 388 (1882). See also Sistare *v.* Best, 88 N. Y. 527 (1882). That the corporate treasurer may sell the stock, see Holden *v.* Metropolitan Nat. Bank, 138 Mass. 48 (1884); s. c., 151 Mass. 112. Where an agent of a corporation purchases, without authority, stock in another company and sells one of the shares to a person in order to enable the latter to qualify as a director in such company, the person receiving the one share is protected in his title, and the first-named corporation cannot compel him to give it up, even though the agent had no power to sell, the purchaser having purchased in good faith. Hence his acts as a director are valid. Scarlett *v.* Ward, 52 N. J. Eq. 197 (1893).

4 For a careful and clear statement of the plan of having a parent company own stock in subsidiary company, see People *v.* American Bell Tel. Co., 117 N. Y. 241, 244, 255 (1889). A

poration owns all the stock of another corporation, the court may ignore the existence of the latter.[1] This whole subject of the power of one corporation to *buy* the stock of another corporation is much the same as the question of the power of one to *subscribe* to the stock of another, a subject fully considered elsewhere.[2]

§ 317. *Stockholding corporations, known as "holding corporations"—Mortgages by stockholding corporations.*—During the past three years there has sprung into existence a new kind of corporation, namely, a corporation organized not to do business itself, but to purchase and hold the stock of other corporations, in order to secure harmony of control. Formerly the same result was brought about by an actual consolidation of the various corporations, or a sale of the property of one to the other. When, however, these transactions became gigantic in their magnitude, as in the instance of the United States Steel Corporation, involving one and one-half billion dollars and a great number of corporations, it became clear that the old plan of a direct consolidation or sale was impracticable. It was impracticable because these corporations were organized in different states, and the statutes of some of these states did not authorize a direct consolidation or sale. It was also impracticable because in such a vast body of stockholders there were many minority stockholders, who, for profit or principle, would institute injunction suits against a consolidation or sale. Accordingly, the plan was devised of organizing a corporation for the purpose of owning and holding at least a majority of the stock of the various corporations which it was desirable to unite. The most notable examples of this kind of incorporation are the Northern Securities Company and the United States Steel Corporation, the former being organized to retain permanently a majority, at least, of the stock of the Northern Pacific Railroad Company and the Great Northern Railroad Company, and the latter being designed to acquire a majority at least of the stock of a large number of iron and steel and coal corporations.

land company has no power to sell property to a minor or branch company and take stock in payment, but in order to set it aside all parties interested must be made parties to the suit. Marbury *v.* Kentucky, etc. Co., 62 Fed. Rep. 335 (1894). Where a parent company, owning the stock of branch companies, passes into a receiver's hands, and the latter expends money in operating one of the branch companies, he cannot recover it as against a mortgagee of the branch company. The rule is otherwise as to necessary improvements. Coupons paid by the receiver on bonds issued by the branch road rank next after the bonds and other coupons are paid. Phinizy *v.* Augusta, etc. R. R., 62 Fed. Rep. 771 (1894).

1 See § 6, *supra*, and § 663, *infra*.

2 See § 64, *supra*.

Certain difficulties, however, have been met in carrying out this plan of a stockholding corporation. The reason and object of such a corporation is one thing, but its legality is another thing. The principle of law that one corporation has no inherent power to purchase the stock of another corporation[1] is not applicable, inasmuch as it is easy to insert in a certificate of incorporation an express power to purchase, hold and dispose of the stock of other corporations; and under the laws of the state of New Jersey and some other states it is permissible to organize a corporation for that purpose.[2]

There are other legal difficulties, however, which are not so easily disposed of. The law will not always allow to be done indirectly that which the law prohibits directly. For instance, where it is illegal for two competing railroads to consolidate, the law will not allow one of them to purchase the stock of the other,[3] nor will it allow one of them to guaranty the bonds of the other in consideration of the stock of the latter being held for the benefit of the stockholders of the former.[4] Hence, when the Northern Securities Company acquired a majority of the stock of the Great Northern Railroad Company and of the Northern Pacific Railroad Company in 1901, the United States government attacked it, and the court held that under the Anti-Trust Act of congress of 1890 it is illegal for a corporation to hold a majority of the stock of two competing interstate railroad corporations.[5]

1 See §§ 314–316, *supra*.

2 See § 316, *supra*.

3 Penn. R. R. *v.* Commonwealth, 7 Atl. Rep. 368 (Pa. 1886).

4 Pearsall *v.* Great Northern Railroad, 161 U. S. 671 (1896).

5 Northern Securities Co. *v.* United States, 193 U. S. 197 (1904); aff'g United States *v.* Northern Securities Co., 120 Fed. Rep. 720 (1903). Minnesota *v.* Northern Securities Co., 184 U. S. 199 (1902), was a suit to enjoin the Northern Securities Company from acquiring, owning or voting a majority of the capital stock of the Great Northern Railway Company and the Northern Pacific Railway Company, two competing railroad corporations of that state. The court held that it would not entertain the suit for the reason that the two railway companies were not made parties, and no relief would be granted by a court of equity affecting absent persons materially interested, and no amendment would be allowed, inasmuch as it would bring them in as parties and would destroy the jurisdiction of the court. In the case Washington *v.* Northern Securities Co., 185 U. S. 254 (1902), a bill was filed in the supreme court of the United States by the state of Washington against the Northern Securities Company, the Great Northern Railway Company and the Northern Pacific Railway Company, to declare illegal the holding by the first-named company of a majority of the stock of the two last-named companies. In the case State of Minnesota *v.* Northern Securities Co., 123 Fed. Rep. 692 (1903) (rev'd in 194 U. S. 48), the court refused to follow the decision of the United States Circuit Court of Appeals in United States *v.* Northern

The same difficulties arise where a stockholding corporation is organized to purchase and hold the stock of competing *manufacturing* corporations. It was held by the supreme court of the United States that the American Sugar Refining Company had not violated the anti-trust act of congress of July 2, 1890, even though it had purchased the stock of four other sugar refining companies, and had thereby acquired almost the complete control of the man-

Securities Co., 120 Fed. Rep. 721, aff'd, 193 U. S. 197, and held that a holding corporation owning a majority of the stock of two competing railroads was not illegal either at common law or under the statutes of Minnesota prohibiting trusts or combinations in restraint of trade or under the statutes of Minnesota prohibiting the consolidation of parallel and competing lines of railroad. A state cannot maintain a bill in equity in the United States court to enjoin a corporation from holding the stocks of competing railroads on the theory that such holding violates the anti-trust act of Congress of July 2, 1890. Only the attorney-general may institute such a suit. Minnesota *v.* Northern Securities Co., 194 U. S. 48 (1904). After the decision in 193 U. S. 197, *supra*, there followed an acrimonious litigation among the defendants as to the mode in which the holding company's holdings of stock should be distributed. The following decisions were rendered. The United States government having obtained a final decree enjoining the Northern Securities Company from voting the stock held by it in the Northern Pacific Railway Company and the Great Northern Railway Company, and enjoining them from paying dividends to the Northern Securities Company, the decree will not be modified with a view to directing the method in which such stock of the two railway companies shall be divided among the stockholders of the Northern Securities Company, that question being a subject for independent litigation. A stockholder's petition of intervention to modify the decree will be denied. United States *v.* Northern, etc. Co., 128 Fed. Rep. 808 (1904). Where a holding company has illegally purchased the stock of competing railroads and is compelled by decree of the court to return the same to its stockholders, the stockholders are not entitled to the particular stocks which they turned in, but are entitled to a *pro rata* interest in all the stocks so distributed. Such distribution may be in kind. Continental, etc. Co. *v.* Northern, etc. Co., 66 N. J. Eq. 274 (1904).

In view of the new questions involved in a distribution of the assets of the Northern Securities Company, a preliminary injunction against distribution in a certain way was granted *pendente lite* in Harriman *v.* Northern Securities Co., 132 Fed. Rep. 464 (1904). Where a holding corporation holding the majority of the stocks of two competing railroad companies is required by decree of court to sell or distribute among its stockholders such stocks, it need not return to each stockholder the stocks he originally turned in, but may distribute such stocks *pro rata* among the stockholders. Northern, etc. Co. *v.* Harriman, 134 Fed. Rep. 331 (1905); aff'd, 197 U. S. 244. Where a holding corporation has been declared illegal and a distribution to its stockholders ordered, the stockholders are not entitled to the stock which they turned in originally, but are entitled only to their *pro rata* share of the assets existing at the time of the injunction and decree of distribution, the capital stock having been reduced for that purpose. The assets may be

ufacture of refining sugar in the United States;[1] but, as pointed out in another case,[2] the bill in equity did not bring out the fact that the sugar so refined was transported into different states, and hence was interstate commerce. The decisions are clear that it is illegal for individuals as *trustees* to hold a majority of the stock of competing manufacturing corporations where the purpose and result is to prevent competition.[3] Equally so, it is quite likely that the court would hold it to be illegal for a *corporation* to hold such stock for the same purpose and with the same result. No attack was made on the United States Steel Corporation on this ground, and it is quite likely that any such attack would have failed, inasmuch as that corporation did not take in or seek to take in all the competing plants, and its chief purpose seems to have been to combine the mining and transportation branches of the business with the manufacturing branch, with a view to an increased output at a lower cost and price.

It may be said, therefore, that a stockholding corporation is legal and unobjectionable,[4] except where, by its purchases of stock, it

distributed in kind *pro rata* among the stockholders, or may be sold for cash, and the company may by vote adopt the former plan, thus avoiding the disastrous consequences of a forced sale. Harriman *v.* Northern Securities Co., 197 U. S. 244 (1905).

1 United States *v.* E. C. Knight Co., 156 U. S. 1 (1895).

2 Gibbs *v.* McNeeley, 118 Fed. Rep. 120 (1902). But see 160 Fed. Rep. 144.

3 People *v.* North River, etc. Co., 121 N. Y. 582 (1890); State *v.* Standard Oil Co., 49 Ohio St. 137 (1892); also various cases in ch. XXIX, *infra*.

4 Where by its charter a corporation has a right to purchase stock in other corporations the corporation may subscribe for stock in another corporation to be formed to carry on a similar business, and the court will not, at the instance of a stockholder, review the discretion of the directors in making such investment. Rubino *v.* Pressed, etc. Co., 53 Atl. Rep. 1050 (N. J. 1903). A corporation having charter power to purchase the stock of other corporations may give its certificates of indebtedness in payment therefor, and may also issue with such certificates its preferred stock, the dividends to be used to pay the principal and interest of such certificates, the preferred stock then to belong to the vendors. Ingraham *v.* National Salt Co., 130 Fed. Rep. 676 (1904), overruling 122 Fed. Rep. 40. A New Jersey corporation, having corporate power so to do, may purchase stock in another corporation in a similar business, and as a part of the purchase price may guarantee and agree to pay dividends on certain outstanding preferred stock of the latter company. Such a contract is not illegal, immoral or against public policy. Windmuller *v.* Standard, etc. Co., 106 N. Y. App. Div. 246 (1905); aff'd, 186 N. Y. 572. It is legal for a manufacturing company to organize a subsidiary company to sell its product, the entire capital stock of the latter being owned by the former. Dittman *v.* Distilling Co., 64 N. J. Eq. 537 (1903). A stockholder's suit to set aside an alleged illegal issue of new stock must join a holder of such new stock, especially where the holder is a holding corporation which it is alleged has been buying

violates a statutory or common-law prohibition against the suppression of competition. In the case of railroads this objection arises where a stockholding corporation owns a majority of the stock of competing railroads.[1] Under the Massachusetts statute prohibiting

the stock illegally. Weidenfeld *v.* Northern, etc. Ry., 129 Fed. Rep. 305 (1904). A New Jersey holding corporation whose entire assets consist of stock in a New York corporation, and whose entire income is derived from such stock, is not subject to a license or franchise tax in New York. People *v.* Kelsey, 101 N. Y. App. Div. 205 (1905). A statute relative to railroad fares applicable to any corporation controlling another refers to control by lease or otherwise, and not to control by ownership of stock. Senior *v.* New York, etc. Ry., 111 N. Y. App. Div. 39 (1906); aff'd, 187 N. Y. 559. Where a corporation legally owns all the stock of another corporation it may endorse the notes of the latter. *In re* New York, etc., 141 Fed. Rep. 430 (1905). Where stock held by the holding company is sold for nonpayment of assessment, and is bought in by the holding company, and the assessment was illegal, its damages must take that into consideration. Grand Valley, etc. Co. *v.* Fruita Imp. Co., 37 Col. 483 (1906). A holding company incorporated in South Africa does business in London, within the meaning of the income tax law, where most of its purchases and sales of stocks are made in London, and some stockholders' meetings are held there and directors' meetings are held there. Goerz & Co., Ltd. *v.* Bell, [1904] 2 K. B. 136. Where the stock of a subsidiary company is held by the president, he may be ordered to turn it over to the trustee in bankruptcy. *In re* Muncie, etc. Co., 139 Fed. Rep. 546 (1905). In Massachusetts by statute if a foreign corporation acquires a majority of the capital stock of a Massachusetts street railway, gas, or electric light company, and issues stock, bonds or other evidences of indebtedness based on the property, franchises or stock of the Massachusetts corporation, such Massachusetts corporation shall be dissolved, unless such issues were authorized by the laws of Massachusetts. Laws 1894, p. 554, Ch. 476. A corporation which has sold its property and distributed most of its assets among its stockholders cannot use its remaining cash to buy stock in another corporation for the purpose of distributing such stock. Ferry *v.* Latrobe, etc. Co., 155 Fed. Rep. 161 (1907). Where a New Jersey holding company owns all the stock of a Kentucky railway company and nothing else, the New Jersey stock is not taxable in Kentucky, inasmuch as all the property of the railway is taxed, which under the Kentucky statutes exempts the stock. Commonwealth *v.* Ledman, 106 S. W. Rep. 247 (Ky. 1907). See note 2, p. 872, *supra.*

1 In the case of Pearsall *v.* Great Northern R. R., 161 U. S. 646, 671 (1896), the court said: "Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole, of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common. This though possible, would not be altogether feasible, and would require considerable time for its accomplishment. In a few years the two companies might by sales of the stock, so acquired, become completely dissevered, and the interests of the stockholders of each company thus become antagonistic." In the case of Pennsylvania R. R. *v.* Commonwealth, 7 Atl. Rep. 368, 373 (Pa. 1886), the court said: "During the argument counsel invoked the aid

railroads from holding directly or indirectly the stock of any other corporation, a steam railroad cannot indirectly hold the stock of a street railroad by having a holding company as an intermediary.[1] Where a steam railroad is buying the stocks and bonds of street railroads, the attorney general under the Massachusetts statute may file an information in equity to prevent the exercise of that particular power, instead of applying for a mandamus or an information at law in the nature of *quo warranto*.[2] In the celebrated litigation between Mr. Harriman and Mr. Fish for control of the Illinois Central Railroad Company, it was held that it was legal for a New Jersey holding company to own and vote stock in an Illinois railroad company, the New Jersey company having been organized to buy, own and sell shares of stock in other corporations.[3] In some states railroad corporations are expressly authorized to buy the stock of railroad corporations, especially branch lines, and in Connecticut one railroad corporation after buying the majority of the stock of another may in some cases condemn the minority holdings.[4]

of the undoubted general principle that the ownership of shares of stock, as of other property, carries with it the legal right to sell, and contended that the owners of the shares of the South Pennsylvania Railroad Company could not legally be restrained from so doing, and that an injunction against the purchaser would have this effect. We do not think the principle applies to this case. We are not called upon to express any opinion as to the right of individual shareholders to sell their several shares *bona fide* in the open market. This, so far as they are concerned, is an intended sale in combination, for the express purpose of enabling them to abandon the rights and duties conferred and imposed upon them by the act incorporating the company, and of putting the control of their corporation into the hands of its rival. This is an act contrary to the public policy of the state, which they have no right to do."

Where a New Jersey holding company owns the majority of the capital stock of two competing street railway and electric light companies in Mississippi, a state may enjoin its voting such stock, inasmuch as an illegal trust is thereby created. Southern, etc. Co. *v.* State, 44 S. Rep. 785 (Miss. 1907). A stockholder in a New York city street railway company may file a bill in equity to set aside a purchase by a holding company of the majority of the stock of his company, it being shown that the holding company had acquired control of all street railways, elevated railways and subways in New York city, the basis of this decision being that the New York statute prohibiting monopolies overrides in such a case the New York statute authorizing holding companies. Burrows *v.* Interborough, etc. Co., 156 Fed. Rep. 389 (1907).

1 Attorney General *v.* New York, etc. R. R., 84 N. E. Rep. 737 (Mass. 1908).

2 Malone *v.* New York, etc. R. R., 83 N. E. Rep. 408 (Mass. 1908).

3 Edmunds *v.* Illinois Central R. R., 36 Nat'l Corp. Rep. (Chicago) 50 (1908).

4 See § 314, *supra*. By statute in New York the public service commission has jurisdiction over street railroads, common carriers and gas and

In the case of industrial corporations this objection may arise where competition is thereby stifled and production limited and prices increased.[1]

It is to be borne in mind also that the mere fact that a corporation is a separate entity, and is to be considered the same as an individual who holds stock in two competing corporations, is not conclusive on that point. The courts have power to ignore the cor-

electric corporations and associations, and also over companies "controlling" any property of the same, but this evidently does not apply to holding companies controlling such corporations themselves. Ch. 429, Laws 1897, Art. 1, Sec. 2.

1 In the case Edwards *v.* Southern Ry., 66 S. C., 277 (1903), it was held that a statutory penalty for owning, leasing or operating competing railroad lines applied to a railroad that purchased all the stock of a competing railroad. Where one corporation purchases a majority of the stock of another corporation, thereby creating a tendency to restrain competition the purchase is illegal, even though a complete monopoly would not result. Minority stockholders of the purchasing corporation may enjoin the purchase. Dunbar *v.* American, etc. Co., 224 Ill. 9 (1906). A holder of notes of the corporation may collect them even though they were issued to purchase stock in violation of an anti-trust statute, he having no notice of such purpose, although he knew of the purchase of the stock. National Salt Co. *v.* Ingraham, 143 Fed. Rep. 805 (1906). A corporation purchasing the stock of another corporation cannot repudiate the contract on the ground that it will enable the former to violate an anti-trust statute. Ingraham *v.* National Salt Co., 130 Fed. Rep. 676 (1904).

Where a manufacturing company sells its patents, etc., to a holding company in consideration of stock of the latter, under a plan for controlling the patents and business in that line of business, this is entering a combination within the meaning of a contract of the former by which royalties were to be paid to another corporation. Brownsville Glass Co. *v.* Appert Glass Co., 136 Fed. Rep. 240 (1905). A company may be organized under the statutes of New Jersey to hold stock in other corporations, and a stockholder cannot raise the objection that the object was to create a monopoly, inasmuch as such monopoly was not necessarily the result of the exercise of the charter powers. Dittman *v.* Distilling Co., 64 N. J. Eq. 537 (1903). In a proceeding by a state against foreign corporations for violating an anti-trust statute, the state may compel the corporations to produce their stock books in order that the state may investigate whether one company owns a majority of the capital stock of the competing company. State *v.* Standard Oil Co., 194 Mo. 124 (1906). Even though a "trust" has purchased stock in a corporation, yet another stockholder cannot maintain a suit in equity to have such stock forfeited to the corporation itself. His remedy is to compel the corporation to abandon any illegal contract or connection. Hence, the mere fact that the Amalgamated Copper Co., a New Jersey corporation, has acquired a majority of the stock of a Montana Copper Company, as well as of other companies, is not sufficient to enable a minority stockholder in a Montana company to obtain an injunction against the voting of such stock or the paying of dividends thereon, or the directors acting as such. MacGinniss *v.* Boston, etc. Co., 29 Mont. 428 (1904). See also ch. XXIX, *infra*.

Even though the Michigan statutes

porate existence, when such existence merely serves to conceal the truth.[1] Nevertheless, it requires a strong case to induce a court of equity to consider two corporations as one, on account of one owning all the capital stock of the other.[2]

authorize one mining company to purchase the stock of other mining companies, yet where this results in establishing a practical monopoly in a certain kind of copper, a minority stockholder may enjoin the voting of such stock so held by the purchasing company, and no formal demand need first be made by him upon the directors to institute the suit. Bigelow *v.* Calumet, etc. Co., 155 Fed. Rep. 869 (1907), rev'd Oct., 1908.

1 See § 663, *infra*. A subsidiary company may be liable to a lawyer for services, even though he has been paid by the parent company for services rendered to the latter. Trimble *v.* Texarkana, etc. Ry., 97 S. W. Rep. 164 (Mo. 1906). Where a railroad company owns all the stock of certain other railroad companies and all the property is operated as one system, the parent company may be liable as principal for the negligence of one of the subordinate companies causing injury to an employee of the latter. Lehigh, etc. R. R. *v.* Delachesa, 145 Fed. Rep. 617 (1906). Where one corporation owns all the stock and purchases all the property for another corporation and employs a person to do work for the latter, it is liable for his wages on the ground that the subordinate company was merely an agency or instrumentality for carrying out the purposes of the former. Kelly *v.* Ning, etc. Assoc., 2 Cal. App. 460 (1905). In a suit against a subsidiary company to obtain among other things, a transfer to the receiver of a parent company the stock which such parent company holds in the subsidiary company, the subsidiary company is a necessary party defendant. Conklin *v.* United States, etc. Co., 123 Fed. Rep. 913 (1903). Where a receiver of the parent company has been appointed by the federal court at the place where such company was incorporated, the federal courts in other jurisdictions where the subsidiary corporations exist will appoint the same receiver, but will not necessarily turn over the tangible property to such receiver, even though a subsidiary corporation holds it on a terminable lease. Conklin *v.* United States, etc. Co., 123 Fed. Rep. 913 (1903). See 85 N. E. Rep. 433.

Even though one corporation owns all the stock of another, yet the former does not thereby own the profits of the latter. American, etc. Co. *v.* Rutan, 123 Fed. Rep. 979 (1903); rev'd on another point in 128 Fed. Rep. 1017. A holding corporation is not entitled to a surplus in a sale of a boiler purchased by one of the constituent companies on the credit of the holding company. Tilford *v.* Atlantic Match Co., 134 Fed. Rep. 924 (1905). A brewing company is not responsible for rebates given to a refrigerator company that handles the former's product, even though a minority of the stock of the brewing company is owned by the owners of a majority of the stock of the refrigerator company. United States *v.* Milwaukee, etc. Co., 145 Fed. Rep. 1007 (1906). A holding company that reports and pays taxes on the property and franchises of companies, whose capital stock it owns, cannot be taxed on such part of its capital stock as represents such property and franchises. Commonwealth *v.* Chesapeake, etc. Ry., 91 S. W. Rep. 672 (Ky. 1906). A director in a holding company who is also a director in one of the sub-companies, need not account to the former for fees which he receives as director in the latter. *Re* Dover, etc. Ltd., 98 L. T. Rep. 31 (1907).

2 Even though an Illinois railroad

There is another principle of law to be noted. There are decisions to the effect that where one corporation is illegally holding stock in another corporation, it may be enjoined from voting such stock at elections. The better rule is that such an injunction will not lie, unless an actual fraud or illegal act is being perpetrated other than the mere illegality of the corporation holding the stock, but the law on this subject is not as yet fully settled, and this is one of the dangers of these stockholding corporations.[1]

Finally, attention is called to the principle of law that the owner of the majority of the stock of a corporation is under certain legal obligations towards the minority stockholders. This obligation may not go to the extent of a trusteeship, except under unusual circumstances.[2]

A court of equity, however, will scrutinize carefully any acts of the corporation which are for the benefit of the majority stockholders to the detriment of the minority stockholders, and will enjoin or set aside such acts at the instance of minority stockholders where actual fraud is involved.[3]

corporation owns practically the entire capital stock of a Texas railroad corporation, yet the former cannot be brought into court in Texas by serving officers of the latter. Peterson *v.* Chicago, etc. Ry., 205 U. S. 364 (1907). A stockholder in an English holding corporation, which owns all the stock of an Illinois corporation, cannot maintain a bill to have the English corporation declared fraudulent and a dummy, and that the property of the Illinois corporation be declared joint property of the stockholders in the English corporation. Terry *v.* Chicago Packing and Provision Co., 105 Ill. App. Rep. 663 (1903). Where a director of a holding company serves as a director in a subsidiary company, his fees therefor do not belong to the holding company, even though the holding company provided him with qualification shares. *Re* Dover, etc. Ltd., 96 L. T. Rep. 837 (1907); aff'd, 98 *Id.* 31. Although a holding company owns the stock of a street railway company and also of a mining company, and sells the former stock, the mining company may withdraw privileges which it has given to the street railway company. Coal, etc. Ry. *v.* Peabody Coal Co., 82 N. E. Rep. 627 (Ill. 1907). Where a railroad company acquires all the stock of another railroad company and then files a certificate with the secretary of state under the New York statute, which prescribes that thereupon the former succeeds to the property of the latter, the latter is practically dissolved. Rochester Railway *v.* Rochester, 205 U. S. 236 (1907), aff'g 182 N. Y. 116. Even though an English holding company owns the entire capital stock of a German company and controls its entire business, yet the profits of the German company are not considered profits of the English company under the income tax law, except so far as they are actually received by the English company. The German company is not a mere alias or trustee or agent for the English company. Gramophone, etc. Ltd. *v.* Stanley, 95 L. T. Rep. 461 (1906).

1 On this subject see § 615, *infra*.

2 For instance, see Farmers' L. & T. Co. *v.* New York, etc. Ry., 150 N. Y. 410, 434 (1896).

3 For instances, see § 662, *infra*. Where a holding company increases

A New Jersey court has held that a scheme whereby an insurance company purchased a majority of the stock of a trust company, and the trust company purchased a majority of the stock of an insurance company, was illegal, and would be set aside at the instance of a dissenting stockholder, inasmuch as it resulted in self-perpetuating boards of directors, without the responsibility which would exist if

the capital stock of one of its subsidiary companies and then causes subsidiary companies and then causes it to purchase the common stock of the holding company, thereby creating a conflict of interest between the preferred stockholders of the holding company and the subsidiary company, which by the plan would control the holding company itself, minority stockholders may enjoin such a reorganization, it being a part of the plan that the holding company shall sell its various stocks to such subsidiary company. Robinson *v.* Holbrook, 148 Fed. Rep. 107 (1906).

A stockholder in a holding corporation cannot maintain a suit in behalf of the corporation on the ground that its promoters made large, unlawful and secret profits by being interested in the constituent company whose stock was turned in to the holding company in exchange for the stock of the latter, it appearing that when the stock was so turned in the promoters were the only parties interested. If any of the original parties were defrauded their remedy is a suit at law for damages against the guilty parties. The court said (p. 241): "We have here nothing more than the ordinary transaction of parties coming together and agreeing in writing to form a corporation that shall take over from them certain definitely understood properties and cash, for which is to be issued its entire capital stock. It is doubtless true that in many instances there is great overcapitalization, and that the general public is frequently misled by the large amounts of preferred and common stock issued by corporations. The rights of the public are not involved in this litigation. . . . The stockholders of the constituent companies and the individual defendants were the organizers of the corporation and became its first stockholders; they dealt wholly between themselves as sellers and buyers, organizers and corporation; no other persons had any interest in this initial transaction; if fraud had been practiced by any one of the organizers upon those associated with him, the cause of action would have vested in the party injured." Blum *v.* Whitney, 185 N. Y. 232 (1906). See 68 Atl. Rep. 1104.

It is no defense to an action by an employee that he was employed by a resolution of a dummy board of directors who had no real interest in the company, and that there was a contest in the company and the president had informed the party that the contract was not good. Collier *v.* Consolidated, etc. Co., 70 N. J. Eq. 313 (1904). Where a telephone company agrees to pay to another company a certain percentage of all rentals received on telephones which are leased, and the former company grants exclusive licenses in exchange for stock of still other companies, such stock is in the nature of a rental and is to be included in the contract. Western, etc. Co. *v.* American, etc. Co., 125 Fed. Rep. 342 (1903). A consolidated company may maintain a suit against a director of one of the constituent companies for fraudulently, at the time of consolidation, causing an issue of a large amount of stock to him out of the treasury stock for past services, which stock was thereupon exchanged for stock in the constituent company, especially where such director as trustee of the treasury stock of both companies controlled them and voted such stock for the consolidation, and also

those directors represented their own stock; and the court pointed out that the "Voting Trust Cases" in New Jersey had established the principle of law that agreements which sever the ownership of stock from the voting power are, in many instances, a violation of

voted proxies obtained on a notice of the meeting, which did not state that his compensation was to be voted upon. United, etc. Co. *v.* Smith, 44 N. Y. Misc Rep. 567 (1904). A suit does not lie against an individual to enjoin the violation of a contract between the plaintiff and a corporation, even though it is alleged that the individual controls the corporation, it not being alleged that he owns all or a majority of its stock. Aberthaw, etc. Co. *v.* Ransome, 192 Mass. 434 (1906). Directors who waste the funds of the company in purchasing the worthless stock of another corporation are personally liable to a receiver for the amount so expended. Bowers *v.* Male, 186 N. Y. Rep. 28 (1906).

A promoter who has merely an option to purchase stock which he then sells to a new corporation is merely an agent of the vendor and a dividend declared on the stock of the new corporation before the option is exercised belongs to the vendor. Rowe *v.* White, 112 N. Y. App. Div. 688 (1906); aff'd, 189 N. Y. 523. A holding company may legally loan money to one of its constituent companies and may take the bonds of the latter as security therefor and place such bonds under a mortgage of the holding company, the bonds to be returned when the loan is paid. Dittman *v.* Distilling Co., 64 N. J. Eq. 537 (1903). Even though the court at the instance of a dissenting stockholder has enjoined a corporation from issuing stock in payment for the property of another corporation to be purchased at a high valuation, this does not prevent the majority of the stockholders forming a holding corporation in another state and issuing stock of the latter in exchange for the stock of the two former corporations at a price equivalent to the above mentioned valuation. The court has no power to enjoin such a transaction at the instance of a dissenting stockholder. The fact that the holding company may name the directors of both companies is not objectionable in itself. Pierce *v.* Old Dominion etc. Co., 67 N. J. Eq. 399 (1904).

Where a holding company turns the control for a number of years over to a person controlling competing companies, and such person causes contracts to be made between the various companies and then sells his own companies at a large profit, the holding company may compel him to divide the profit with it, it appearing that all the transactions were to secure such profit and the profit was due to all the companies being so united. If there is no other basis of division, the profits will be divided half to each. Bay State, etc. Co. *v.* Rogers, 147 Fed. Rep. 557 (1906). Where a director dominates the board and induces the board to purchase worthless securities of other companies in which he is interested, and he thereby makes a large individual profit, he may be compelled by a receiver of the corporation to account for his profits, and it is immaterial whether he did or did not vote therefor as a director. Pepper *v.* Addicks, 153 Fed. Rep. 383 (1907). See also Finch Mfg. Co. *v.* Stirling Co., 187 Pa. St. 597. An American stockholder in an English corporation which owns the entire capital stock of an American Brewing Company may bring suit against directors of the American Company to account for misappropriating its funds with the connivance of the English corporation, and the latter may

another principle of law, "that every stockholder is entitled to the benefit of the judgment of every other stockholder in the management of the affairs of the corporation." [1] It is further held in New

be made a party and served by publication. Gordon *v.* Sorg, 113 Ill. App. Rep. 522 (1904). While negotiations were pending between two gas companies for their consolidation by one company buying the stock of the other, upon a certain basis of capital and indebtedness, one of them, without the knowledge, passed a resolution declaring a scrip dividend of ten per cent. on its capital stock, thus increasing its indebtedness by that amount. The certificates were accordingly issued; but after the consolidation, upon a bill filed for that purpose, the scrip was declared void. Bailey *v.* Citizens' Gas Light Co., 27 N. J. Eq. 196 (1876).

Where a New Jersey holding company owns all the stock of certain Rhode Island street railroad companies, and as such stockholder causes them to be leased to a new corporation which guarantees 5 per cent. on the stock of the Rhode Island corporation, and then causes another New Jersey holding company to be organized to issue one share of its stock for every four shares of stock in the first holding company, and all the stockholders of the first holding company accept the offer excepting one stockholder, he may maintain a bill in equity in the United States court in Rhode Island against both holding companies to compel the payment to him of an equitable compensation corresponding to the earnings over and above the 5 per cent. Four years' delay is no bar. Sabre *v.* United, etc. Co., 156 Fed. Rep. 79 (1907). Where a mortgage covers after acquired property and the company thereafter acquires nearly the entire capital stock of another company, but the president of the former fraudulently causes such stock to be transferred to himself as security for an alleged debt and thereafter causes the stock to be sold for non-payment of the debt and buys it in himself, the court on a foreclosure of the mortgage will subject the stock to the mortgage. Williamson *v.* N. J. Southern R. R., 26 N. J. Eq. 398 (1875); s. c., on appeal, 29 N. J. Eq. 311.

A temporary receiver will not be appointed for a corporation, whose only assets consist of stock in various gas companies, which stocks have been mortgaged by the former company, where all charges of fraud and mismanagement are denied. Brady *v.* Bay State etc. Co., 106 Fed. Rep. 584 (1901).

[1] Robotham *v.* Prudential Insurance Co., 64 N. J. Eq. 673 (1903). The counsel in this case claimed that the following situation was legal: "One man controls a company of $10,000,000 capital. He may form a new company with a capital of $5,100,000, to hold a majority of the stock. He may then sell all but $2,600,000 of the stock in company No. 2, and transfer his remaining stock to a new company with a capital of $2,600,000. He may then sell to company No. 3 all but $1,400,000, and transfer that to a new company. This process may go on until the power of the whole chain of corporations is vested in the holder of a few thousand dollars of stock in the ultimate company, and the same chain can be used for an unlimited number of companies." In reply to this the court said that such a situation, if it should arise, might lead to the following questions: "First. Whether the holders of the $4,900,000 of stock could not disfranchise the new irresponsible adventurers who assumed to wield the voting power of the $5,100,000 of stock,—disfranchise this stock until the bene-

Jersey that an English company holding a majority of the stock of a New Jersey corporation, the American stockholders being excluded, and the holding company having the voting power without the legal title to the stock, may be compelled to give up the stock to the certificate holders.[1]

Mortgages are often given by a stockholding company, the certificates of stock being deposited with the trustee of the mortgage, in order that the stock itself may be covered by the mortgage. This would seem to be more of a pledge than a mortgage;[2] and of course the difference is important, where the certificates of stock are not actually transferred and delivered to the trustee of the mortgage. Where a railroad company owns shares of stock in an

ficial owners of it should take control of their own property and use its voting power. Second. Whether the actual, beneficial owners of the $5,100,000 of stock could not break through the chain of corporate fictions which separated them from their property, and dictate how its voting power should be exercised. Third. Whether it would not be the duty of the attorney-general of the state to take proceedings to dissolve the holding companies, as an abuse of corporate franchises,—as a fraud upon the extremely liberal provisions of our corporate act, which, however, permit the incorporation of companies only for a 'lawful purpose.'" As to "voting trusts" see § 622, *infra*. Where a corporation owns all the stock of another corporation, the latter cannot vote, at an election of the former, stock of the former held by the latter. O'Connor *v.* International etc. Co., 68 N. J. Eq. 680; aff'g s. c., 68 N. J. Eq. 67 (1904).

1 Warren *v.* Pim, 66 N. J. Eq. 353 (1904), the court saying: "A holding company is owner of the stock itself. This association is not. It is only a sham owner, vested with a colorable and fictitious title for the sole purpose of permanently voting upon stock that it does not own. The officers of a holding company are responsible to the stockholders therein; are subject to be called to account annually, and to be refused re-election if their management of the concerns intrusted to them is not satisfactory to their constituents. But under the present voting trust there is no such responsibility, no such control by the constituents. The constituents—that is, the owners of the deposited shares—have disabled themselves from exercising by force of majorities any control of the discretion of the trustees. The only control that is at all reserved is either to terminate the trust outright, or else to simply oust one trustee and put another man in his place."

2 See § 464, *infra*. Where stock is "mortgaged" and delivered to the trustee of the mortgage, this is a mortgage and not a pledge. Toler *v.* East Tennessee, etc. Ry., 67 Fed. Rep. 168, 178 (1894). Inasmuch as a mortgage on shares of stock is not a recordable instrument the record thereof does not operate as constructive notice. Shuster *v.* Jones, 58 S. W. Rep. 595 (Ky. 1900). Where the stock in several corporations is put in trust by a deed acknowledged, delivered and accepted by the trustees in New York where the grantor resided, the trust deed is governed by the law of New York, without reference to the residence of the trustees or the subsequent residence of the grantor. Mercer *v.* Buchanan, 132 Fed. Rep. 501 (1904).

elevator company, such stock is not subject to the general mortgage executed by the railroad company, the stock never having been delivered to the trustee, and not being specifically mentioned in the mortgage itself.[1] But bonds and stocks held by a railroad company at the time when foreclosure is commenced and a receiver is put in possession are subject to the mortgage.[2] Where a mortgage covers bonds to be thereafter delivered, and instead of such de-

1 Humphreys *v.* McKissock, 140 U. S. 304 (1891). *Cf.* Williamson *v.* N. J. etc. R. R. 25 N. J. Eq. 13 (1874); s. c., 26 N. J. Eq. 398 (1875); s. c., on appeal 29 N. J. Eq. 311 (1878). In Park *v.* New York, etc. R. R. 64 Fed. Rep. 190 (1894), the court declined to decide whether a general mortgage on all property, real, personal, and mixed, attached to stocks owned and held by a mortgagor, as against a subsequent mortgage, expressly covering the stocks. The court merely ordered the receivers to pay the coupons on the latter mortgage bonds. See § 464, *infra*. A general mortgage does not prevent the corporation from receiving and disposing of municipal bonds given in aid of the railroad. A mortgage on all property now owned or hereafter to be acquired, followed by a specification of the various kinds of property, does not cover municipal-aid bonds when they were not mentioned in such specifications. Smith *v.* McCullough, 104 U. S. 25 (1881). It does not cover municipal bonds given in payment of subscriptions. Morgan County *v.* Thomas, 76 Ill. 120 (1875). A chattel mortgage does not include shares of stock, although broad enough in its terms to do so, where both parties testify that it was not the intent to include the stock and the mortgagee allowed the mortgagor's assignee to take away the stock. Younkin *v.* Collier, 47 Fed. Rep. 571 (1891). Even though a debenture is a floating charge on all the property, yet the directors may legally pledge stock which the company owns in another corporation. *Re* Standard, etc. Co., Ltd., 95 L. T. Rep. 829 (1906). Somewhat similar to this is the principle of law that a mortgage on the railroad and property pertaining to it, and on the property, etc. of the railroad, does not cover unpaid subscriptions. Dean *v.* Biggs, 25 Hun, 122 (1881), aff'd 93 N. Y. 662. The uncalled subscriptions to stock are not covered by debentures unless specifically mentioned. *Re* Russian Spratts, Lim., [1898] 2 Ch. 149. A mortgage on all the land, property and effects of the corporation does not include uncalled subscriptions. Pickering *v.* Ilfracombe Ry., 37 L. J. (C. P.) 118 (1868); Lishman's Claim, 23 L. T. Rep. (N. S.) 759 (1870); King *v.* Marshall, 33 Beav. 565 (1864). *Cf. Re* Marine Mansions Co., L. R. 4 Eq. 601 (1867); *Re* British, etc. Soc., 4 De G., J. & S. 407 (1864); Gardner *v.* London, etc. Ry., L. R. 2 Ch. 201, 215 (1867). As to whether subscriptions may be mortgaged, see § 111, *supra*. A mortgage drawn in the usual terms does not cover a subscription for stock. General Elec. Co. *v.* Wightman, 3 N. Y. App. Div. 118 (1896). A debenture may be made a lien on uncalled subscriptions. Newton *v.* Debenture-Holders, [1895] A. C. 244. The word "assets" in a mortgage may be construed to cover uncalled subscriptions. Page *v.* International, etc. Trust, 68 L. T. Rep. 435 (1893). A transfer of the "business and property" of a corporation does not carry unpaid subscriptions. Bank of China *v.* Morse, 44 N. Y. App. Div. 435, 445 (1899); aff'd, 168 N. Y. 458.

2 Herring *v.* New York, etc. R. R. 105 N. Y. 340 (1887). See also Whitney *v.* New York, etc. R. R., 32 Hun, 164 (1884).

livery the mortgagor deposits the bonds as security with the United States Government and then makes another mortgage covering such bonds, the first mortgage is entitled to the bonds upon their being released by the United States Government, even though such bonds are delivered under the second mortgage, unless the bonds or the notes secured by them under the second mortgage have passed into *bona fide* hands.[1] Where the mortgage covers after-acquired property and the company does acquire such property, and instead of taking title causes the title to be transferred to a new corporation, all the stock of which is thereby acquired by the mortgagor, such stock is subject to the mortgage as against any personal claim of the trustee of the mortgage, even though the trustee of the mortgage has loaned money to the mortgagor with the stock pledged as collateral.[2]

Generally, however, the particular stocks and bonds which are covered by the mortgage are delivered to the trustee of the mortgage.[3]

1 Central T. Co. *v.* West India, etc. Co., 169 N. Y. 314 (1901). Where a pledgee brings suit to obtain possession of the pledge, which had been wrongfully diverted, and during the suit the pledge becomes worthless, a supplemental complaint may be served alleging that fact and demanding the value of the pledge at the time demand was made therefor. Central T. Co. *v.* West India, etc. Co., 109 N. Y. App. Div. 517 (1905). A mortgage purporting to cover municipal bonds not yet delivered by a municipality does not sustain a suit by the trustee against such municipality to obtain such bonds, upon foreclosure of the mortgage. Farmers' L. & T. Co. *v.* Board of Sup'rs, etc., 93 Fed. Rep. 579 (1899).

2 Guaranty T. Co. *v.* Atlantic, etc. R. R., 138 Fed. Rep. 517 (1905); rev'g on this point 132 Fed. Rep. 68. See also Central T. Co. *v.* Kneeland, 138 U. S. 414 (1891). Where the owner of all the stock of a waterworks company organizes another company to build a new pumping station and a new source of supply, a mortgage of the first company covering extensions, additions and after-acquired property covers such new pumping station, it appearing that a portion of the mortgage bonds were reserved for such extension, and the physical facts, visible to any person, and the provision to the mortgage, which were also open to public notice, making it evident that the mortgage necessarily included the new pumping station and mains. New England, etc. Co. *v.* Farmers', etc. Co., 136 Fed. Rep. 521 (1905). See also § 857, *infra.* Where the equity of redemption of a mortgaged property is acquired by a corporation, the after-acquired property clause of a previous mortgage applies to the equity so purchased, but if the proceeds of a subsequent mortgage given by the corporation are used to discharge such prior mortgage on the property purchased, such second mortgage must be repaid that amount, before the after-acquired clause applies, it being a condition of the purchase that title should not pass until the vendor's lien was paid. The same rule applies to taxes paid from the proceeds of the second mortgage. Farmers' etc. Co. *v.* Denver, etc. R. R., 126 Fed. Rep. 46 (1903).

3 See § 776, *infra;* also § 464.

A mortgage on shares of stock does not prevent the corporation controlled by such stock from issuing a mortgage on its property, and it is no breach of trust for the trustee of the first mortgage to be the trustee of the second mortgage, where the first mortgage does not prohibit such second mortgage, the stock, by the terms of the mortgage, remaining in the name of the mortgagor.[1]

In this class of mortgages by stockholding companies, complication sometimes arises as to the rights, duties and obligations of the trustee of the mortgage. Thus where stock is deposited with one trust company as additional security for a mortgage given to another trust company, and upon default the former company refuses to deliver the stock, and the latter trust company then commences a suit in equity to compel the former trust company to deliver the stock, and during that suit the stock declines in value, a bondholder secured by such mortgage cannot hold liable the trust company holding the stock on account of the decline in value, inasmuch as the suit in equity determined all questions, including the amount of damage.[2] Where a mortgage secured by stock as collateral expressly authorizes the trustee to release the collateral and accept other security in lieu thereof upon the consent of the majority in interest of the bondholders, a minority bondholder cannot complain of such substitution unless he proves that the bondholders as a whole will be injured.[3] A trustee of a pledge of stock for the payment of interest on certificates issued by the corporation may on default file a bill in equity to have the stock sold, even though the trust agreement provides for another remedy.[4]

1 Gasquet *v.* Fidelity, etc. Co., 75 Fed. Rep. 343 (1896); Central Trust Co. *v.* Kneeland, 138 U. S. 414, 423 (1891).

2 Bracken *v.* Atlantic T. Co., 167 N. Y. 510 (1901). Where a corporation guarantees certain bonds, and a person holding stock of the company indorses on the guaranty that he holds the stock to secure the performance of the guaranty, he cannot afterwards claim that he has a prior lien as pledgee of the stock. Mercantile Trust Co. *v.* Atlantic Trust Co., 86 Hun, 213 (1895). Where the pledge is deposited with a third party, the pledgor and pledgee may modify their agreement as to the pledge. The depositary of the pledge cannot act upon a provision in the original agreement relative to an independent and outside transaction, and in an action by the pledgee to realize on the stock cannot set up that by reason of the modified agreement between the pledgor and pledgee the depositary in its outside transaction has suffered damage. Mercantile Trust Co. *v.* Atlantic Trust Co., 69 Hun, 264 (1893). For subsequent phases of this litigation, see Bracken *v.* Atlantic Trust Co., 167 N. Y. 510 (1901).

3 Ikelheimer *v.* Consolidated, etc. Co., 59 Atl. Rep. 363 (N. J. 1904).

4 Land, etc. Co. *v.* Asphalt Co., 121 Fed. Rep. 192 (1903); aff'd 127 Fed. Rep. 1. Where a majority of the stockholders and also the directors have ratified a sale by a pledgee of property of the corporation a minor-

Although a trust company is a pledgee of bonds for the benefit of many notes of the pledgor in the hands of many holders, and the trust company, after notice by mail to the holders of the notes, is authorized by the court to sell the bonds at ten cents on the dollar, yet a holder of the notes may thereafter question the good faith of the trust company in making such sale.[1]

Where a bond issued by a state recites that it is secured by an equal amount of stock in a railroad company, the holder of such bond may file a bill to foreclose on that amount of stock and need not join other bondholders as parties defendant.[2] Bondholders cannot sustain a bill in equity to remove a trustee who holds the stock of various gas companies as collateral security for the payment of

ity stockholder cannot cause the sale to be set aside, inasmuch as the pledgor might have originally consented to the sale. Macon, etc. R. R. *v.* Shailer, 141 Fed. Rep. 585 (1905). For a case involving the rights and duties of a trustee holding mortgages as security for debentures, the corporation itself having become insolvent, see Girard Trust Co. *v.* McKinley, etc. Co., 135 Fed. Rep. 180 (1905).

1 Minneapolis Trust Co. *v.* Menage, 73 Minn. 441 (1898). Where a corporation owns all of its bonds, excepting a few held by one holder, such bonds being secured by a pledge of securities, and requests the trustee holding the securities to sell the same, which the trustee does at an insufficient price, the corporation itself being the buyer, and the single outside holder of bonds not being notified in time to protect his interests, he may either follow his securities or may hold the trustee liable. And even though he accepted a small sum in settlement from the trustee, yet if that settlement was caused by misrepresentations as to the value of the securities, he is not bound by them. Other holders of the bonds who have turned them into the corporation on an agreement to take an exchange of new bonds secured by the same securities will also be allowed to participate the same as a bondholder who did not turn in his bonds. Anthony *v.* Campbell, 112 Fed. Rep. 212 (1901). Where trustees hold stock as security for various debts of various parties, the stock to be sold if the debts are not paid, it is illegal for one of the trustees to resign and for the remaining trustee to sell the stock in a way calculated not to bring its full value, and for the resigning trustee to purchase the same at a very low price for the benefit of himself and the other trustees. The sale will be set aside. Jenkins *v.* Hammerschlag, 38 N. Y. App. Div. 209 (1899). Where a prospectus, offering for sale trustees' transferable certificates, states that such certificates represent stock deposited with the trustee, the stock being in an English corporation, the trustee is personally liable if it turns out that the English corporation had a prior lien on the stock to the full extent of its value. The trustee was bound to take notice of the lien created by the by-laws of the English corporation. The rule of *caveat emptor* has been relaxed so as to create an implied warranty of title on the part of the seller. Even though the trustee acted as agent, yet, the principal not being disclosed, the trustee is liable. McClure *v.* Central Trust Co., 165 N. Y. 108 (1900). See also § 763, *infra*.

2 South Dakota *v.* North Carolina, 192 U. S. 286 (1904).

their bonds, even though such trustee has voted such stock in favor of directors who have made improvident contracts in which such directors were personally interested, it appearing that by the terms of the trust agreement the trustee was to vote such stock as the pledgors directed, until default of the bonds, and it not being shown that the trustee knew that such default had been made.[1] Where by the terms of the pledge the pledgor reserves the right to vote the stock, the stock being transferred into the name of the pledgee, the pledgor may by a bill in equity compel the pledgee to give to the former a proxy to vote the stock in favor of a merger of the corporation with another corporation, even though thereby the pledgee will have to take stock of the new corporation in exchange for the old stock.[2] The directors of a New Jersey holding corporation owning a majority of the stock of a New York Insurance company cannot place the stock in a voting trust for a period of years, because it is the duty of such directors to manage and control the property of the corporation instead of delegating such control to outside individuals.[3]

Where a pledge of stock is deposited with a third party, according to the contract of pledge, such third party need not be joined in a suit by the pledgor against the pledgee to redeem.[4]

1 Moreover, such removal will be denied when the trust agreement itself provides for the removal of the trustee by vote in writing of one-third in interest of the bondholders at a meeting called for that purpose, and no reason is shown for disregarding this mode of changing the trustee. Dillaway *v.* Boston, etc. Co., 174 Mass. 80 (1899). A temporary receiver will not be appointed of a corporation, whose only assets consist of stock in various gas companies, which stocks have been mortgaged by the former company, where all charges of fraud and mismanagement are denied. Brady *v.* Bay State, etc. Co., 106 Fed. Rep. 584 (1901).

2 Pennsylvania R. R. *v.* Pennsylvania Co., etc., 205 Pa. St. 219 (1903). Where a holding company in pledging its securities to secure its bonds specified the securities it is to deliver, and delivers only a part of them, it is not entitled to a proxy from the trustee of the mortgage on the stocks actually delivered, unless it delivers all of the stocks called for by the trust instrument. Moreover, any such proxy may be limited in its powers in order that the trustee may be protected against the holding company voting the stock for purposes inconsistent with the trust agreement. Delaware, etc. Co. *v.* Metropolitan T. Co., 146 Fed. Rep. 600 (1906). A voting trust in which the trustee of a mortgage held the stock and voted it was involved in Curtze *v.* Irou, etc. Co., 46 Or. 601 (1905), and it was held that such voting trust did not in itself extend the date of the mortgage.

3 Knickerbocker, etc. Co. *v.* Voorhees, 100 N. Y. App. Div. 414 (1905).

4 Baeck *v.* Meinken, 33 N. Y. Misc. Rep 371 (1900). The trustee of a mortgage who holds security under the mortgage is a proper party to a suit in equity to wind up the insolvent mortgagor, and if such trustee is ordered by the court to turn over

A pledgee has power to have the stock transferred on the corporate books, and if it has agreed to hold certain stock as security for a third person's note and fails to obtain a proper transfer, it is liable in some cases.[1]

Instead of a holding corporation, an unincorporated voluntary association is sometimes formed to invest in the stocks of different corporations. Such an organization has some advantages over a regularly incorporated company. The Mackay Companies, which owns stock in over one hundred telegraph, cable and telephone companies, is an illustration of this form of organization.[2]

§ 318. *Infants as purchasers of stock.*—An infant is incompetent to purchase shares of stock. Most cases of this class arise upon a winding up of the corporation, when the infant is placed upon the list of contributories, and, in defense, infancy is set up.[3] An infant's purchase or sale of stock is voidable and not void.[4] This seems to be the rule finally arrived at by the English courts, after some hesitation and difference of opinion. The transfer is similar to a deed, and passes an interest to the infant even when coupled with a liability, if it be for his benefit to accept it.[5] Consequently an infant, upon coming of age, is bound to elect whether he will affirm or disaffirm a purchase of stock made by him while yet an infant.[6] He

the securities to a receiver the trustee is entitled to intervene and have its rights determined. Miles *v.* New etc. Assoc., 99 Fed. Rep. 4 (1900). Where a third party holds the pledged stock and agrees with the pledgee that if the pledgee does not pay any assessments the third party may pay them and obtain repayment out of the dividends, holding the stock as security, and the third party pays the assessments without the pledgee being notified of such assessments, and the third party causes the identity of the stock to be lost, the pledgee can reclaim the stock without paying the assessment to such third party. Moore *v.* Bank of British Columbia, 125 Fed. Rep. 849 (1903).

1 First Nat. Bank *v.* Park, 117 Iowa 552 (1902). A New York trust company that holds, as a depositary, the certificates of stock of four railroad corporations which are about to be consolidated, one of which is incorporated in another state, is not liable for its omitting to have such stock in such corporation transferred into its name, even though thereby an attachment takes precedence over such deposit. The trust company is not bound to know the law of such other state. New Jersey Con. Co. *v.* Farmers' L. & T. Co., 39 N. Y. Misc. Rep. 672 (1903)

2 See § 622, h. *infra.*

3 See §§ 67, 250, *supra.*

4 Lumsden's Case, L. R. 4 Ch. App. 31 (1868); Smith *v.* Nashville, etc. R. R., 91 Tenn. 221 (1892).

5 Lumsden's Case, L. R. 4 Ch. App. 31 (1868).

6 Where, however, the corporation becomes insolvent just before or just after the infant comes of age, he need not affirm or disaffirm, but may await the action of the corporation; but where he is silent for two years after coming of age, and corporate insolvency then occurs, he is bound.

may disaffirm while still an infant, and is then not liable on calls.[1] The plea of infancy is a good defense,[2] but the plea must allege a disaffirmation within a reasonable time after becoming of age.[3] Where a stockholder sells his stock through a stock-exchange jobber, and the sale is made to an infant, the jobber is liable to the vendor for calls paid by him in consequence of such infancy.[4] An infant's sale of stock, even by a transfer of the certificate, is not binding on him.[5] Where a corporation sells all its property to another corporation for stock of the latter to be given to stockholders of the former, an infant stockholder in the old corporation may hold the latter liable for the value of the stock after he becomes of age, even though he consented to the transaction and took new stock, which he afterwards returned.[6]

§ 319. *Married women as purchasers, owners, or vendors of stock.*—At common law a married woman's rights as regards shares of stock were the same as prevailed with reference to other personal property purchased or owned by her. She had no material rights. Modern statutes have, however, completely changed her rights of property and of contract. These statutes are so different in form and effect that, for the purpose of ascertaining the status of a married woman as a stockholder, it is necessary to consult the statute law in the state of her domicile, and also in the state of the corporation itself.[7] In England the severity of the common law has been but partially modified by statute.[8]

Mitchell's Case, L. R. 9 Eq. 346 (1870). For other cases of ratification, see references in §§ 67, 250, *supra*.

1 Newry, etc. Ry. *v.* Coombe, 3 Exch. 565, 578 (1849), where it was said: "He became a shareholder by contract during infancy, and during infancy he disaffirmed the contract; therefore, in my opinion, he ceased to be a shareholder liable to be sued for calls."

2 Birkenhead, etc. Ry. *v.* Pilcher, 5 Exch. 24 (1850).

3 Dublin, etc. Ry. *v.* Black, 8 Exch. 181 (1852).

4 Nickalls *v.* Merry, L. R. 7 H. L. 530 (1875).

5 Smith *v.* Baker, 42 Hun, 504 (1886).

6 White *v.* New Bedford, etc. Corp., 178 Mass. 20 (1901).

7 As to the conflict of laws on this

8 By 33 & 34 Vict., ch. 93, § 4, married women may purchase or take paid-up stock, or stock upon which there can be no liability; but if taken by means of moneys of her husband without his consent, he may apply to the court and have it turned over to himself. Previous to this act the corporation might refuse to register her as a stockholder, but now the corporation must accept her the same as any other applicant for registry. Regina *v.* Carnatic Ry., L. R. 8 Q. B. 299 (1873). Under this act she may transfer her stock only after it has been formally set aside by statutory authority as her separate property. Howard *v.* Bank of England, L. R. 19 Eq. 295 (1875). Where the corporation has allowed a transfer by a married woman, it cannot cancel the registry. Ward *v.* Southeastern Ry., 2 El. & El. 812 (1860).

§ 320. *Competency of miscellaneous parties — Joint operation.*— A sale of stock by a person *non compos mentis* is void. The corpo-

subject, see § 12, *supra*. A wife may pledge her stock to secure her husband's debt. Just *v.* State Sav. Bank, 132 Mich. 600 (1903). The husband has the right to appropriate to himself shares of stock owned by his wife, and where she signs the certificate and delivers it to him and he sells it, this is a reduction of the stock to himself, even though it is not transferred on the books. Johnson *v.* Hume, 138 Ala. 564 (1903). A husband may transfer stock to his wife by way of a gift, even under the Massachusetts statutes, the corporation in making the transfer being considered a third party as an intermediary. Tucker *v.* Curtin, 148 Fed. Rep. 929 (1906), rev'g *In re* Tucker, 131 Fed. Rep. 647. In Hill *v.* Pine River Bank, 45 N. H. 300 (1864), the transfer by a married woman was in accordance with the laws of the state where she lived and also the state where the corporation was organized. Dow *v.* Gould, etc. Co., 31 Cal. 629 (1867), holds that in California a gift of stock from husband to wife is valid, and that, after such gift, he could not sell and transfer it as his own. Leitch *v.* Wells, 48 N. Y. 585 (1872). See also Vanderheyden *v.* Mallory, 1 N. Y. 452 (1848); Voorhees *v.* Bonesteel, 16 Wall. 16 (1872). Where the wife authorizes her husband to sell her stock and use the proceeds in his business, he cannot sell the stock and assign the proceeds to another person. The latter cannot collect such proceeds. Deming *v.* Bailey, 2 Rob. (N. Y.) 1 (1864). Possession by the husband, as executor, of stock of his wife is not a reduction to possession. Sowles *v.* Witters, 39 Fed. Rep. 403 (1889). Taking out a certificate in his own name by the husband reduces his wife's stock to his possession, and it passes by his will, even though he made a memorandum to the effect that he held it in trust for her. Cummings *v.* Cummings, 143 Mass. 340 (1887). The case of Stanwood *v.* Stanwood, 17 Mass. 57 (1820), holds that where the husband does not have the stock transferred to himself on the corporate books but declares it to be his wife's stock, there is no reduction of it to his possession. See also Wall *v.* Tomlinson, 16 Ves. Jr. 413 (1810), to the effect that a transfer of the wife's stock to the husband as trustee is not a reduction to possession; also, Arnold *v.* Ruggles, 1 R. I. 165 (1837); Wildman *v.* Wildman, 9 Ves. Jr. 174 (1803), and Slaymaker *v.* Bank of Gettysburg, 10 Pa. St. 373 (1849), to the effect that only a registry will reduce the wife's stock to the possession of the husband. In Pennsylvania it has been held that assent by the husband to the assignment by the wife of a certificate of stock owned by her, sufficient to give good title to a holder for value of the certificate, is shown by the fact that not only was her signature to the assignment, and the irrevocable power of attorney executed in connection with it, witnessed by him, but that certain blank spaces in the instrument were filled out in his handwriting. Souder *v.* Columbia Nat. Bank, 156 Pa. St. 374 (1893). The fact that stock stands in the name of the wife and is transferred by her in blank and is then pledged by her husband for his individual debt does not put the pledgee on notice that the husband is misappropriating the wife's stock. McManus *v.* Laughlin, 186 Pa. St. 498 (1898). Where a husband takes his wife's bonds and delivers them to his creditor as security and afterwards sells them to such creditor in payment of debt, such creditor is not protected if he knew throughout the transaction that the bonds belonged to the wife. Callendar *v.*

ration is bound absolutely to know of the lunacy of a transferrer, even though it allows a registry on his ordinary signature and

Kelly, 190 Pa. St. 455 (1899). See also Cornell's Appeal, 114 Pa. St. 153 (1886), and §§ 66, 250, 308, *supra*, and § 538, *infra*. The wife's stock, standing in her name at the time of and after marriage, is not subject to her husband's debts. Cockrane *v.* Chambers, Ambl. 79, n. (1825). In Connecticut it is held that the wife is not liable in *assumpsit* to her husband's creditors, to whom she has pledged her stock, although she subsequently pledges it to another. An express promise to pay on her part is necessary. Platt *v.* Hawkins, 43 Conn. 139 (1879). A married woman may give away or pledge her stock. Walker *v.* Joseph, etc. Co., 47 N. J. Eq. 342 (1890). A wife who allows stock bought with her money to stand for several years in her husband's name, in order to give him credit, is estopped from asserting her ownership as against his creditors. Hamlen *v.* Bennett, 52 N. J. Eq. 70 (1893). At common law a married woman, even though she owns a majority of the stock of a corporation, cannot bind herself to pay its debts, and even under the New Jersey statute she does not obtain anything for the use of her separable estate sufficient to sustain such promise. Allen *v.* Beebe, 63 N. J. L. 377 (1899). Where a husband who is about to use his wife's bonds without her consent executes in the presence of a witness an assignment to her of certain stocks of his own, the certificates of the same being attached thereto, to secure her from loss, by reason of his use of her securities, and this paper is found on his death in his tin box with the stocks, it amounts to a declaration of trust and is legal, even though thereafter he amended it by substituting other securities. Collins *v.* Steuart, 58 N. J. Eq. 392 (1899). Curtis *v.* Steever, 36 N. J. L. 304 (1873), clearly and properly holds that the wife's stock, held by her as her separate estate, is not subject to her husband's debts. A certificate issued to the husband as trustee of the wife constitutes her separate estate, where he pays the dividends to her. In Kentucky a resident married woman's power of attorney to convey stock is void. Bank of Louisville *v.* Gray, 84 Ky. 565 (1886). Where a husband uses his wife's money to purchase stock and takes title in his own name, but considers himself trustee for her, a creditor of the husband, who at the time of incurring the debt knew that the latter held the stock of his wife, cannot subject it to the payment of the debt. Porter *v.* Bank of Rutland, 19 Vt. 410 (1847). Although a corporation errs in allowing a wife to transfer her stock to her husband, yet the statute of limitations runs against her right of action from the time of the transfer. Chase *v.* Hibernia Nat. Bank, 44 La. Ann. 69 (1891). In Kentucky, by statute, a wife's bank stock goes to her heirs, and not to her husband, upon her decease. Kent *v.* Deposit Bank, 91 Ky. 70 (1890). A person taking stock from a person in whose name it stands cannot hold the same as against the latter's wife, where the stock belonged to her separate estate and was so known to be by the person taking it. Stickney *v.* Adler, 91 Ala. 198 (1890). At common law the husband may appropriate stock standing in the name of his wife and may sign her name on the back of the certificate and pledge the same for his debts. Birmingham, etc. Co. *v.* Hume, 121 Ala. 168 (1899). It appears in this case that the wife actually signed her own name on the back of the certificates and delivered the same to her husband to pledge for his debts. A married woman cannot claim stock as against a *bona fide* pledgee from

transfer.[1] An assignee in bankruptcy or for the benefit of creditors takes only the interest and equitable rights of his assignor. A previous unrecorded transfer of the insolvent's stock is protected.[2] A partner may accept stock as collateral security for a loan from the firm,[3] and may sell and transfer partnership stock.[4] A tenant

her husband where the stock stood in his name, even though she paid for the stock and supposed it had been issued in her name. Anderson *v.* Waco State Bank, 92 Tex. 506 (1899). A *bona fide* pledgee of stock held by a married woman and transferred in blank by her is protected even though she made the transfer under duress and coercion on the part of her husband, especially where the statutes authorize a woman to transfer her stock without the husband joining in such transfer. Bryan *v.* Montandon, 6 Idaho 352 (1898). A delivery of a transfer of stock does not complete the gift, where the donor retains the certificate of stock, especially where thereafter he votes the stock and receives the dividends, and hence such a delivery by a man to his wife while he is solvent is not good after he becomes insolvent. Allen, etc. Co. *v.* Grumbles, 129 Fed. Rep. 287 (1904). *Cf.* § 308. Where a married woman sells and transfers her stock to her husband and the corporation allows the transfer, it is not liable to her, even though the transfer was not allowed by law, if the corporation was not aware of the fact that she was married. Bigby *v.* Atlanta, etc. Ry., 119 Ga. 685 (1904). Where stock is transferred to a man by his wife, in order to qualify him to act as a director in national bank, the agreement between them that the stock shall still continue to be hers is legal. Citizens' Nat. Bank *v.* Sturgis Nat. Bank, 81 S. W. Rep. 550 (Tex. 1904). Even though by law the husband is entitled to dividends on the wife's stock and he becomes bankrupt, yet dividends paid after his discharge cannot be collected by his trustees in bankruptcy. Bryan *v.* Sturgis Nat. Bank, 90 S. W. Rep. 704 (Tex. 1905).

1 Chew *v.* Bank of Baltimore, 14 Md. 299 (1859). A person who fraudulently induces a stockholder of unsound mind to transfer to the former the latter's stock is guilty of conversion. Hagar *v.* Norton, 188 Mass. 47 (1905). Where an insane person has been defrauded of stock, and the stock is used to levy an assessment, and the corporation is about to sell his stock for non-payment, an injunction will be granted incident to a suit to set aside the transaction. Weber *v.* Della, etc. Co., 11 Idaho 264 (1905). A guardian *ad litem* of a person who transfers stock when he is of unsound mind may recover it back. Weber *v.* Della, etc. Co., 94 Pac. Rep. 441 (Idaho 1908). A sale of stock is not easily set aside on the ground of mental incapacity on the part of the vendor. Perry *v.* Pearson, 135 Ill. 218 (1890). The question of whether the vendor of stock was of sound mind is largely a question for a jury. Doheny *v.* Lacy, 168 N. Y. 213 (1901). Fraudulent representations made to a person of feeble mind were held sufficient for a concellation in De Frees *v.* Carr, 8 Utah, 488 (1893).

2 Dickinson *v.* Central Nat. Bank, 129 Mass. 279 (1880); Purchase *v.* New York Exch. Bank, 3 Rob. (N. Y.) 164 (1865). *Contra*, Shipman *v.* Ætna Ins. Co., 29 Conn. 245 (1860), where the previous transferee delayed unreasonably in claiming ownership of the stock.

3 Weikersheim's Case, L. R. 8 Ch. App. 831 (1873).

4 Quiner *v.* Marblehead Social Ins. Co., 10 Mass. 476 (1813). *Cf.* Sargent *v.* Franklin Ins. Co., 25 Mass. 90

for life, unless restrained by conditions, may sell his interest in stock.[1]

The question of the rights of a life tenant as to the certificate of stock itself is considered elsewhere.[2]

A director of the corporation itself may buy and sell its stock like any other individual. The information which he has of the affairs of the corporation, whereby he is enabled to buy or sell at an advantage over the person with whom he deals, does not affect the validity of the transaction. He is entitled to the benefit of his facilities for information. There is no confidential relation be-

(1829). Compare also Comstock *v.* Buchanan, 57 Barb. 127 (1864), aff'd, 57 Barb. 146, where the stock stood in both partners' names. Stock may belong to a partnership, although standing in the individual names of the partners in order to make them stockholders. Fairfield *v.* Phillips, 83 Iowa, 571 (1891). Where one of several associates engaged in the common enterprise of building railroads, in many of which he owned stocks, bonds, etc., dies, and his executor, with the assistance of experts, etc., makes a settlement with the other associates, such settlement is binding although such other associates did not impart all the knowledge or information they might have given. The subsequent rise in value of some of the securities is immaterial. Colton *v.* Stanford, 82 Cal. 351 (1890). Where stock is issued to two persons in their individual names, one of them cannot sell and transfer it, even though it was acquired in the partnership law business. The law is different as to a partner in a trading copartnership. Moynahan *v.* Prentiss, 10 Colo. App. 295 (1897). Where a firm contracts to sell stock, and then one of the members of the firm dies, a tender of certificates standing in the names of the individual members of the firm, and not signed in blank, is not a sufficient tender. Nicholls *v.* Reid, 109 Cal. 630 (1895). Where a person holds land for himself and a partner, and transfers the same to a corporation for stock, and conceals all the facts from his partner, the latter may recover the value of his share of the stock, and the measure of the value is the highest value between the day of receiving the stock and the day when the plaintiff received notice thereof. Morris *v.* Wood, 35 S. W. Rep. 1013 (Tenn. 1896). Even though a partnership allows stock owned by it to stand on the books of the company in the name of one of the partners, yet an attachment against him and levied on such stock does not give the attaching creditor priority over the rights of the partnership. New York, etc. Co. *v.* Francis, 96 Fed. Rep. 266 (1899), modified in 101 Fed. Rep. 16. A bill in equity filed by a partner to hold his copartners and third persons liable for a misappropriation of stock owned by the firm cannot be sustained where it is not alleged that the third persons knew of such misappropriation at the time of such misappropriation. Wall *v.* Old Colony, etc. Trust Co., 174 Mass. 340 (1899).

1 See § 560, *infra*.

2 See § 560, *infra*. In a suit by a remainderman to recover from a corporation the value of stock which the corporation had transferred to the life tenant absolutely and which had been lost, the statute of limitations does not begin to run until the death of the life tenant, even though the trust was created in 1854 and the life tenant died in 1898. Wooten *v.* Wilmington, etc. R. R. 128 N. C. 119 (1901).

tween him and a stockholder, so far as a sale of the stock between them is concerned; and, so long as he remains silent and does not actively mislead the person with whom he deals, the transaction cannot be set aside for fraud.[1]

[1] Quoted and approved in Hooker *v.* Midland, etc. Co., 215 Ill. 444 (1905). An officer in purchasing stock need not disclose facts which he knows as to the condition of the company. O'Neile *v.* Ternes, 32 Wash. 528 (1903). The secretary of a company cannot sustain an action for deceit against the president and vice president on the ground of fraud inducing him to sell them his stock, even though they misrepresented the condition of the business, especially where he waited five months before selling and where the only damage was future contingent profits. Boulden *v.* Stilwell, 100 Md. 543 (1905). Where a director purchases stock from a stockholder at one hundred and ten, concealing the fact that the property is about to be sold, making the stock worth one hundred and eighty-five, it is fraud on his part and the sale may be rescinded. Oliver *v.* Oliver, 118 Ga. 362 (1903). In Kansas it is held that before a director may legally purchase the stock of a stockholder he must inform the latter of the true condition of the affairs of the corporation. Stewart *v.* Harris, 69 Kan. 498 (1904). The purchase by the president of a bank of the stock of a shareholder at $150 a share when it was worth $350 a share was held to be fraudulent in Stewart *v.* Smith, 72 Kan. 77 (1905). Directors may purchase stock from other stockholders. *In re* Liquidation, etc., 43 S. Rep. 270 (La. 1907). Even though the president of a company in inducing the stockholders to sell their stock to another company conceals the fact that he is largely interested in the latter company, this does not constitute fraud. Wann *v.* Scullin, 109 S. W. Rep. 688 (Mo. 1908). Tippecanoe County *v.* Reynolds, 44 Ind. 509 (1873); Carpenter *v.* Danforth, 52 Barb. 581 (1868). This case was disapproved by the commentator to Story's Eq. Jur. (12th ed.) 229*b*, note, but the disapprovel is omitted in the 13th ed. See also Grant *v.* Attrill, 11 Fed. Rep. 469 (1882), where the sale was induced by threat of assessments. See also Johnson *v.* Laflin, 5 Dill. 65, 83 (1878); s. c., 13 Fed. Cas. 758, 765; aff'd, 103 U. S. 800 (1880); Deaderick *v.* Wilson, 8 Baxt. (Tenn.) 108 (1874); Gilbert's Case, L. R. 5 Ch. App. 559 (1870); Alexander *v.* Rollins, 14 Mo. App. 109 (1883); aff'd, 84 Mo. 657; § 350, *infra*. In New York, by statute, a director is prohibited from selling stock "short." Laws 1892, ch. 692. Where the president of a company advises a stockholder to sell his stock at a certain price to a certain person, and the sale is made, the president is liable for the difference between that price and the market price, where the person purchased as the secret agent of the president. Fisher *v.* Budlong, 10 R. I. 525 (1873). A director may buy stock from a stockholder at less than its real value, and there is no fraud in the fact that the director knew the real value while the stockholder did not. Crowell *v.* Jackson, 53 N. J. L. 656 (1891); Haarstick *v.* Fox, 9 Utah, 110 (1893). Where the president sells stock for $120 per share after he has indorsed a false statement of the company's affairs, the stock being really worth but $70 per share, the vendee may have the sale rescinded. Prewitt *v.* Trimble, 92 Ky. 176 (1891). It would be "inequitable to permit the directors of a corporation to so manage its business, or to so deal with its property, as to lessen the value of its stock for the purpose of purchasing such stock for themselves at a low figure." But this relation does not

It is illegal for the directors to issue to themselves, in exclusion of others, such part of the original or increased capital stock as has not been already issued, the issue being for the purpose of controlling an election and making a profit.[1] Where the various stockholders of a corporation join in a contract for the sale of their stock, but secretly one of them receives a bonus from the purchaser, the others may compel him to account therefor proportionately.[2]

exist between one director and another director. Perry *v.* Pearson, 135 Ill. 218 (1890). The vendor of stock to the secretary of the company cannot rescind on the ground of fraud, the secretary having, at the time of the sale, given all the information which he had concerning the company. No confidental or fiduciary relation exists between such parties. Krumbhaar *v.* Griffiths, 151 Pa. St. 223 (1892). See also § 350, *infra*. Trustees under a reorganization who are to hold a majority of the stock and vote the same for five years, unless they decide to distribute the same before that time, are not precluded from selling stock owned by themselves individually, and the fact that they sell their own stock is no ground for compelling a distribution of the remaining stock. Haines *v.* Kinderhook, etc. Ry., 33 N. Y. App. Div. 154 (1898). The president of a corporation may, of course, sell stock owned by himself, even though the corporation has been newly formed and the stock is of doubtful value. Matter of Rowell, 45 N. Y. App. Div. 323 (1899). If a director misrepresents the financial condition of the company and thus induces a stockholder to sell his stock to him, he is liable to the vendor for the difference between the actual value of the stock and the price paid. Hume *v.* Steele, 59 S. W. Rep. 812 (Tex. 1900). In a sale of stock by a director a misstatement made by him in good faith, as to the property owned by the corporation, does not render him liable in an action for deceit. Boddy *v.* Henry, 113 Iowa, 462 (1901). A director may buy all the stock of all the stockholders and sell the same to a new corporation at a profit. Walsh *v.* Goulden, 130 Mich. 531 (1902). See 126 N. Y. App. Div. 257.

1 See § 70, *supra*.

2 Where three persons own all the stock of a corporation and one of them represents all three in selling the stock, but secretly takes an additional price for his sole benefit, the others may hold him liable for their portion thereof in an action at law. Graham *v.* Cummings, 208 Pa. St. 516 (1904). Where the general manager acts as an intermediary in selling all the stock of the company and he makes a secret profit, the stockholders may compel him to pay it over. Barbar *v.* Martin, 67 Neb. 445 (1903). Where in a contract between a number of manufacturers and bankers as promoters for the organization of a corporation to take over the plants, the bankers secretly gave a larger price to some of the vendors than was specified in the agreement, one of the vendors who did not receive such secret price may file a bill for an accounting of the secret profits, and may join as parties defendant the corporation, and the parties taking the secret profit and the promoters. Shutte *v.* United, etc. Co., 67 N. J. Eq. 225 (1904). One of the vendors who was secretly to have a higher price than the others may recover the higher price, even though he may possibly be under legal obligation to divide it with the other vendors. Boice *v.* Jones, 106 N. Y. App. Div. 547 (1905). Even though three persons who own all the stock of a corporation, enter into a contract to sell it, and one of them

A joint owner of stock cannot transfer the interest of the other joint owner where the stock is registered in the name of both.[1] On the death of one, the survivor takes title to the whole stock.[2]

Where stock is purchased by a person in his own name, but for himself and another, the latter is a part owner and has rights and liabilities as such.[3] The same complications and principles of law

secretly receives a higher price for his holdings of the stock, yet the other vendor cannot by an action in *assumpsit* claim a part of such extra price. His remedy, if he has any, is in equity for an accounting, or an action for deceit. Cummings *v.* Synnott, 120 Fed. Rep. 84 (1903); rev'g 116 Fed. Rep. 40. Even though the seller's broker divides a secret profit with the purchaser's broker without the purchaser knowing thereof, yet the purchaser cannot hold the seller's broker liable for his profits. The remedy is rescission. Illingworth *v.* DeMott, 59 N. J. Eq. 8 (1900).

1 Standing *v.* Browning, L. R. 27 Ch. D. 341 (1884); Comstock *v.* Buchanan, 57 Barb. 127 (1864); aff'd, 57 Barb. 146. Where stock is devised to husband and wife jointly, the assignee of the husband's interest is entitled only to his share of the dividends during life, and if the wife survives the husband the stock goes to her. Phelps *v.* Simons, 159 Mass. 415 (1893). But if the other joint owner dies first, the previous transfer of the survivor is effective and conveys the whole. Slaymaker *v.* Bank of Gettysburg, 10 Pa. St. 373 (1849). Where two persons own stock in common, replevin will not lie by one as against the other for his part of the stock unless there was a conversion. Barrowcliffe *v.* Cummins, 66 Hun, 1 (1892).

2 Garrick *v.* Taylor, 29 Beav. 79 (1860); Hill's Case, L. R. 20 Eq. 585 (1874). Under the Indiana statute the survivor of joint owners of stock does not take the entire stock unless the instrument creating the title expressly so provides, and hence if the instrument provides only for dividends, the parties hold as tenants in common. Thieme *v.* Union T. Co., 32 Ind. App. 522 (1904).

3 Stover *v.* Flack, 41 Barb. 162 (1862). A member of a pool is entitled to his share of the stock upon its termination, even though he was a trustee of the pool and was an officer of the company the stock of which had been purchased, and even though there had been an over-issue of stock. Cary *v.* Leszynsky, 184 Mass. 44 (1903). Where two persons are interested in stock and it is sold by one of them and the other sues for his part, it is no defense that the price received was fraudulently obtained. Doyle *v.* Burns, 123 Iowa, 488 (1904). Subscribers to stock may make a contract by which they divide their subscriptions with others and agree that no person should hold more than a certain amount of stock. Hladovec *v.* Paul, 222 Ill. 254 (1906). A written pool agreement for the purchase of certain stock and the appointment of a manager to buy and sell at his discretion, the pool to continue for a specified time, prevents any member of the pool selling his part of the stock in any other way. Ridgely *v.* Taylor & Co., 118 N. Y. App. Div. 10 (1907). See 69 Atl. Rep. 899.

A person who sells stock to a supposed pool and brings suit to hold them all liable jointly, cannot on appeal claim that he might have held a portion of them liable. Jones *v.* Hoadley, 115 N. Y. App. Div. 479 (1906). Where stock is purchased to be resold on joint account, and one party refuses to live up to the contract, the other may dispose of the

are involved as in the large class of cases, involving promoter's contracts among themselves for a division of stock received in connec-

stock on the best terms possible. Davidor *v.* Bradford, 129 Wis. 524 (1906). A contributor to a fund to be invested by syndicate managers in stocks and other property has not such an interest in the stocks as enables him to maintain a suit in the state where the corporations are organized as against the non-resident syndicate managers. Jones *v.* Gould, 141 Fed. Rep. 698 (1905); aff'd, 149 Fed. Rep. 153. Where several persons purchase stock for themselves proportionately, the purchases being made by one of them, there is no trust relationship or partnership. Loetscher *v.* Dillon, 119 Iowa, 202 (1903). In a joint venture in buying and selling stocks a partnership may exist and it is no defense to a suit by one against the other for an accounting that a part of the profits were illegally acquired, the former not having participated in any improper conduct. Van Tine *v.* Hillands, 131 Fed. Rep., 124 (1904). Where in a partnership dissolution it is adjudged that one of the partners is entitled to certain stock, and in the event of the others failing to transfer it, he shall have its value, he is entitled to a transfer unless the others are unable to transfer it. Reilly *v.* Freeman, 109 N. Y. App. Div. 4 (1905); aff'd, 184 N. Y. 610. Where several persons are carrying stock for another, he agreeing to take it up from time to time at cost, any one of them may sue him for not so doing. Villard *v.* Moyer, 123 N. Y. App. Div. 629 (1908). An agreement between two parties by which, on their joint order or the order of a particular one of them, a certain stock might be bought or sold at any time in amount, not to exceed a specified amount at any one time, each of them to advance certain specified proportions of the necessary money, the profits to be divided equally, and one of the parties guaranteeing to the other that the profits should amount to a certain sum, is in the nature of a partnership and not of a loan, and hence the statute against usury does not apply to it. Orvis *v.* Curtiss, 157 N. Y. 657 (1899). Where several parties buy and sell a certain stock in the name of one of themselves and close the deal, a subsequent purchase of the same stock by that one does not inure to their common benefit. Kennedy *v.* Porter, 109 N. Y. 526 (1888). Although three stockholders do, by an instrument similar to a bill of sale, sell their stock to a fourth stockholder "for and during the period of six months, . . . in trust for the use and benefit of the grantors," with power to sell the same on certain terms, yet this instrument is not a sale or trust agreement, but is merely a power of attorney. It does not prevent the fourth stockholder from selling his own stock on such terms as he chooses, even though he does not sell the stock of the others, it not appearing that the sale of his stock prevented his selling the stock of the others. The instrument conferred merely at most "only a dry legal title for the mere purpose of sale, and with the power of sale carefully circumscribed." Levi *v.* Evans, 57 Fed. Rep. 677 (1893). A syndicate operation was involved in Hogg *v.* Hoag, 107 Fed. Rep. 807 (1901), where certain stocks and property were transferred to a trustee who issued certificates therefor to the members of the syndicate. A part of the subscribers did not pay and the vendor of the property took the trustee's certificates of such non-paying subscribers, and on the death of the trustee a bill was filed to have the court substitute a new trustee, and one of the subscribers filed a cross-bill for an accounting. The court decreed a winding up of the syndicate and appointed a receiver. The court held that a partial payment made to the

tion with their operations. This class of cases is considered elsewhere.[1] A partnership or joint ownership of stocks between two

vendor of the stocks was legal, even though all the property was not conveyed to the trustee, as contemplated, and that the vendor's acceptance of the certificates of non-paying subscribers obligated him to pay therefor, although such trustee's certificates had become worthless, the transaction being in connection with the Oregon Pacific Railroad Company. The court said that the syndicate was in substance, though not technically, a joint-stock company. Where a person holds stock under an agreement with another that after the profits have repaid the cost of the stock, the further profits should be divided equally between them, such agreement is binding upon a person who buys such stock with notice of the agreement. Morris *v.* Shepard, 53 Atl. Rep. 172 (N. J. 1902). Where several parties agree to purchase land in the name of a corporation in exchange for stock to be taken in the name of one of them, the others may compel the latter to account for the stock. King *v.* Barnes, 109 N. Y. 267 (1888). See also § 252, *supra*. Where several parties buy a certificate of stock in fixed proportions, and the certificate is taken by one for the benefit of all, he is a bailee for the others and not a vendor. Coquard *v.* Wernse, 100 Mo. 137 (1890). In a joint operation in stocks no bill for an accounting will lie where by mutual consent the joint operation was ended, and one sold his stock while the other held his. Keller *v.* Swartz, 137 Pa. St. 65 (1890). Four years' delay on the part of the president to claim that he was entitled to a half interest in certain stock which a creditor of the corporation had purchased will not sustain his claim which was based upon a general talk to that effect. Mason *v.* Smith, 200 Pa. St. 270 (1901). An agent employed to conduct a joint adventure, who has been sued by his principals for the profits, cannot file a bill in equity for an accounting and distribution of the funds on the ground that he was entitled to an interest in such profits. Conger *v.* Judson, 69 N. Y. App. Div. 121 (1902). A bill in equity for an accounting does not lie at the instance of a party who claims that in consideration of newspaper work the defendants agreed to carry five hundred shares of stock for him in connection with a pool which had been formed. Black *v.* Vanderbilt, 70 N. Y. App. Div. 16 (1902). Where it is agreed between two brothers that one shall buy stock in a corporation on their joint account, and this is done, and the one purchasing charges his brother with the cost of his portion of the stock, and this account is accepted, a suit in equity lies to obtain the stock upon payment therefor, the corporation being a close corporation. Rand *v.* Whipple, 71 N. Y. App. Div. 62 (1902). Where a person has a one-third interest in certain stock issued to another person, and the company is reorganized, and is then reorganized a second time, the former person may compel the latter person to account for the stock finally received, on the basis of a partnership in the stock. Reilly *v.* Freeman, 1 N. Y. App. Div. 560 (1896). Where one party loans money to another party to buy stock in a certain company, such stock to be delivered to the former party in pledge, and the latter party uses the stock for another purpose, the loan of the money is not a mere loan, but the money is impressed with a trust, and this trust follows the stock as against non-*bona fide* holders. Barnard *v.* Hawks, 111 N. C. 333 (1892). See also §§ 321, 622.

[1] See §§ 705, 707, *infra*. A mere statement by an owner of mining

persons may be shown by the acts and contracts of the parties, and by the fact that the property clearly owned by them in common

claims that he will give to another person a half interest, does not sustain an action for one-half of stock issued for such claims, even though such other person contributed money and services. Griffin *v.* Knoblock, 20 Colo. App. 153 (1904). Where several parties have turned in property for stock and divide the same, one of them cannot, fourteen years thereafter, maintain a bill in equity to correct a mistake in the division where there was every opportunity to discover the mistake. *In re* Ridgway's Account, 206 Pa. St. 587 (1903). Trover does not lie in Pennsylvania by one joint speculator against the other for stock which the former hands to the latter to use as collateral in their speculations, even though the latter sold the stock and lost the proceeds in speculations. Martin *v.* Megargee, 212 Pa. St. 558 (1905). A contract between a patentee and a person by which the latter puts money into a corporation and receives stock in payment, and thereafter the corporation is sold to another corporation, each party turning in individual property in addition, does not constitute a partnership entitling one to claim a part of the price received by the other. Volney *v.* Nixon, 67 N. J. Eq. 457 (1904). In the case Leigh *v.* Laughlin, 211 Ill. 192 (1904) the court sustained a suit in equity by a person to compel his agent to deliver certain certificates of stock to the former, the agent having claimed but not proven that though the purchase of the stock was in the former's name it was for the joint benefit of both. Where a surviving partner organizes a corporation and transfers to it a large part of the assets of the old firm fraudulently, but outside persons become interested in the stock of the corporation, the estate may bring suit to compel the corporation to permit it to become a stockholder, and may join the other stockholders as parties defendant, and may compel the corporation to pay to the estate such part of the profits as in equity it is entitled to, the corporation having acquired patent rights and other property from other sources. Rowell *v.* Rowell, 122 Wis. 1 (1904). Where two parties contribute to locating and developing mines for their equal benefit, but not to working them, and one of them in whose name the mines are taken sells the mines for stock, the remedy of the other is at law for conversion of the bailment, there being neither a partnership nor a trust. Doyle *v.* Burns, 123 Iowa, 488 (1904). An agreement between promotors by which one person was to have thirty per cent. of the profits, does not make him a partner or joint adventurer. It was merely an agreement to pay a compensation. Boice *v.* Jones, 106 N. Y. App. Div. 547 (1905), holding also that where one promotor sues another on the theory of partnership, he cannot on the trial prove a joint adventure, instead of partnership. Where a person who obtains options and purchases stock for another is to have an interest in the profits on the sale of the same, it is immaterial whether it is a technical partnership or a mere joint venture, inasmuch as the same legal rules apply, in a suit by the former for an accounting by the latter. Spier *v.* Hyde, 92 N. Y. App. Div. 467 (1904). Where several parties have turned in property for stock and divide the same, one of them cannot, fourteen years thereafter, maintain a bill in equity to correct a mistake in the division, where there was every opportunity to discover the mistake. *In re* Ridgway's Account, 206 Pa. St. 587 (1903). Representations made by the manager of the company in purchasing the stock of a stock-

was used in the acquisition of other property.[1] The statute of frauds does not apply to such an arrangement.[2] A drunken person's sale of stock may be set aside if an undue advantage was taken.[3] Laches may be a bar to a suit brought by the claimant of stock against the corporation for allowing transfers of the same in fraud of his rights.[4]

§ 321. *Sales, purchases, and transfers by agents.* — A claim that a person purchased stock as trustee or agent to pay for and carry the same for the benefit of another person is a claim which can be proved by oral testimony, but must be clearly proved, and must be founded on a sufficient consideration. "Loose, vague, and indefinite expressions are insufficient to create such a trust. The intention must be evinced with clearness and certainty."[5] Stock may be purchased through an agent, and in making such a purchase the agent is not permitted to make a secret profit, even though he acts without compensation.[6] Where an agent conceals from his prin-

holder do not entitle the latter to a rescission on the ground of fraud, where there were no personal relations between them and the vendor did not rely upon any statements made, but on his own judgment, and received a price nearly equal to the actual value of the stock. Sullivan *v.* Pierce, 125 Fed. Rep. 104 (1903). Where the manager of a pool has not divided the proceeds fairly he may be compelled to account. Bradley *v.* Sweeny, 120 N. Y. App. Div. 315 (1907). On the sale of the property of an insolvent corporation the agreement of some of the stockholders with the others to divide with them any profits which may be made, does not apply to compensation to the former for work in connection with the reorganization. Poling *v.* Teter, 60 S. E. Rep. 1101 (W. Va. 1908).

1 Beardsley *v.* Beardsley, 138 U. S. 26 (1891). See also § 321, *infra*.

2 See § 339, *infra*.

3 A sale of stock by a drunken person for an insufficient consideration will be set aside; and if, without his fault, he is unable to restore the amount received, it will be provided for in the final decree. Thackrah *v.* Haas, 119 U. S. 499 (1886). An older brother who buys for $70,000 stock from his younger brother, which is worth $95,000, the latter being a drunkard, may be compelled to rescind the transaction. Shevlin *v.* Shevlin, 96 Min. 398 (1905).

4 Ware *v.* Galveston City Co., 140 U. S. 102 (1892).

5 Levi *v.* Evans, 57 Fed. Rep. 677 (1893). An absolute transfer of stock may be shown to have been in trust only, the stock to be returned upon the termination of a lease. Town of Mt. Morris *v.* Thomas, 158 N. Y. 450 (1899). See also § 465, *infra*, and § 320, *supra*.

6 Kimber *v.* Barber, L. R. 8 Ch. App. 56 (1872), holding that, where a person offers to buy for another, stock at a certain price, but buys it at a less price and keeps the difference, he is liable to the vendee for his gains. Keyes *v.* Bradley, 73 Iowa, 589 (1887). An agent who secretly takes a commission from a party dealing with his principal cannot enforce a contract by which he was to share in the stock purchased by the principal. York *v.* Searles, 97 N. Y. App. Div. 331 (1904). Where the general manager acts as an intermediary in selling all the stock of the company and he

cipal the amount of stock received by the agent for property, and keeps a part of the stock, the principal may hold him liable for the highest market value of the stock reached between the act and a reasonable time after discovery of the act by the principal.[1] When an agent has an option on stock and sells it to his principal, who thinks he is purchasing from an outsider, the principal may rescind.[2] A person appointed on the sale of the corporate property to sell stock received in payment therefor, cannot sell to himself, neither can he subsequently purchase from one to whom he has sold such stock.[3] The real owner of stock may compel the nominal owner to transfer the stock to him.[4] The corporation may disregard the nominal holder and allow the real owner to sell and transfer the stock.[5] An agent cannot keep stock on the ground that his principal had no power to purchase it.[6] Where an owner of stock turns it over to his

makes a secret profit, the stockholders may compel him to pay it over. Barbar *v.* Martin, 67 Neb. 445 (1903). See also § 320, *supra*. Where an agent is entitled to all that land is sold for above $50,000, and a sale is made for $10,000 cash and $44,000 in stock, par value, he must prove what the stock was worth. He cannot assume that it was worth par. Anderson *v.* Avis, 62 Fed. Rep. 227 (1894). An agent may of course be held liable for misrepresenting the price which he received on the sale of stock and for retaining the difference. Horner *v.* Perry, 112 Fed. Rep. 906 (1901). The cashier of a bank cannot collect money for his services while collecting the dividends and coupons of a depositor and stockholder in a bank, where there was no agreement to pay. Wright *v.* Sheldon, 24 R. I. 336 (1902).

1 McKinley *v.* Williams, 74 Fed. Rep. 94 (1896). A settlement between a principal and his agent is no bar to a subsequent suit by the principal against the agent for conversion of stock where the principal was not aware of the facts when he made the settlement. Ballard *v.* Beveridge, 171 N. Y. 194 (1902). Where an agent or broker is employed to buy stock for a "pool," and agrees to do so for a compensation consisting of a part of the profits, he is liable in damages for fraud if he charges the "pool" more than the stock cost him. Manville *v.* Lawton, 19 N. Y. Supp. 587 (1892).

2 Montgomery *v.* Hundley, 103 S. W. Rep. 527 (Mo. 1907). Where the agent sells the principal the agent's stock instead of certain other stock as the principal directed, the principal must repudiate the transaction at once if he intends to do so. Trott *v.* Schmitt, 119 N. Y. App. Div. 474 (1907).

3 Wing *v.* Hartupee, 122 Fed. Rep. 897 (1903).

4 Colquhoun *v.* Courtenay, 43 L. J. (Ch.) 338 (1874), 29 L. T. Rep. 877. Where a person subscribes for stock in the name of another as trustee, he may maintain an action to compel the trustee to account for the subscription and to turn it over upon payment being made. McComb *v.* Frink, 149 U. S. 629 (1893). A trustee holding stock is entitled to have his charges paid before delivering it up. Uehling *v.* Lyon, 134 Fed. Rep. 703 (1905).

5 Sabin *v.* Bank of Woodstock, 21 Vt. 353 (1849), holding also that the nominal holder is not protected, although he subsequently becomes the real owner of the stock.

6 Where a street railway company employs a person as its agent to purchase a majority of the stock of another street railway company, and he does so, and the former pays him for

agent to look after the stock, the stock itself being put in the name of the agent as absolute owner, and the stock is subsequently attached for a debt of such agent, and sold thereunder, the real owner of the stock may hold the agent liable for the value of the stock. Long delay is not a bar so long as the agent does not deny the agency.[1] Where a person turns over stock and bonds to another in order that the latter may act for the former in carrying out a reorganization, the former may file a bill against the latter for an account and need not resort to an action at law.[2] Even though the wife allows her stock to stand in the name of her husband, yet, if the stock belongs to her and she has the certificates, she may maintain a bill in equity to enjoin his judgment creditors from selling the stock and to compel the corporation to allow a transfer of the stock to her, but she must show that no fraud or injury resulted to her husband's creditors.[3] The relation of an agent towards

the stock and for his services, he cannot refuse to deliver the stock on the ground that the company had no power to purchase, or on the ground that it had passed no resolutions authorizing him to purchase, and the former may recover the stock from a transferee with notice from the agent. Manchester St. Ry. *v.* Williams, 71 N. H. 312 (1902).

1 Hovey *v.* Bradbury, 112 Cal. 620 (1896). Where one of the partners in a firm organized to locate, develop and operate mines does not turn into the firm a mine located by him, but transfers the same to a corporation for stock, and the other partners delay for two years after knowledge thereof, before filing a bill claiming an interest in the stock, and in the meantime the corporation has expended money and the stock may have passed into other hands, the court will refuse relief on the ground that the firm evidently intended to deny any obligation if the mine turned out to be worthless, but to claim an interest if it turned out to be valuable. Curtis *v.* Lakin, 94 Fed. Rep. 251 (1899).

2 Benedict *v.* Moore, 76 Fed. Rep. 472 (1896). Where an agent or trustee holds stock which belongs to another person, and the corporate property is sold, the money going to such stock belongs to such other person and the fact that the latter did not pay an assessment does not prove that he abandoned the stock. Loetscher *v.* Dillon, 119 Iowa 202 (1903). Where an agent with whom stock is deposited transferred in blank causes the same to be transferred to himself on the books of the company, and then hypothecates the same, and afterward dies, the real owner of the stock may claim other stock in the same corporation which such agent had at the time of his death. The identity of the certificates is immaterial. Marshall *v.* Marshall, 11 Colo. App. 505 (1898). The real owner of stock may compel his agent or trustee to account for such stock. Love *v.* Wheeler, 87 Fed. Rep. 523 (1898).

3 Magerstadt *v.* Schaefer, 213 Ill. 351 (1904). The mere fact that a man purchases stock through his brother as his agent, and allows the stock to stand in his brother's name and thereby gives him credit, is not fraud on the part of the former. Shields *v.* City Nat. Bank, 138 N. C. 185 (1905). Where a person uses the money of his sister to purchase national bank stock and continues to hold it until his death, he holds it as

his principal in the purchase, sale, or holding of stock exists where a "dummy" is used to shield the real owner from liability on the stock.[1] A stockholder may of course sell stock through an agent.[2] But power to sell does not give power to pledge.[3] An agent employed to sell stock has no inherent power to guarantee dividends thereon.[4] Where an agent writes the stockholder's name on the back of the certificate of stock, and disposes of it without authority, he is guilty of conversion and may be arrested.[5] Where

trustee for her, even though it is in his name and he became director on the faith thereof. *In re* Fisher's Estate, 128 Iowa 18 (1905).

1 See § 253, *supra*. A colorable transfer will not operate to discharge the transferrer where shares were collusively assigned to a servant for the purpose of evading liability. Hence, when the servant, upon the concern becoming solvent, attempted to claim the shares as though the transfer had been out and out, the court having previously decided against the *bona fides* of the transaction, it was held that the owner was entitled to a declaration that the servant held the shares in trust for him. Colquhoun *v.* Courtenay, 29 L. T. Rep. 877 (1874); 43 L. T. (Ch.) 338. Where a pledgee directs its agent to cause the stock to be transferred into the name of the pledgee "as pledgee," but the agent takes a new certificate running to the pledgee as absolute owner, the pledgee is not liable on the stock to corporate creditors, it being shown that the pledgee did not know of such issue of the new certificate; and especially in this case where the pledgee is a bank which had authority to take stock in pledge, but not to purchase it absolutely. May *v.* Genesee, etc. Bank, 120 Mich. 330 (1899).

2 See ch. XXV, *infra*, on stockbrokers. A person may assign stock to another with discretionary power to sell at any time the latter thinks best, and pay the former's creditors therefrom. Neilson's Appeal, 13 Atl. Rep. 943 (Pa. 1888). Where an agent to sell stock is to have any excess of price over a sum named to him by the vendor, and the agent finds a customer at an advanced price and the vendor refuses to sell, the agent may recover such profit as he lost thereby. Mattingly *v.* Roach, 84 Cal. 207 (1890). An agent authorized to sell stock may sell part of it. Ulster, etc. Inst. *v.* Fourth Nat. Bank, 8 N. Y. Supp. 162 (1889). See also various decisions in § 375, *infra*.

3 See §§ 326, 351, *infra*. A stockholder's power of attorney to his agent, "to exchange old issues or certificates [of stock] and receive new issues or certificates in lieu thereof," does not authorize the agent to sell or pledge the stock. The corporation is liable for allowing a transfer to a third person on such authority. Quay *v.* Presidio, etc. R. R., 82 Cal. 1 (1889). Where a person gives to another a general power of attorney, covering the sale and transfer of all stocks, etc., the attorney cannot, by delivering up the certificate therefor to the corporation, transfer the stock of his principal into his own name. The corporation is bound to inquire further. Tafft *v.* Presidio, etc. R. R., 84 Cal. 131 (1890), rev'g 22 Pac. Rep. 485 (1889). Power of an agent to sell does not give him power to pledge for his own use; and where the corporation with knowledge of the facts allows a transfer it is liable to the owner. Read *v.* Cumberland Tel. etc. Co., 93 Tenn. 482 (1894).

4 Smith *v.* Tracey, 36 N. Y. 78 (1867).

5 Reigner *v.* Spang, 5 N. Y. App. Div. 237 (1896). Where a stockholder in

an agent wrongfully repledges the stock belonging to his principal and then assigns for the benefit of creditors, and his assignee obtains repossession of the stock realizing on other securities which were pledged with it, the original owner of the stock may reclaim it.[1] An agent's written authority to transfer stock is revoked by death.[2] But where stock is transferred to a trustee to sell with the stock of other persons, the trustee's power of sale is not revoked by the death of the transferrer.[3] Even though an agent has a half interest in the profits of the sale of stock, this is not a copartnership, and the owner may sell at private sale and without notifying the agent.[4]

The principal and most difficult questions connected with an agency herein arise where the owner of stock indorses it in blank, and places it in the hands of an agent, and the agent, in violation of his orders, then sells the stock to a *bona fide* purchaser. The law is clear that the *bona fide* purchaser is protected in his ownership of the stock.[5] Where the owner of a certificate of stock endorsed in

an insolvent corporation turns over his stock to another person to deposit under a reorganization agreement, the latter agreeing to pay the assessment on the stock and to deliver to the stockholder the new securities upon repayment of such assessment, and he refuses so to do thereafter, he is guilty of a conversion and of a fraud upon the stockholder. Miller *v.* Miles, 58 N. Y. App. Div. 103 (1901); aff'd, 171 N. Y. 675. Where the owner of stock and bonds turns them over to a trust company to sell as it should deem best and return one-half of the proceeds, and the trust company, in violation of the trust, pledges them for a past-due debt, the remedy of the owner against the pledgee is not for conversion but for an accounting. Smith *v.* American Nat. Bank, 89 Fed. Rep. 832 (1898).

1 Woodside *v.* Grafflin, 91 Md. 422 (1900).

2 *Re* Kern's Estate, 176 Pa. St. 373 (1896). Where a certificate of stock runs to a person as attorney for another person and the latter dies, the attorney cannot compel the corporation to transfer the stock on his signature as attorney, unless the executor of the estate also joins in the transfer. Spellissy *v.* Cook, etc. Co., 58 N. Y. App. Div. 283 (1901). The express power of an agent to sell securities is revoked by the death of the principal, and if he sells thereafter he is liable for damages in conversion. Matter of Mitchell, 36 N. Y. App. Div. 542 (1899); aff'd, 161 N. Y. 654.

3 Hiller *v.* Ladd, 80 Fed. Rep. 794 (1897).

4 Hays *v.* Colonial Trust Co., 66 Atl. Rep. 143 (Penn. 1907).

5 See § 351, *infra*. Where the owner of stock which is endorsed in blank leaves it with his broker for safe keeping and the broker fraudulently pledges it, the pledgee, being *bona fide*, is protected. Shattuck *v.* American Cement Co., 205 Pa. St. 197 (1903). A *bona fide* pledgee from an agent who makes the pledge in breach of trust is protected. Maxwell *v.* Foster, 67 S. C. 377 (1903). Even though brokers in sending stock to a customer endorse it in blank and entrust it to a messenger, and the messenger converts it to his use by having other brokers sell it in good faith, yet such latter brokers are liable to the customer for the value of the stock. Hall *v.* Wagner, 111 N. Y. App. Div. 70 (1906). Even though a person forges

blank puts it in his safe-deposit box and allows a clerk to have a key of the box and the clerk abstracts the certificate and sells it to a *bona fide* purchaser, it is a question for the jury as to who stands the loss.[1] But a person buying stock from an agent, with knowledge that the latter is acting as agent, is bound to inquire into the scope of his authority, and if the agent is authorized only to sell for cash, his agreement to sell on time cannot be enforced by the purchaser.[2] In a suit by a stockholder to hold a corporation liable for his stock and dividends, by reason of its allowing a transfer by an unauthorized agent of the stockholder, the subsequent owners of the stock are not necessary parties. The defense of prescription may prevail.[3] A broker who claims to be acting for an undisclosed principal in contracting for the purchase of bonds, and who stipulates that he shall not be personally liable, cannot enforce such contract, if in fact he was the principal himself.[4]

Where a person secretly speculates in stock in the name of another person, the latter having the accounts with brokers, in some of which accounts the former is not interested, the former cannot maintain a bill for accounting against the brokers.[5]

A partner or principal of a person who signed a reorganization agreement under seal cannot sue the committee for breach of the contract. The instrument being under seal, only a party to it can enforce its covenants.[6]

§ 322. *Purchases of stock by guardians, executors, and trustees.*— In England, at an early day, the common-law rule was declared to be that guardians, executors, and trustees had no right to invest the trust funds in the stocks of private corporations, and that if they did so, they themselves were personally liable for the moneys so invested.[7] The rigor of this rule has been relaxed somewhat in

the name of a stockholder on the back of the latter's certificate of stock and pledges it, yet if the stockholder, being informed of the transfer by the secretary, confirms it, and the stock is sold to a *bona fide* purchaser, the owner cannot complain. Dover *v.* Pittsburg etc. Co., 143 Cal. 501 (1904).

1 Aull *v.* Colket, 2 W. N. Cas. 322 (1875).

2 Norton *v.* Nevills, 174 Mass. 243 (1899).

3 St. Romes *v.* Levee, etc. Co., 127 U. S. 614 (1888).

4 Paine *v.* Loeb, 96 Fed. Rep. 164 (1899).

5 McKay *v.* Hudson, 118 Fed. Rep. 919 (1902).

6 Williams *v.* Magee, 76 N. Y. App. Div. 513 (1902).

7 Trafford *v.* Boehm, 3 Atk. 440 (1746), where the investment was in bank and South Sea stock. Lewin on Trusts, 281 (7th ed., 1879), says that, "unless specially given power, it is settled in England that a trustee may not invest the trust fund in the stock of any private company, as South Sea stock, bank stock, etc.; for the capital depends upon the management of governors and directors, and is subject to loss."

England, by statute and by orders in chancery, so that such investments may be made in the stock of the banks of England and of Ireland and the East India Company.[1] A trustee authorized to invest in the stock of any company incorporated by act of parliament cannot invest in the stock of a company organized under the general acts.[2] In this country, aside from a few *dicta* and a few decisions to the contrary, the English rule, in its original integrity, is upheld and followed. The weight of authority clearly holds that the investment of trust funds in the stock of railroad, insurance, bank, manufacturing, or other corporations is made at the peril of the trustees.[3] The *cestui que trust* may hold the trustee liable for the

1 Lord St. Vincent's Act, 22 & 23 Vict., ch. 35, § 32; 23 & 24 Vict., ch. 38.

2 *Re* Smith, [1896] 2 Ch. 590.

3 In New York the case of King *v.* Talbot, 40 N. Y. 76 (1869), aff'g 50 Barb. 453, clearly sustains this rule. In Adair *v.* Brimmer, 74 N. Y. 539, 551 (1878), the trustees were held liable for selling coal lands, taking in pay coal stocks, although they were authorized by the will to invest in such securities as they deemed safe. See also Mills *v.* Hoffman, 26 Hun, 594 (1882); reversed in 92 N. Y. 181, but not on this point; Ackerman *v.* Emott, 4 Barb. 626 (1848). See also Brown *v.* Campbell, Hopk. Ch. (2d ed.) 265 (1824). Under a statute in New York a trustee of real estate, with power to sell it, may, with the consent of the *cestui que trust* and the court, sell it to a corporation, if such corporation cannot invest in stock or bonds, which trust estates cannot hold. N. Y. Real Property Law, § 94. In Pennsylvania the rule laid down in the text is the same. Nyce's Estate, 5 Watts & S. 254 (1843), holding the trustee liable for investment in United States Bank stock, although the guardian approved of the trustee's investment; Morris *v.* Wallace, 3 Pa. St. 319 (1846), where the investment was in the stock of a suspended bank. In Worrell's Appeal, 9 Pa. St. 508 (1848), a guardian was held liable for an investment in the stock of the Schuylkill Navigation Company, although dividends had been accepted by the *cestui que trust;* and this ruling was sustained on a second appeal, 23 Pa. St. 44 (1854). In Rush's Estate, 12 Pa. St. 375 (1849), however, under the terms of the will, stock in the Lehigh Coal and Navigation Company was approved, and this case was distinguished from Worrell's Appeal, 9 Pa. St. 508 (1848), on the second appeal of that case, 23 Pa. St. 44 (1854). In Hemphill's Appeal, 18 Pa. St. 303 (1852), United States Bank Stock was held not good. In Pray's Appeal, 34 Pa. St. 100 (1859), manufacturing corporation stock was disapproved, the works being unfinished, and the stock not paid up, and the ruling in Barton's Estate, 1 Pars. Sel. Cas. 24 (1842), was doubted. In Ihmsen's Appeal, 43 Pa. St. 431 (1862), railroad stock was held not good. In Pennsylvania the probate court may allow the executor of an estate to loan the funds of the estate to an unincorporated association in which the estate is interested. *In re* Mustin's Estate, 188 Pa. St. 544 (1898). An administrator in Pennsylvania who exchanges bonds for worthless stock is liable therefor. *In re* Locher's Estate, 67 Atl. Rep. 954 (Pa. 1907). "Stock in a joint-stock trading company can never be a suitable investment for an executor or trustee to make, unless he has been invested with greater powers than are ordinarily incident to such a position." Reed *v.* Reed, 68 Atl. Rep. 849

amounts so invested, together with interest upon the same. But where the trustee is authorized to purchase stock he is not liable for the embezzlements of an agent whom with due care he employs

(Conn. 1908). In New Jersey the rule is the same. Gray *v.* Fox, 1 N. J. Eq. 259 (1831); Ward *v.* Kitchen, 30 N. J. Eq. 31 (1878). Also in New Hampshire. In Kimball *v.* Reding, 31 N. H. 352 (1855), stock in a contemplated railroad was disapproved. In French *v.* Currier, 47 N. H. 88, 99 (1866), unproductive stock was held not good. In Massachusetts the tendency is to favor a contrary rule. "Trustees in this commonwealth are permitted to invest portions of trust funds in dividend-paying stocks and interest-bearing bonds of private business corporations, when the corporations have acquired, by reason of the amount of their property and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks and bonds as permanent investments." But where the trustee invested over a fifth of the estate in Union Pacific Railrod stock, and afterwards invested a further amount in the same stock, he was charged with the loss due to the second investment. Dickinson's Appeal, 152 Mass. 184 (1890). In Harvard College *v.* Amory, 26 Mass. 446 (1830), express power was given. In Lovell *v.* Minot, 37 Mass. 116 (1838), the stock was taken as security. Kinmonth *v.* Brigham, 87 Mass. 270 (1862), and Brown *v.* French, 125 Mass. 410 (1878), were not cases of investments in stocks. Hunt's Appeal, 141 Mass. 515 (1886), is a dictum, the decision being that the taking of a national-bank certificate of deposit is legal. Trustees holding stock in an industrial corporation (Farr Alpaca Co.) may use accumulated trust funds to subscribe for new stock which is worth more than par. Hyde *v.* Holmes, 84 N. E. Rep. 318 (Mass. 1908). But see Smith *v.* Smith (Mass. 1908), see p. 1739, *infra*. Even though the life tenant assented in writing to regular accounts of trustees which show illegal investments in stocks, yet if she knew nothing of their value or of the breach of trust she is not bound thereby. Bennett *v.* Pierce, 188 Mass. 186 (1905). A trustee has no power to invest in windmill manfacturing company stock, especially where the investment involved actual fraud. Cropsey *v.* Johnston, 137 Mich. 16 (1904). An executor may take part in and personally subscribe for stock in a corporation formed to take over an embarrassed and unprofitable partnership in which the estate is interested. Houghteling *v.* Stockbridge, 136 Mich. 544 (1904). See 85 N. E. Rep. 426.

In several of the southern states the courts hold that trustees, etc., may invest the trust funds in stocks. Boggs *v.* Adger, 4 Rich. Eq. (S. C.) 408 (1852), holds United States Bank stock good. Washington *v.* Emery, 4 Jones, Eq. (N. C.) 32 (1858), approves railroad stock. In Gray *v.* Lynch, 8 Gill (Md.), 403 (1849), and in Smyth *v.* Burns, 25 Miss. 422 (1853), bank stock was held good. In Lamar *v.* Micou, 112 U. S. 452 (1884), and 114 U. S. 218 (speaking for Georgia and Alabama), bank and railroad stock was held good, but not Confederate bonds. See also on this subject generally, 40 Am. Dec. 515, notes. An executor who is interested in a corporation, and gets a commission for selling its stock, is liable to replace funds which he induces the *cestui que trust*, a woman, to invest in such stock. Potter's Appeal, 56 Conn. 1 (1887). In Kentucky the statutes authorize the retention by a guardian of an investment in good bank stock. Fidelity, etc. Co. *v.* Glover, 90 Ky. 355 (1890). A trustee cannot make an investment in bonds in violation of a statute, even though

to make the purchase.[1] Where the trustee is expressly authorized to invest in bank stock he is not liable to the estate for losses, though the investment is made in his individual name.[2] Even though a will authorizes trustees to make investments as they deem best and recites that they shall have the same power as the testator had, yet if the trustees do not exercise reasonable discretion but proceed to invest funds in the bonds and stock of a railroad corporation after they have already invested a fifth of the estate in such bonds and stock, they are liable for such further investment.[3] Where stock in

the *cestui que trust* assents thereto. Aydelott *v.* Breeding, 111 Ky. 847 (1901). A trustee for an infant cannot convey land to a corporation and take stock in payment. Randolph *v.* East Birmingham Land Co., 104 Ala. 355 (1894). A constitutional provision against any statute authorizing guardians or trustees to invest in the bonds or stock of a private corporation does not prevent a guardian, who already holds such stock, purchasing more, in order to control the corporation and prevent the control passing into dangerous hands. Neither does such constitutional provision prevent a guardian taking such stock as collateral security. Nagle *v.* Robins, 9 Wyo. 211 (1900). Where the life tenant refuses to pay for increased capital stock which is issued at fifty cents on a dollar, the remaining fifty cents being a stock dividend, and the trustee takes the stock for himself, and ten years have elapsed since the life tenant claimed the stock, the statute of limitations is a bar to his suit to compel the trustee to account for the stock. Matter of Smith, 66 N. Y. App. Div. 340 (1901); aff'd, 178 N. Y. 563.

1 Speight *v.* Gaunt, L. R. 9 App. Cas. 1 (1883). The trustee is not liable for loss due to the fact that the certificates of stock purchased by him were forgeries, provided he used due care. Isham *v.* Post, 141 N. Y. 100 (1894).

2 Pensyl's Appeal, 15 Atl. Rep. 719 (Pa. 1888). A trustee who is directed by a will to invest in dividend-paying securities is not bound to sell dividend-paying securities which he receives as trustee and then reinvest the proceeds. Dunklee *v.* Butler, 30 N. Y. Misc. Rep. 58 (1899). Even though the will of an umbrella manufacturer gives the trustees power to invest as the trustees may deem to be for the benefit of the estate, yet the trustees cannot legally invest in debenture stock of a combination or trust in the umbrella business, where another part of the will directed that the testator's umbrella business be closed within six months after his decease. Matter of Hall, 48 N. Y. App. Div. 488 (1900). A trustee who is appointed under a will and holds national bank stock, in accordance with the terms of the will has no right, upon the dissolution of the bank, to take a proportionate interest in a banking copartnership which succeeds to the business, and is liable for loss occurring thereby. Penn *v.* Fogler, 182 Ill. 76 (1899).

3 *In re* Day's estate, 183 Mass. 499 (1903). Under a power given by the will to change investments, trustees may invest in railroad and street railway bonds. Allis *v.* Allis, 123 Wis. 223 (1904). Where a trustee is authorized to invest in "any corporation or company, municipal, commercial or otherwise," he may invest in the stock of a foreign corporation. *Re* Stanley; Tennant *v.* Stanley, [1906] 1 Ch. 131. Where power is given by a will to trustees to invest money in "securities," they may invest in shares of stock in railway companies. *Re* Rayner, [1904] 1 Ch.

several corporations is put in trust by a deed acknowledged, delivered and accepted by the trustees in New York, where the grantor resided, the trust deed is governed by the law of New York, without reference to the residence of the trustees or the subsequent residence of the grantor.[1] Where a trustee receives securities from the testator, which a trustee is not authorized to invest in, it is his duty within a reasonable time to sell them and invest the funds in authorized securities.[2] Trustees of property with

176. Even though trustees are authorized by the will to invest in sound productive securities as they might deem best, they may be liable for investments in stocks which depreciate and cause a loss to the estate. Brown *v.* Brown, 65 Atl. Rep. 739 (N. J. 1907). *Quo warranto* proceedings do not lie to test the right of a private corporation to act as trustee for certain shares of its own stock which a stockholder has placed in trust. State *v.* Higby Co., 130 Iowa 69 (1906). A stockholder in a national bank may donate his stock to his children by putting it in trust for them, and he is not then liable on the stock where it is clear that his acts were not for the purpose of avoiding liability. Fowler *v.* Gowing, 152 Fed. Rep. 801 (1907). The statute of frauds does not apply to an express trust in stock. *In re* Fisher's estate, 128 Iowa 18 (1905). Under a power to invest in good dividend-paying stock a trustee has no power to sell and reinvest, and a statute allowing such reinvestments does not apply to a pre-existing trust. Branch *v.* DeWolf, 68 Atl. Rep. 543 (R. I. 1908). Even though trustees are given a wide discretion in investments, they should not invest in the stock of a foreign corporation. Pabst *v.* Goodrich, 113 N. W. Rep. 398 (Wis. 1907).

1 Mercer *v.* Buchanan, 132 Fed. Rep. 501 (1904).

2 Matter of Wotton, 59 N. Y. App. Div. 584 (1901); aff'd, 167 N. Y. 629. In the absence of instructions in a will, an executor should usually sell stocks and reinvest the proceeds, but special circumstances may govern particular cases. Hill on Care of Estates, p. 28. Where stock which the trustees are expressly authorized to hold is merged into stock which they are not authorized to hold, it is their duty to dispose of the stock as soon as they can make an advantageous sale of the same. *Re* Castlehow, [1903] 1 Ch. 352. In New Jersey by statute an executor or trustee may continue to hold securities which the testator owned at the time of his death and is not liable for loss if he exercised good faith and reasonable discretion. Brown *v.* Brown, 65 Atl. Rep. 739 (N. J. 1907). Executors and trustees may sustain the price of stock by purchasing the same where the results to the estate would be disastrous unless they do so, as, for instance, where the estate owes a large amount of money secured by such stock, which loans would be called if the stock declined in value. Matter of Corbin, 101 N. Y. App. Div. 25 (1905). Executors and trustees have no legal right to pay the debts of a corporation, even though the estate holds practically all of its stock and bonds. Matter of Corbin, 101 N. Y. App. Div. 25 (1905). In the case Bertron, etc. *v.* Polk, 101 Md. 686 (1905), the trustees were held liable for selling stocks in order to reinvest the proceeds in mortgages, ground rents, etc. at a less rate of interest. It is the duty of the executor, without obtaining permission from the court, to dispose of stocks and bonds which the testator owned but which the law does not allow him to invest in, as

power of sale may transfer the property to a corporation in exchange for all the stock of the latter.[1] Where a deed of trust refers to certain stock and transfers the same to the trustee and authorizes him to transfer the stock to himself on the books, an indorsement of the certificates is unnecessary to pass title to the trustee.[2] Where trustees invest in partly paid up stock without authority and one of them dies and the other is obliged to make good the loss, he may have contribution from the estate of the deceased trustee.[3] The guardian

soon as he conveniently can do so, and at such a reasonable time as is to the interest of the estate, and to use the proceeds in purchasing statutory investments. Matter of New York Life, etc. Co., 86 N. Y. App. Div. 247 (1903). Where a trustee is authorized to retain investments owned by the testator at the time of his death, he may retain hazardous coal stocks, and the life tenant is entitled to the entire income. *Re* Bates, 95 L. T. Rep. 753 (1906). Where trustees legally hold, by the terms of a trust agreement, stock in an American holding corporation, and the American courts compel the holding corporation to distribute its assets among its stockholders, such assets being railroad stocks, the trustees must sell such railroad stocks as are so received by them. *Re* Anson's Settlement, 97 L. T. Rep. 472 (1907). In England trustees may, by order of the court, be given leave to retain stock which formed part of the estate at the time of the testator's death. *Re* Piercy, 95 L. T. Rep. 868 (1906). Where a trustee sells stock by decree of the court on account of the precarious nature of the stock, the life tenant is not entitled to anything from the corpus of the estate where it is not shown that the income is decreased. Lister *v.* Weeks, 61 N. J. Eq. 623 (1900). Under a statute in Kentucky, a trustee may sell stock which he holds for the estate and invest the proceeds in real estate. Bank of Kentucky *v.* Winn, 110 Ky. 140 (1901). In this case the court held also that at common law the trustee has that power, and further, that in a suit to authorize such transfer neither the corporation nor the remainderman is a necessary party. A trustee of an estate has implied power to sell railroad stock belonging to the estate in order to reinvest the proceeds in securities which the law allows him to invest in. Toronto, etc. Co. *v.* Chicago etc. R. R., 64 Hun, 1 (1892); aff'd, 138 N. Y. 657. See also *Re* Bennison, 60 L. T. Rep. 859 (1889). Trustees should sell the stock if depreciation is probable. Ward *v.* Kitchen, 30 N. J. Eq. 31 (1878). Where a person transfers all his property to a trustee for various purposes and a part of the property consists of stock, which a trustee cannot legally hold, it is the duty of the trustee to sell the stock and reinvest the proceeds, and he is liable for a decline in value if he does not sell within a reasonable time. Babbitt *v.* Fidelity T. Co., 66 Atl. Rep. 1076 (N. J. 1907). See also § 323, *infra*.

1 *In re* Sprague, 22 R. I. 413 (1901). A trustee holding property for various persons cannot transfer it to a corporation in exchange for stock of the latter, even though the trust agreement authorizes a sale and provides that the proceeds of the sale shall be divided among the beneficiaries. In a suit to enjoin such sale an action to hold members of the executive committee personally liable for conspiracy should not be joined. Moody *v.* Flagg, 125 Fed. Rep. 819 (1903). See also N. Y. Real Property Law, § 94.

2 Curtis *v.* Crossley, 59 N. J. Eq. 358 (1900).

3 Jackson *v.* Dickinson, [1903] 1 Ch. 947.

of an infant cannot purchase stock belonging to the estate of the ward's ancestor and offered at administrator's sale, even though he purchases as guardian, but the court or a succeeding guardian or the beneficiary on attaining majority may ratify the sale or disaffirm it.[1] A person transferring stock in trust, the dividends to be paid to him during life, and also such part of the principal as the trustee deems best, and the stock to go to his heirs upon his death, the trustee to have power to sell and reinvest the fund, cannot be revoked by the person creating the trust.[2]

§ 323. *Sale or pledge of stock by trustee, legally or in breach of his trust.*—It is the duty of a trustee to keep and preserve the trust property, and to apply the income according to the terms of the instrument creating the trust. As a general rule it is not his duty or his right to sell or change the investment. Unless the instrument creating the trust authorizes a sale of the trust property, it is a breach of trust for the trustee to make a sale,[3] excepting of such securities as neither the trust instrument nor will nor the law prescribes that he may keep or invest in. In this respect the powers of a trustee differ widely from those of an executor or administrator. Moreover, under ordinary circumstances, a trustee cannot sell stock held in trust, although such sale be for the purpose of investing the proceeds in other property.[4] If, however, the estate has stocks which the law would not allow him to invest in, it is, as stated above,

1 Rogers *v.* Dickey, 117 Ga. 819 (1903).

2 Sands *v.* Old Colony, etc. Co., 195 Mass. 375 (1907). In the case State *v.* Probate Court, etc. County, 113 N. W. Rep. 888 (Minn. 1907), a stockholder transferred title to his children and the children then leased to him the use of the stock during his life and the transaction was upheld by the court. See also § 308, *supra.*

3 Bohlen's Estate, 75 Pa. St. 304 (1874); Bayard *v.* Farmers', etc. Bank, 52 Pa. St. 232 (1866); Jaudon *v.* National City Bank, 8 Blatchf. 430 (1871); s. c., 13 Fed. Cas. 376; aff'd, Duncan *v.* Jaudon, 15 Wall. 165 (1872). On the relations and duties of trustees generally in regard to stock, see also Perry on Trusts (3d ed.) §§ 439, 543. Where several stockholders, including a trustee, sell, his failure to obtain an order of court does not constitute a failure to deliver in the specified time, where the transferee accepted delivery without such order. German Sav. Inst. *v.* De La Vergne, etc. Co., 70 Fed. Rep. 146 (1895); s. c., on appeal, 175 U. S. 40.

4 A trustee who sells stock for the purpose of investing in real estate may be compelled to replace it. Earl Powlet *v.* Herbert, 1 Ves. Jr. 297 (1791). *Cf.* Bohlen's Estate, 75 Pa. St. 304 (1874); Peckham *v.* Newton, 15 R. I. 321 (1886). *Cf.* note 1, *supra.* The *cestui que trust* may waive the objection. Duncan *v.* Jaudon, 15 Wall. 171 (1872). Under the statute authorizing trustees to invest money in real estate, stocks may be traded by them for real estate. *In re* Derr's Estate, 203 Pa. St. 96 (1902). Washington *v.* Emery, 4 Jones Eq. (N. C.) 32 (1858), holds that a change in the investment is allowable if there is good reason to believe that the es-

the trustee's duty to sell them unless the will directs otherwise or gives him discretionary power as to investments.[1] A court of equity has inherent power to authorize a trustee to sell shares of stock held in trust, even though the trust instrument does not give him that power, but the court will not ordinarily make such an order or decree, and will only do so when all the persons interested in the estate are before the court.[2] One of two or more executors may legally sell and transfer stock belonging to the estate,[3] but the rule is different in regard to trustees, and all must join in any sale or transfer of stock.[4]

§ 324. Where a trustee improperly sells shares of stock belonging to the trust estate, the *cestui que trust* has a right to elect to have the stock restored or the amount received for it paid over, together with interest from the time of the sale.[5] Were the rule

tate will be benefited. But they are not liable for failure to sell if such a course is pursued in good faith and in the exercise of a sound discretion. Bowker *v.* Pierce, 130 Mass. 262 (1881); Parker *v.* Glover, 42 N. J. Eq. 559 (1887); Stewart's Appeal, 110 Pa. St. 410 (1885),—the last case holding also that a sale by the trustee to himself, even at the market price, was voidable at the instance of the interested parties. The trustee cannot change the stock bequeathed. Murray *v.* Feinour, 2 Md. Ch. 418 (1851). Even though trustees hold stock in trust and are not authorized to change the investment, yet if the company is reorganized into a larger company, by exchange of stock for stock and bonds of the latter, and such reorganization is necessary from a business standpoint, a court of equity has power to authorize the trustee to exchange the old stock for the new stock and bonds. *Re* New's Settlement, [1901] 2 Ch. 534. A trustee is not liable merely because he did not sell a security in a falling market, the investment itself being legal. *Re* Chapman, [1896] 2 Ch. 763. Unless the will permits it, an investment cannot be changed into stock. *Re* Warde, 2 Johns. & H. 191 (1861). *Cf.* Waite *v.* Whorwood, 2 Atk. 159 (1741). In Jones *v.* Atchison, etc. R. R., 150 Mass. 304 (1889), the court upheld a sale of stock made by the trustee for the purpose of changing the investment.

1 See § 322, *supra*. *Cf.* the cases in note, p. 914, *supra*.

2 Am. & Eng. Ency. of Law, 2d ed., vol. XXVIII, p. 994. A decree of a South Carolina court allowing the transfer of stock held in trust in a South Carolina corporation is not binding on the remaindermen if they were not parties to the proceedings. Putnam *v.* Lincoln, etc. Co., 118 N. Y. App. Div. 469 (1907). Where trustees hold stocks under a will which states that the trustees shall "stand and be possessed," to pay the income to specified persons, they have no power to sell the stock except by order of the court. Bremer *v.* Hadley, 81 N. E. Rep. 961 (Mass. 1907).

3 See § 329, *infra*.

4 Cooper *v.* Illinois, etc. R. R., 38 N. Y. App. Div. 22 (1899). Bohlen's Estate, 75 Pa. St. 304, 312 (1874); also p. 925, note 4, *infra*; Perry on Trusts, § 412.

5 Harrison *v.* Harrison, 2 Atk. 121 (1740); Bostock *v.* Blakeney, 2 Bro. Ch. 653 (1789); Pocock *v.* Reddington, 5 Ves. Jr. 794 (1801); Long *v.* Stewart, 5 Ves. Jr. 800, n. (1801); Hart *v.* Ten Eyck, 2 Johns. Ch. 62, 117 (1816);

otherwise the trustee would profit by his own breach of trust in case there was a decline in the value of the stock. The trust attaches to any stock standing in the name of the trustee, and although the same certificates are not retained, an equal amount of other similar stock owned by the trustee may be applied to the trust.[1] Where, however, a trustee has pledged trust estate stock in breach of trust and becomes insolvent, his general estate is not bound to redeem the pledge.[2] And in all cases where the trustee has sold stock belonging to the trust estate in breach of his duties as trustee, he may be held liable in damages by the *cestui que trust* or his representative for the value of the stock.[3] Specific performance in regard to a trust

Re Massingberd's Settlement, 60 L. T. Rep. 620 (1889). A trustee selling stock at a high price and then replacing it at a lower figure is liable to the *cestui que trust* for the high price. Snyder *v.* McComb, 39 Fed. Rep. 292 (1889). Where a corporation is in a precarious condition, a trustee holding stock in it may sell the stock, even though he does not sell stock held by him personally, and even though it turns out subsequently that it would have been better not to have sold. Owen *v.* Campbell, 100 Mich. 34 (1894). A trustee who reports a sale of stock, but makes the sale subsequently to a relative at a low price is liable. Schweitzer *v.* Bonn, 55 N. J. Eq. 107 (1895).

1 Pinkett *v.* Wright, 2 Hare, 120 (1842). A trustee is liable for breach of trust of his co-trustee in regard to stock where the former is negligent in keeping himself informed as to the transactions of the latter in the trust property. Bullock *v.* Bullock, 55 L. T. Rep. 703 (1886). Trust stock was pledged by a trustee to secure his own debt in 1864, the pledgee knowing that the stock was trust stock; the stock was sold by pledgee in 1867; the *cestui que trust* learned thereof in 1877 and commenced suit against the executors of the surety for the trustee; judgment was rendered in 1882, and executors commenced this suit against the pledgee within three years after 1882. *Held,* that no laches or statute of limitations barred the suit. Blake *v.* Traders' Nat. Bank, 145 Mass. 13 (1887). See Marshall *v.* Marshall 11 Colo. App. 505 (1898).

2 Lowe *v.* Jones, 192 Mass. 94 (1906).

3 A trustee authorized to sell stock, but selling in breach of trust, is liable for the value of the stock at the time of commencing suit against him, and interest; also for dividends declared after the breach of trust; or the *cestui que trust* may demand the value of the stock at the time of the breach of trust, and interest, or replacing of similar stock and dividends. McKim *v.* Hibbard, 142 Mass. 422 (1886). A trustee to use stock to pay debts may assign a part of the stock to pay a debt due himself, if in good faith and at a full valuation. Patterson *v.* Lennig, 118 Pa. St. 571 (1888). Where trustees are appointed in 1862, and the surviving trustee dies in 1879 and his two executors continue to execute the trust, one being an Englishman and the other an American, the American taking charge of the American securities, and in 1883 new trustees are appointed, but no effort is made to have the securities transferred from the executors to the new trustees until 1892, and in the meantime the American executor has fraudulently disposed of the American securities, the English executor cannot be held liable, laches being a bar. *Re* Taylor, 81 L. T. Rep. 812 (1900).

estate of stock may be decreed.[1] A trustee may be removed or held liable for bad faith in voting and controlling trust estate stock.[2] The executor of an estate owning stock in a corporation may enjoin the corporation from paying a back salary to its president, who is a co-executor of the estate, even though the stock of the estate was pledged by the decedent and was transferred into the name of the pledgee.[3] Directors' fees received by trustees of an estate, who were elected directors in respect of the stock so held in trust, belong to the estate.[4] Trustees holding negotiable bonds have the right to deposit them with a bank with instructions to collect the coupons from time to time and credit the estate.[5] Even though a certificate of stock runs to a person as trustee, yet, if, as a matter of fact, it belongs to him, the purchaser of the certificate is entitled to the stock as against

The mode of transferring stock on the corporate books in England is described in Shepherd *v.* Harris, [1905] 2 Ch. 310, and it was held that a trustee who joins with his co-trustee, a stock broker, in selling the stock as authorized, is not liable for his co-trustee defaulting with the proceeds and forging the note and stock receipt. Where the market price of stock has been $250 a share, but by reason of purchases to obtain control the price is run up, and an executor sells for $600 a share and also sells some of his own at the same price, he is not liable even though the stock subsequently sells at $1500 a share. Christy *v.* Christy, 225 Ill. 547 (1907). See also § 729, *infra*. Even though executors or trustees have improperly disposed of stock, yet a suit to recover the same, from parties receiving the stock with notice of the facts, must be brought by the trustees or by the *cestui que trust*, after a demand to the trustees to bring the suit and a refusal of the latter. Robinson *v.* Adams, 81 N. Y. App. Div. 20 (1903); aff'd, 179 N. Y. 558.

1 See § 338, note, *infra*.

2 Where a majority of the stock of the corporation passes by will to a trustee of the estate, and he makes himself president and increases his salary, and pays little attention to the business, and tries to sell the company out to a consolidation, and does not properly divide the income between life tenant and remaindermen, and causes the company to sell its reserve, and is responsible for the company losing its most valuable contract, and is unable to agree with a *cestui que trust*, the court will remove him from the trusteeship. Lister *v.* Weeks, 60 N. J. Eq. 215 (1900). See also § 612, *infra*. Even though a trustee of stock who has been an officer and stockholder in the corporation is voted a salary, this is no ground for removing him as trustee, there being no proof that he voted in favor of the salary. Neither is the fact that the company did not pay as large dividends as it formerly did, any ground for the removal of the trustee. Dailey *v.* Wight, 94 Md. 269 (1902). Where all the assets of a corporation are transferred for stock of another corporation and such stock is sold by trustees of the former to pay its debts, the fact that one of the trustees subsequently buys a portion of the stock does not render him liable for such debts. Wing *v.* Charleroi, etc. Co., 112 Fed. Rep. 817 (1902).

3 Monmouth Inv. Co. *v.* Means, 151 Fed. Rep. 159 (1906). See also § 612, *infra*.

4 *Re* Francis, etc. 92 L. T. Rep. 77 (1905).

5 *Re* De Pothonier, [1900] 2 Ch. 529.

a claim to the stock made by a son of the vendor. There is no trust in such a case.[1]

§ 325. *Transferee of stock from trustee is protected, when.*—A vendee or pledgee of stock, directly from a trustee, is or is not protected in his interest in the stock, according as he is or is not chargeable with notice of the fact that the stock belongs to a trust estate, and that the trustee is using it in breach of the trust. Anything that is sufficient to put a party on inquiry is considered equivalent to actual notice, if inquiry be not made and reasonably satisfied. The law imputes to a purchaser the knowledge of a fact of which the exercise of common prudence and ordinary diligence would have apprised him. This is called constructive notice, and has the same effect as an actual notice of the trusteeship. The most common instance of a constructive notice that stock being sold belongs to a trust estate is where the words "trustee" or "in trust," either with or without the name of the *cestui que trust,* are written on the face of the certificate of stock after the name of the person in whose name it stands on the corporate books. It is well established that such words, indicating a trustee ownership, are notice to the purchaser that his vendor is selling trust property, and that he must ascertain whether the trustee has power to sell the stock.[2] There

1 Amberson *v.* Johnson, 127 Ala. 490 (1900).

2 Quoted and approved in Johnson *v.* Amberson, 140 Ala. 342 (1904). Where stock stands in the name of a person as "trustee," a pledgee of the same is bound to inquire as to the character of the trust and is not protected "if it turns out that a reasonable inquiry would have disclosed that the property had been transferred in violation of the duty or power of the trustee." Such pledgee takes the stock subject to the right of the *cestui que trust* or of the trustee to reclaim possession. First Nat. Bank, *v.* Nat. Broadway Bank, 156 N. Y. 459 (1898). "A certificate for shares of stock running to 'A. B., trustee,' or to 'A. B., in trust,' without disclosing the names of beneficiaries or the particulars of the trust, is notice to a purchaser of the shares that 'A. B.' does not hold them in his own right, but as a trustee." Gerard *v.* McCormick, 130 N. Y. 261, 267 (1891); Budd *v.* Munroe, 18 Hun, 316 (1879). Where trustees under a will hold registered bonds, the registration being to them as trustees, it is illegal for the corporation to allow one of them to transfer such registered bonds, and the corporation is liable for the same if such transfer is in breach of trust on the part of the trustee. Cooper *v.* Illinois, etc. R. R., 38 N. Y. App. Div. 22 (1899). In this case the bonds had been registered in the name of the executor of the estate, who upon his death was succeeded by two trustees, and one of these trustees caused the corporation to transfer the bonds from the name of such executor to bearer. The court held, however, that a broker, who sold the bonds, was not liable, although he knew that the bonds were registered in the name of the executor prior to the transfer thereof to bearer. Where a trustee has deposited funds with a bank as trustee for a long time, and obtains a loan as

are many other facts which will prevent the vendee from claiming that he is a *bona fide* holder of the stock. Thus, if the stock is pledged to a bank by the trustee, who is a director of a bank, and the

trustee and pledges bonds as security, the bank may be a *bona fide* holder of the same, even though the bonds have been stolen and have been issued twenty years prior thereto and the corners appear to have been burned. Depositing funds as "trustee" did not give notice that he was acting for others and did not require an investigation as to his authority. Manhattan Sav. Inst. *v.* N. Y. etc. Bank, 170 N. Y. 58 (1902). In Shaw *v.* Spencer, 100 Mass. 382 (1868), the court said that the word "trustee" means "trustee for some one whose name is not disclosed," and that a custom of trade disregarding such words on certificates of stock is illegal and ineffectual to protect the purchaser. To same effect, Jaudon *v.* National City Bank, 8 Blatchf. 430 (1871); s. c., 13 Fed. Cas. 376; aff'd, Duncan *v.* Jaudon, 15 Wall. 165, 176, where the court says the purchasers "are chargeable with constructive notice of everything which, upon inquiry, they could have ascertained from the *cestui que trust*." A corporation is liable for allowing a transfer of stock standing in the name of a person as trustee where such transfer was unauthorized. Geyser-Marion, etc. Co. *v.* Stark, 106 Fed. Rep. 558 (1901), holding also that a custom to the contrary is not binding unless the *cestui que trust* consented thereto, and that the presumption is that a trustee has no power to sell or transfer the subject of the trust. The court said: "The word 'trustee' means something. It is a warning and declaration to every one who reads it (1) that the person so named is not the owner of the property to which it relates; (2) that he holds it for the use and benefit of another; and (3) that he has no right or power to sell or dispose of it without the assent of his *cestui que trust*." The court pointed out that there were only three decisions to the contrary; two in California and one in Maryland, the latter of which had been overruled by Marbury *v.* Ehlen, 72 Md. 206. See also Gaston *v.* American Ex. Nat. Bank, 29 N. J. Eq. 98 (1878); Walsh *v.* Stille, 2 Pars. Sel. Cas. (Pa.) 17 (1842). A pledgee of stock which upon its face is held in trust is bound to inquire into the power of the trustee to make the pledge, and the fact that he has made a pledge on another occasion is not enough. Clemens *v.* Heckscher, 185 Pa. St. 476 (1898). See also Simons *v.* Southwestern R. R. Bank, 5 Rich. Eq. (S. C.) 270 (1853), where a master in chancery held the stock in his own name officially; Loring *v.* Brodie, 134 Mass. 453 (1883); Loring *v.* Salisbury Mills, 125 Mass. 138 (1878); Sweeney *v.* Bank of Montreal, 5 Can. Law T. 503 (1885); Bank of Montreal *v.* Sweeny, L. R. 12 App. Cas. 617 (1887). In California, however, it is held that although the word "trustee" on the face of the certificate, followed by the name of the *cestui que trust*, may give notice that it is trust property, yet that where the word "trustee" is but a cloak for an agency, for the purpose of shielding the real owner from liability on his stock, and to conceal the fact that he is dealing in stocks, the court will disregard it, and will not protect the real owner against his agent's unauthorized sale of the stock. Brewster *v.* Sime, 42 Cal. 139 (1871); Thompson *v.* Toland, 48 Cal. 99 (1874). In Maryland it is held that the word "trustee" added to the name appearing on the certificate of stock does not require the purchaser to make extraordinary investigations. The fact that the vendor sells as trustee is not notice that he intends to commit a breach of trust, there

bank is prohibited from loaning to its directors, the bank is not a *bona fide* holder, though without notice or knowledge of the trusteeship.[1]

In England, the House of Lords has decided that certificates of stock in railway companies are not negotiable in any respect, and that a *bona fide* transferee of the certificate is not protected until he has obtained registry in the corporate books.[2] In this country a different rule prevails, and it is accepted and assumed as elementary that a *bona fide* purchaser for value of certificates of stock belonging to a trust estate, and sold in breach of trust, there being no mention of the trust on the certificates, is protected in his purchase, although he has not registered the transfer on the corporate books. A *bona fide* purchaser through several mesne conveyances, starting from a trustee who sells the stock in breach of trust, is protected.[3]

being nothing on the record to indicate such intent. Grafflin *v.* Robb, 84 Md. 451 (1896). Where a certificate of stock runs to a person absolutely and passes into *bona fide* hands, the corporation is not liable for allowing a transfer, even though such stock was held in trust and the corporation knew the fact so to be, it appearing that no harm was done by the transfer, inasmuch as the certificate had already passed into *bona fide* hands. Smith *v.* Nashville, etc. R. R., 91 Tenn. 221 (1892). A purchaser of certificates of stock need not look back of the last registry of transfer on the corporate books. A breach of trust back of that does not invalidate his title. Winter *v.* Montgomery, etc. Co., 89 Ala. 544 (1890); Salisbury Mills *v.* Townsend, 109 Mass. 115 (1871). Where stock standing in the name of a person as trustee is sold and the certificates are turned in for transfer without the purchaser seeing them, he takes good title, even though there was a breach of trust, he not knowing of such breach nor of the trusteeship. Notice to a person attending to the transfer is not notice to the transferee. Stinson *v.* Thornton, 56 Ga. 377 (1876).

1 Albert *v.* Baltimore Savings Bank, 2 Md. 159, 171 (1852), aff'g 1 Md. Ch. 407. A bank which receives trust stock as security for a loan, and afterward, on payment of the loan, transfers the stock to parties designated by the pledgor, is liable to the *cestui que trust* for aiding in the latter transfer. Magnus *v.* Queensland Nat. Bank, L. R. 37 Ch. D. 466 (1888), aff'g L. R. 36 Ch. D. 25.

2 Shropshire Union, etc. Co. *v.* Regina L. R. 7 H. L. 496 (1875). *Cf.* Dodds *v.* Hills, 2 Hem. & M. 424 (1865); also §§ 377, 412, *infra*. A *cestui que trust* of stock in England may defeat a *bona fide* purchaser's title to the stock by suing for the stock before a transfer is made on the corporate books. Roots *v.* Williamson, L. R. 38 Ch. D. 485 (1888). In Powell *v.* London & Prov. Bank, [1893] 1 Ch. 610; aff'd, [1893] 2 Ch. 555, the transferee lost title to stock which really belonged to a trust estate, but which stock stood in the trustee's name absolutely as the full owner, although the transferee had obtained a transfer on the books, it appearing that the transferee had filled in a part of the essential blanks.

3 Salisbury Mills *v.* Townsend, 109 Mass. 115 (1871); Stinson *v.* Thornton, 56 Ga. 377 (1876); Cohen *v.* Gwynn, 4 Md. Ch. 357 (1848). Where, however, the trustee has been re-

§ 326. The mere fact that a purchaser of stock knows, or is bound to take notice from the certificate of stock, that he is buying from a trustee, and that the stock belongs to the trust estate, puts the purchaser to no inquiry except that of ascertaining whether the trustee has power to sell the stock. If he has such power the purchaser will be protected, although the trustee uses the money for his own private purposes, provided the purchaser has no notice of such an intent on the part of the trustee.[1] The purchaser has a right to assume that the object of the sale is to invest the funds in a permanent investment or to discharge liabilities.[2] Where, however, the purchaser knows that his vendor sells or pledges the stock as trustee, and also knows that the sale or pledge is for the private debts or purposes of the trustee, the purchaser is chargeable with knowledge of the breach of trust, and is not protected.[3] Nor is a pledgee of stock from a trustee, acting as trustee, protected where the trustee is authorized merely to sell the stock.[4] Power to sell

moved by a court and another trustee appointed in the state of the corporation, a purchaser of the certificates held by the old trustee is not protected, his purchase being after the removal. Sprague *v.* Cocheco Mfg. Co., 10 Blatchf. 173 (1872); s. c., 22 Fed. Cas. 960. But in Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616 (1874), it was held that a successful suit in a state not the state of the corporation, to remove a trustee, does not affect a *bona fide* purchaser of the certificate from the trustee, the purchase being made pending the suit; and that the corporation allowing registry of the new trustee as holder of the stock, and issuing new certificates to him, is liable in damages to the purchaser from the old trustee.

1 Hughes *v.* Drovers', etc. Bank, 86 Md. 418 (1897); Perry on Trusts, § 225, 3d ed. (1882); Lewin on Trusts, 417, 7th ed. (1879); Godefroi on Trusts, 125, 127 (1879). Where the will directs that the life tenant shall be allowed to manage and take possession of stock constituting the trust estate, and the trustee is exempted from liability therefor, a *bona fide* pledgee of the stocks from the life tenant is protected. Freeman *v.* Bristol Sav. Bank, 76 Conn. 212 (1903).

2 Ashton *v.* Atlantic Bank, 85 Mass. 217 (1861), where the trustee sold land, took notes in payment, and stock as collateral, and sold the notes with the collateral.

3 Jaudon *v.* National City Bank, 8 Blatchf. 450 (1871); s. c., 13 Fed. Cas. 376; aff'd *sub nom.* Duncan *v.* Jaudon, 15 Wall. 165; Walsh *v.* Stille, 2 Pars. Sel. Cas. (Pa.) 17 (1842); White *v.* Price, 39 Hun, 394 (1886); aff'd, 108 N. Y. 661; Simons *v.* Southwestern R. R. Bank, 5 Rich. Eq. (S. C.) 270 (1853); Shaw *v.* Spencer, 100 Mass. 382 (1868), holding also that silence while the vendee pays an assessment is no waiver. Where the pledgee of the trustee knows that he is pledging trust estate stock, and the pledge is for a personal loan to the trustee, the transaction is illegal. Tuttle *v.* First, etc. Bank, 187 Mass. 533 (1905). Where the purchaser of trust estate stock took with notice of the trust, such person may be joined with the corporation itself as parties defendant in a suit to recover back the stock. Luddington *v.* Mercantile Nat. Bank, 102 N. Y. App. Div. 251 (1905); aff'd, 182 N. Y. 522.

4 Loring *v.* Brodie, 134 Mass. 453

does not confer power to pledge.[1] Where a broker has with notice dealt with a trustee who was using trust securities illegally, the broker may be held liable at law for conversion or in equity to reach the securities and account for the dividends and their value.[2] Where the *cestuis que trust* are of full age and consent to the trustee using stock belonging to the trust in violation of the trust agreement, they cannot afterwards complain and compel the person buying such stock to return the same.[3]

§ 327. *Rights and liabilities of the corporation allowing a transfer by a trustee in breach of his trust.*—Where a corporation has notice that a stockholder holds his stock as trustee for another, and the means of ascertaining the character of that trust are within the power of the corporation, it is bound to refuse to allow a registry of the trustee's transfer until it is satisfied that the trustee has power to make the transfer.[4] If the corporation allows the transfer, and

(1883). Pledgees from the trustee for antecedent debts are not *bona fide* holders without notice, even though the form of a public sale was gone through. Darling *v.* Potts, 118 Mo. 506 (1893).

1 Merchants' Bank *v.* Livingston, 74 N. Y. 223 (1878); Manhattan Bank *v.* Walker, 130 U. S. 267 (1889); Webb *v.* Graniteville Mfg. Co., 11 S. C. 396 (1878). The power of an agent to sell does not authorize him to pledge. First Nat. Bank *v.* Taliaferro, 72 Md. 164 (1890). Power to sell and reinvest does not give a trustee power to pledge. First Nat. Bank *v.* Nat. Broadway Bank, 156 N. Y. 459 (1898). On this subject see also § 321, *supra*, and § 351, *infra*.

2 English *v.* McIntyre, 29 N. Y. App. Div. 439 (1898). A stock broker who sells stock which on its face runs to a person as trustee and who knows it belongs to a trust estate and who pays the proceeds to the trustee individually may be compelled to repay the money to the trust estate if the trustee has embezzled the same, and such liability may be enforced by a suit in equity. Safe, etc. Co. *v.* Cahn, 102 Md. 530 (1906).

3 Preble *v.* Greenleaf, 180 Mass. 79 (1901).

4 Chapman *v.* City Council, 28 S. C. 373 (1888); Bayard *v.* Farmers', etc. Bank, 52 Pa. St. 232 (1866), where a refusal of the corporation to transfer until the terms of the trust were examined by its attorney and found to allow the sale was sustained. The corporation cannot, however, retain the copies of the probate records used in investigating. Bird *v.* Chicago, etc. R. R., 137 Mass. 428 (1884). Where a trustee transfers stock, a corporation may insist on his showing his authority so to do. Hill on Care of Estates, p. 105. In the transfer of trust stock the corporation may very properly refuse to allow a registry where the sale is made by the trustee at a price far below its market value. Succession of Boullemet, 39 La. Ann. 1046 (1887). Where stock is transferred to a trustee by the executors, the corporation knowing of the trust, and the corporation subsequently allows the trustee to transfer the stock to third persons, the corporation is liable to the *cestui que trust* if such last-mentioned transfer is fraudulent and in breach of trust. Maybury *v.* Ehlen, 72 Md. 206 (1890). If the will gives the executrix power to sell the stock, the corporation is protected in allowing transfers by the executrix

the trustee had no power to make it, the corporation is liable to the *cestui que trust*.[1] The fact that the certificate runs to the holder as "trustee" is sufficient notice to the corporation.[2] Notice to a board of directors is notice to all subsequent boards.[3] The corporation is bound to see that the sale by the trustee is made in accordance with the terms of the trust. Thus, it is liable if it permits a sale and transfer by one trustee when there are two trustees; and a general power of attorney by the other trustee authorizing sales will not protect the corporation in its registry of a transfer signed by one only.[4] It is liable for allowing an illegal registry of a trustee's trans-

and trustee, even though it did not know the contents of the will. Although the transfer is to a bank, the corporation is not bound to know that the transfer is a pledge and not a sale. Peck *v.* Providence Gas Co., 17 R. I. 275 (1891). Where, upon reorganization, the committee issues transferable certificates exchangeable into stock of the new corporation when it is formed, the new corporation is liable for allowing an exchange by a person to whom a trustee has illegally transferred the certificates issued to him. Mobile, etc. Ry. *v.* Humphries, 7 S. Rep. 522 (Miss. 1890). Where trustees under a will hold registered bonds, the registration being to them as trustees, it is illegal for the corporation to allow one of them to transfer such registered bonds, and the corporation is liable for the same if such transfer is in breach of trust on the part of the trustees. Cooper *v.* Illinois, etc. R. R., 38 N. Y. App. Div. 22 (1899). In this case the bonds had been registered in the name of the executor of the estate, who, upon his death, was succeeded by two trustees, and one of these trustees caused the corporation to transfer the bonds from the name of such executor to bearer. The court held, however, that a broker who sells the bonds is not liable, although he knew that the bonds were registered in the name of the executor prior to the transfer thereof to bearer. Where stock is specifically bequeathed in trust for a certain person during her life and then for her children, and the corporation allows the executor to transfer the stock to the trustee, as trustee for the life tenant only, and afterwards allows the trustee to transfer the stock to *bona fide* hands, the corporation is liable for allowing the second transfer. Wooten *v.* Wilmington, etc. R. R., 128 N. C. 119 (1901). See also § 560, *infra*.

1 Quoted and approved in Young *v.* New Standard, etc. Co., 148 Cal. 306 (1905).

2 See § 325, *supra*. In the case of Stockdale *v.* South Sea Co., Barn. Ch. 363 (1740), the court said, however: "These great companies are only to consider the person in whose name the stock is standing, unless the trust of that stock is declared in their books."

3 Mechanics' Bank *v.* Seton, 1 Pet. 299 (1828).

4 Bohlen's Estate, 75 Pa. St. 304, 312 (1874). Cooper *v.* Illinois, etc. R. R., 38 N. Y. App. Div. 22 (1899). Perry on Trusts, Sec. 412. Nor where the signatures of the other trustees are forged by one. Cottam *v.* Eastern Counties Ry., 1 Johns. & H. 243 (1860). In England one executor or trustee cannot assign railway stock. All must join. Barton *v.* North Staffordshire Ry., L. R. 38 Ch. D. 458 (1888). *Cf. Re* Taylor, 81 L. T. Rep. 812 (1900). Where stock stands in the name of two trustees, and one signs a transfer and the signature of the other trustee is forged thereto, a stock broker who caused the cor-

fer, when the trust is for an unmarried woman, to take effect when she shall marry.[1] If there are several *cestuis que trust,* the corporation is liable for allowing one of them to transfer the whole interest in the stock, where by mistake of the corporation the stock had been registered in the name of that one, and not in the name of the trustee.[2] If, however, the *cestui que trust* is guilty of laches in taking steps to obtain his rights, the corporation is discharged.[3] Thus even though the corporation allows the life tenant to sell the stock outright, yet if the remainderman does not sue within the period of limitations, after knowledge of the facts, the corporation is not liable.[4] The remedy of a *cestui que trust* is in equity not at law.[5] A waiver of former breaches of trust is no waiver of the one complained of, and a judgment against the trustee himself is no bar to the suit against the corporation, except to the extent that satisfaction had been obtained.[6] The corporation may be compelled by the court to purchase an equal amount of stock and register it for the benefit of the *cestui que trust.*[7] Neither the corporation which allows a transfer by a trustee nor a purchaser from the trustee of shares of stock need look to the application by the trustee of the purchase price. All that they are required to investigate is the power to transfer.[8] Where a certificate of stock runs to a person as attorney for another person and the latter dies, the attorney cannot compel the corporation to transfer the stock on his signature as attorney, unless the executor of the estate also joins in the transfer.[9]

§ 328. *Sales of stock by a guardian.*—At common law a guardian may sell the personal property belonging to him as guardian without obtaining any special license or authority, and a *bona fide* purchaser from him of such property is protected, and is entitled

poration to make a transfer thereunder is liable to the corporation, even though he acted in good faith. Oliver *v.* Governor & Co., [1902] 1 Ch. 610; aff'd, 88 L. T. Rep. 244, *sub nom.* Starkey *v.* Governors, etc. of Bk. of England.

1 Magwood *v.* Railroad Bank, 5 S. C. 379 (1874).

2 Farmers', etc. Bank *v.* Wayman, 5 Gill (Md.), 336 (1847).

3 Albert *v.* Baltimore Sav. Bank, 1 Md. Ch. 407 (1849); aff'd, 2 Md. 159 (1852).

4 Yeager *v.* Bank of Kentucky, 106 S. W. Rep. 806 (Ky. 1908).

5 Loring *v.* Salisbury Mills, 125 Mass. 138 (1878). In a suit by a stockholder to hold a corporation liable for his stock and dividends, by reason of its allowing a transfer by an unauthorized agent of the stockholder, the subsequent owners of the stock are not necessary parties. The defense of prescription may prevail. St. Romes *v.* Levee, etc. Co., 127 U. S. 614 (1888).

6 Loring *v.* Salisbury Mills, 125 Mass. 138 (1878).

7 Bohlen's Estate, 75 Pa. St. 304 (1874). See also § 284, *supra.*

8 Hughes *v.* Drovers', etc. Bank, 86 Md. 418 (1897); also § 326, *supra.*

9 Spellissy *v.* Cook, etc. Co., 58 N. Y. App. Div. 283 (1901).

to the property, even though the guardian misappropriates the proceeds of the sale.[1] This rule applies to shares of stock.[2] In most of the states, however, statutes have been passed requiring guardians to obtain the consent of a court before selling the personal property of his ward.[3] If such a statutory permission to sell is required, and the vendee of stock has notice that his vendor sells as guardian, the vendee is bound to see that the requisite permission to sell has been given.[4] A person taking a certificate of stock running to a guardian and indorsed by him in blank must inquire into the authority of the guardian to dispose of the stock, and he must examine the proceedings of the court authorizing the sale and see that the proceedings are in accordance with the statute.[5] An order of the court allowing the guardian to sell is not authority to him to pledge the stock, and the pledgee is bound to take notice of that fact.[6] Where stock is sold by a foreign guardian according to the laws of the state of the guardianship, title passes and the purchaser is protected.[7]

§ 329. *Sales of stock by an executor or administrator.*—It is the duty of an executor or administrator of an estate to collect the assets, pay the debts, and distribute the remainder according to the

1 Field *v.* Schieffelin, 7 Johns. Ch. 150 (1823); Ellis *v.* Essex Merrimack Bridge, 19 Mass. 243 (1824), holding that a *bona fide* purchaser from the guardian of a person *non compos mentis* is protected.

2 Lamar *v.* Micou, 112 U. S. 452, 475 (1884), the court saying: "He had the authority, as guardian, without any order of court, to sell personal property of his ward in his own possession, and to reinvest the proceeds." See also Bank of Virginia *v.* Craig, 6 Leigh (Va.), 399, 432 (1835), to the same effect, and holding that the corporation is not liable for a breach of trust by the guardian in selling the stock. The court said: "If the guardian defrauds his ward, his sureties are responsible; if the purchaser combines in the fraud, he too is chargeable; but the bank cannot interfere and arrest the transfer of its stock by the legal holder of the scrip upon such pretenses. It would trammel and embarrass such transactions so as to impede materially that transferable character which is one of the most valuable attributes of stock." Even though stock is given by will to infants, yet the guardian has power to sell it and the sale will not be disturbed, even though it was sold to relatives, it appearing that there was no market value to the stock and the price was a fair one under the circumstances. Cabble *v.* Cabble, 111 N. Y. App. Div. 426 (1906).

3 Mass. Rev. Stat., ch. 79, § 21.

4 Atkinson *v.* Atkinson, 90 Mass. 15 (1864).

5 O'Herron *v.* Gray, 168 Mass. 573 (1897).

6 Webb *v.* Graniteville Mfg. Co., 11 S. C. 396 (1878). See also Manhattan Bank *v.* Walker, 130 U. S. 267 (1889); and § 326, *supra*. The authority of a guardian given by the court to sell stock does not authorize him to pledge the stock. O'Herron *v.* Gray, 168 Mass. 573 (1897).

7 Ross *v.* Southwestern R. R., 53 Ga. 514 (1874).

provision of the will or of the statute of distribution.[1] In order to pay the debts the executor may sell the personal property of the estate. Accordingly, the rule has become established that the purchaser of personal property from an executor or administrator is not bound to ascertain whether the sale is necessary in order to pay the debts of the estate, nor to see that the proceeds of the sale are applied to the debts. If he buys in good faith and for value, he is protected. These rules are applicable to an executor's or administrator's sales of stock.[2] One of several executors may pledge stock owned by the estate and the pledgee will be protected, there being no suspicious circumstances. The power of an executor to

1 Keyling's Case, 1 Eq. Cas. Abr. 239 (1702), holding that, where the executor holds the stock for several years and it declines in value, he is chargeable with its value one year after the death of the testator. An executor is bound to close at once a speculative account. Matter of Hirsch, 116 N. Y. App. Div. 367 (1906); aff'd, 188 N. Y. 584. See also § 459, *infra*.

2 Leitch *v.* Wells, 48 N. Y. 585 (1872), holding that the *bona fide* transferee is protected, although the executors had previously set aside the same stock to apply to the payment of a certain amount chargeable by the will to the estate annually; Wood's Appeal, 92 Pa. St. 379 (1880), holding that a *bona fide* transferee of the executor's transferee is protected, although the latter would not have been; and this even though the executors transferee was aware whence his title came. The court held that letters of administration are always evidence of power to sell, and that an executorship differed widely from a trusteeship as regards the right to sell; Prall *v.* Tilt, 27 N. J. Eq. 393 (1876); aff'd, 28 N. J. Eq. 479 (1877), where the will authorized advances to the sons, and they represented to the transferee that the stock was so advanced to them by the executor; Lowry *v.* Commercial, etc. Bank, Taney, 310 (1848); s. c., 15 Fed. Cas. 1040. In this case the purchaser had no knowledge or notice that the transferrer sold the stock as an executor; Clark *v.* South Metropolitan Gas Co., 54 L. J. (Ch.) 259 (1884), sustaining a sale of stock by an administratrix of an administrator; *Re* London, etc. Tel. Co., L. R. 9 Eq. 653 (1870), sustaining the title of a *bona fide* purchaser from the executrix as against an assignee in bankruptcy of the deceased, the assignee having delayed his application for five years. An executor may transfer stock of the estate by signing his individual name to the transfer. Mahaney *v.* Walsh, 16 N. Y. App. Div. 601 (1897). A *bona fide* pledgee, from an executor, of stock belonging to the estate and which has been transferred into the name of the executor as executor is protected, even though the money from the loan was diverted. McCreery *v.* First, etc. Bank, 55 W. Va. 663 (1904). A person is not such a stockholder as can maintain a suit against directors for fraud, where his stock has been transferred to another, nor can he maintain his suit on the ground that he owns a certificate of stock standing in the name of another and transferred in blank on the back, such transfer being signed by the administratrix of the stockholder of record, no proof being given of the administratrix's being such or of having executed the transfer. Thompson *v.* Stanley, 73 Hun, 248 (1893); aff'd, 147 N. Y. 713.

pledge is as broad as his power to sell.[1] The fact that stock is specifically bequeathed to the executors as trustees does not prevent the executors selling or pledging such stock. The pledgee or purchaser is protected and need not inquire into the necessity of the sale or pledge.[2] An executor is entitled to have stock belonging to the estate transferred into his own name as executor, in order that he may conveniently vote it and draw dividends.[3] But if the executor transfers estate stock into his own name personally this in itself is a wrongful conversion, unless it is explained, and he may be held liable therefor.[4] The executors in the state of the decedent may transfer the stock of the estate, and convey a title which the *purchaser* of the certificate may require the corporation to recognize, although the corporation itself is domiciled in another state;[5] but the administrator or executor cannot compel the corporation to allow the transfer, inasmuch as a foreign administrator or executor has no

1 Schell *v.* Barton, 198 Pa. St. 600 (1901); Schell *v.* Deperven, 198 Pa. St. 591 (1901). Schell *v.* Deperven, 198 Pa. St. 600. An executor has power to pledge a bond owned by the estate, and the pledgee, if *bona fide*, is protected. Smith *v.* Second Nat. Bank, 169 N. Y. 467 (1902). See also § 474, *infra*.

2 Schell *v.* Barton, 198 Pa. St. 600 (1901); Schell *v.* Deperven, 198 Pa. St. 591 (1901); Schell *v.* Deperven, 198 Pa. St. 600. An executor may transfer the stock to pay the decedent's debts, although it is bequeathed for life with remainder over. Franklin *v.* Bank of England, 1 Russ. 575 (1826). See § 474.

3 The corporation is liable in damages for refusal to make such transfer, even though the corporation has a lien on the stock for a debt owed it by the decedent. Under the statutes of California this rule applies to an alien corporation doing business in that state, the statutes of the state requiring such corporations to make transfers in that state. It applies even though the statutes of Great Britain forbid transfers of stock "without administration upon such property under the laws of England and Great Britain." London, etc. Bank *v.* Aronstein, 117 Fed. Rep. 601 (1902).

4 Holland *v.* Ball, 193 Mass. 80 (1906). But see 98 L. T. Rep. 533.

5 Middlebrook *v.* Merchants' Bank, 3 Keyes (N. Y.), 135 (1866); Luce *v.* Manchester, etc. R. R., 63 N. H. 588 (1886); Hobbs *v.* Western Nat. Bank, 12 Fed. Cas. 265 (1880). An executor or administrator may transfer stock in a foreign corporation without taking out letters in the state incorporating the company. *Re* Cape May, etc. Co., 16 Atl. Rep. 191 (N. J. 1889). In Maryland there is a statute prohibiting such transfers except in a certain way. See Rev. Code, 1888, art. 93, § 79. Although a foreign administrator cannot bring suit on a claim, yet he may assign the claim and the assignee may bring suit. Maas *v.* German Sav. Bank, 73 N. Y. App. Div. 524 (1902); aff'd, 176 N. Y. 377. To the effect that it is legal to pay a debt or deliver personal property to a foreign executor, administrator, or guardian, see Schluter *v.* Bowery, etc. Bank, 117 N. Y. 129 (1889); Wuesthoff *v.* Germania, etc. Ins. Co., 107 N. Y. 591 (1888). *Cf.* Greves *v.* Shaw, 173 Mass. 205 (1899).

standing in court.[1] So also as regards executors appointed in jurisdictions out of the United States.[2] The rule is different in California, where by statute stock descends to the heirs,[3] and the rule may be different where an inheritance tax is a lien on the stock and has not been paid.[4] Under the collateral inheritance tax statutes, the corporation may be liable for the tax if it allows a transfer without payment of the tax by the estate.[5] An executor who sells stock

1 Hutchins *v.* State Bank, 53 Mass. 421 (1847). A foreign executor cannot compel a corporation to transfer stock, inasmuch as he cannot as executor maintain an action at law or in equity in the state. Matter of Fitch, 160 N. Y. 87, 95 (1899).

2 Alfonso's Appeal, 70 Pa. St. 347 (1872), holding that, in Pennsylvania, executors of a decedent, whose domicile was in Cuba, have no authority, under letters testamentary in Cuba, to transfer stock in a Pennsylvania corporation. The court said: "Domestic creditors, legatees, or next of kin should not be sent abroad in quest of property to answer their claims, when the decedent left property within the jurisdiction of the state that can be applied to meet their demands." Under the statutes of Pennsylvania an English executor or the executor of an executor of the estate of an English stockholder in a Pennsylvania corporation may, after filing in Pennsylvania an authenticated copy of the will, transfer shares of stock standing in the name of the deceased in a Pennsylvania corporation without taking out letters of administration in Pennsylvania. Grimes *v.* Pennsylvania R. R., 189 Pa. St. 619 (1899). Where a person resident in England purchases certificates of stock in a French corporation, and fails to have the certificates transferred on the books, an administration on such certificates may be taken out in England. In the Goods of Agnese [1900], P. 60.

3 Even though a Minnesota executor of a deceased Minnesota stockholder in a California corporation sells the stock, yet if a local administrator has been appointed in California the sale and transfer by the Minnesota executor is not good, inasmuch as by the California statutes personal property descends to the heirs the same as real estate. Moreover, the *situs* of the stock is where the corporation exists. Murphy *v.* Crouse, 135 Cal. 14 (1901).

4 Under the Massachusetts statute imposing a tax on inheritances, stock owned by a citizen of New York in a Massachusetts corporation is subject to such tax, and even though the New York executor has transferred such stock, yet upon ancillary administration being taken out in Massachusetts the title of the New York executor is subordinate to the title of the ancillary administration. The court said that the statute assumed that in such cases a local administrator or executor would be appointed. Greeves *v.* Shaw, 173 Mass. 205 (1899). Stock in a consolidated interstate railroad holding a charter in Massachusetts and also in New York is subject to the Massachusetts inheritance tax. Moody *v.* Shaw, 173 Mass. 375 (1899).

5 In Atty. Gen. *v.* New York, etc. Co., [1898] 1 Q. B. 205; aff'd, H. of L., [1899] A. C. 62, the court, in holding that an English corporation was liable for an inheritance tax on shares of stock which it had allowed to be transferred on its books by American executors of the estate of a deceased American owning such stock, said: "The American will, as regards these English assets, had no validity whatever in this country, nor had the American executors any right under it to receive the testator's assets here.

without authority is liable for the loss to the estate thereby at that time, but is not liable for profits made by himself subsequently in dealing in that stock.[1]

An executor may pledge estate stock at his bank on a representation that the money is to be used for the estate, and the bank will be protected, although the note given by the executor is renewed several times, and the proceeds of the transaction were passed to the executor's private account.[2] In delivering stock to a life tenant the executor may endorse on the certificate that it is to be held by the legatee under the terms of the will.[3] A *bona fide* purchaser of stock from a life tenant, to whom the administration improperly transferred it, is protected. The remainderman's remedy is on the administrator's bond.[4] But a pledge of stock by an executor does not protect the pledgee, where the pledgee does not rely on the executor's power, but requires other ineffectual precautions to be taken.[5] Where the transferee of the executor knows that the transaction is not for the benefit of the estate, but is a breach of trust, he is not protected.[6] Where distribution is made in kind, a party who peti-

Until they had taken out representation to their testator in this country, they were pure strangers to the English assets. This American will, to the knowledge of all parties, was never to come into operation as a will in this country; the American executors were never to become executors in this country, it being the express intention of all parties that they should not."

1 Hiller *v.* Ladd, 85 Fed. Rep. 703 (1898). If the administrator sells to himself through "dummies," he may be compelled to disgorge. Carter *v.* Good, 57 Hun, 116 (1890). Even though an executor sells for $30,000 stock which he had inventoried at a higher price, yet he is not liable for the difference if the sale was in good faith. *In re* Semple's Estate, 189 Pa. St. 385 (1899).

2 Goodwin *v.* American Nat. Bank, 48 Conn. 550 (1881); Gottberg *v.* U. S. Nat. Bank, 13 N. Y. Supp. 841 (1890), where the bonds were even registered in the names of both executors and were pledged by one. Under the English act, where shares are registered in the names of two executors jointly, the signature of both to a transfer is necessary, and the company is liable if it permits a transfer by one. Barton *v.* London, etc. Ry. 62 L. T. Rep. 164 (1889).

3 De Loney *v.* Hull, 58 S. E. Rep. 349 (Ga. 1907).

4 Keeney *v.* Globe Mill Co., 39 Conn. 145 (1872). Where by the will of a resident of New York, duly probated in New York, two of the executors being residents of New York, stock is given to one person in trust for another in a Connecticut corporation, such trustee cannot bring suit in the Connecticut courts to compel the executors to transfer the stock to him, even though ancillary letters have been taken out in Connecticut and one of the executors was a resident of Connecticut, and even though the trustee had attached dividends in Connecticut. Russell *v.* Hooker, 67 Conn. 24 (1895).

5 Moore *v.* American, etc. Co., 115 N. Y. 65 (1889)

6 Prall *v.* Hamil, 28 N. J. Eq. 66 (1877). The facts in this case differed from those in Prall *v.* Tilt, 27 N. J. Eq. 393 (1876), in that the trans-

tioned for distribution of the "property" cannot object on the ground that the property should have been sold and the money distributed.[1] Replevin lies by an administrator to recover a certificate of stock which he had illegally pledged as administrator.[2] Where the executor, who is also the life tenant, wrongfully pledges the stock, his executor may rightfully use the funds of his estate to redeem such stock.[3] A residuary legatee cannot file the bill in equity to set aside a sale of stock by the executors in compliance with a contract of sale made by the deceased, the administration of the estate not yet being terminated. His remedy is in the probate court.[4] Sometimes statutes are found requiring executors, when selling personal property of the estate, to sell the same at public auction. When such a statute exists, a purchaser at private sale is not a *bona fide* purchaser, and is not protected, and is liable for the stock and for the dividends paid thereon after his purchase.[5] The *bona fide* transferee

feree knew that the stock was still owned by the executrix. A suit in equity lies to set aside an illegal sale of stock by an executor. White *v.* Price, 108 N. Y. 661 (1888); s. c., 39 Hun, 394 (1886), the court saying: "A person who takes title from an executor in payment of the executor's personal debt is not a purchaser in good faith, and acquires no rights over the prior title or equities of other persons." Also, that a purchaser, buying with knowledge that the right of the executor to sell is denied and is being contested, is not a *bona fide* holder. *Cf.* Keane *v.* Robarts, 4 Madd. Ch. 332 (1819), where it was held that, where the executor did business through an agent, the application of the proceeds from the sale of the stock to the running account between the executor and his agent was legal. A pledgee with notice of stock pledged by an executor in breach of his duty may be compelled to give up the stock. Odd Fellows' Sav. Bank's Appeal, 123 Pa. St. 356 (1889). A pledgee who takes with knowledge that the executor is giving the pledge in breach of trust cannot foreclose the pledge. Bell *v.* Farmers', etc. Bank, 131 Pa. St. 318 (1890). Where an executor pledges, for his personal debt, stock belonging to the estate, in breach of trust, the pledgee is not protected, even though the corporation issued a new certificate to the pledgee, by mistake, as absolute owner, and he cannot hold the corporation liable for retaining the new certificate upon its being delivered for transfer to a purchaser with notice. Davis *v.* National, etc. Bank, 50 Atl. Rep. 530 (R. I. 1901). Where an executor pledges stock and bonds of the estate to a bank, the bank is protected, even though thereafter the executor checks out the money to his own order, and even though the loan was in form to the executor personally, it being understood that it was for the benefit of the estate. Lyman *v.* National Bank, etc., 181 Mass. 437 (1902).

1 Hurley *v.* Hewett, 89 Me. 100 (1896).

2 Parks *v.* Mockenhaupt, 133 Cal. 424 (1901).

3 *In re* Orne's Estate, 192 Pa. St. 626 (1899).

4 Jordan *v.* Taylor, 98 Fed. Rep. 643 (1899).

5 Nutting *v.* Thomasson, 57 Ga. 418 (1876), the court saying also that factors or brokers acting for third persons are also liable; Nutting *v.* Boardman, 43 Ga. 598 (1871), holding that

of such a purchaser, however, is protected.[1] An executor may have the duties of a trustee to perform, and then become subject to the rules governing trustees in their transfers of stock.[2] Executors should sell stocks belonging to the estate, unless there is to be a distribution in kind, and if they do not sell, they may be liable for a decline in values.[3] It is very dangerous for a director to be personally interested in the purchase of a stock from himself as executor.[4]

§ 330. *Duty and liability of the corporation in sales by executors or administrators.*—There has been great difficulty in ascertaining the rights and duties of the corporation in allowing and refusing to allow a registry on the corporate books of a sale of stock by an executor or administrator. The Bank of England, at an early day, assumed the power to refuse to allow a registry of an executor's transfer of stock that had been specifically bequeathed, unless the executor satisfied the bank that the sale was necessary to pay the debts of the estate. The courts, however, compelled it to allow registry without investigating specific legacies or the appli-

the administrator's bondsmen are not proper parties to the suit; Weyer *v.* Second Nat. Bank, 57 Ind. 198 (1877), holding the purchaser liable. If the executor uses the proceeds of sales of stock for his own personal purposes, he is liable for the dividends declared after such sales up to the time of accounting, and for the market value of the stock at the time of accounting. A person taking stock from him with knowledge of the breach of trust is also liable. McGeary's Appeal, 6 Atl. Rep. 763 (Pa. 1886). Gradual sales by the executors at a private sale will be sustained where a public sale would have depressed the value of the stocks, and no public sale was requested by the parties interested. Kaiser's Succession, 48 La. Ann. 973 (1896). See 111 S. W. Rep. 817.

1 Nutting *v.* Thomason, 46 Ga. 34 (1872); s. c., 57 Ga. 418.

2 White *v.* Price, 39 Hun, 394 (1886); aff'd, 108 N. Y. 661; Prall *v.* Tilt, 27 N. J. Eq. 393 (1876). See also §§ 323, 324, *supra.*

3 See §§ 723, 724, *supra.* An administrator is justified in selling stock when he fears a decline in its value, but he must be free from motives of self-interest. Fluck *v.* Lake, 54 N. J. Eq. 638 (1896). Executors are not liable for a decline in the value of stocks during their executorship, even though it is their duty to sell such stocks, if it is shown that the stocks began declining and they did not sell because they hoped that the price would recover. Matter of Thompson, 41 N. Y. Misc. Rep. 420 (1903). Where the administrator fraudulently sells stock for one-eighth of its market value he may be held personally liable. Moore *v.* Woodson, 99 S. W. Rep. 116 (Tex. 1906).

4 An executor who buys stock from the estate at one price and sells it at another may be compelled to pay over the difference. Matter of Sandrock, 49 N. Y. Misc. Rep. 371 (1906). Where a legatee writes to the executor that she has been offered a certain price for stock which has been bequeathed to her, and that he could have it for that price and he buys it, she cannot have the sale set aside, even though he failed to disclose facts which he knew and which showed the stock to be worth much more. O'Neile *v.* Ternes, 32 Wash. 528 (1903). An executor may take part in and per-

cation of the proceeds of the sale.[1] In this country the same rule prevails.[2] The cases of Lowry *v.* Commercial & Farmers' Bank of Baltimore,[3] and Stewart *v.* Firemen's Ins. Co.,[4] clearly establish the rule that, where the corporation has reasonable notice of the fact that the executor is committing a breach of trust, such notice arising from the fact that the transfer is made several years after the estate should have been wound up, the corporation is under obligation to refuse to allow a registry of the transfer; and, having allowed it, the corporation is liable to the parties injured thereby. While a corporation may, under ordinary circumstances, allow an executor or administrator to register a transfer of stock from himself to a purchaser from him, yet, when so long a time has elapsed between the taking out of letters and the transfer that the executor has become practically a trustee, then the purchaser and the corporation must use the same precautions as in sales by a trustee.[5]

sonally subscribe for stock in a corporation formed to take over an embarrassed and unprofitable partnership in which the estate is interested. Houghteling *v.* Stockbridge, 136 Mich. 544 (1904).

1 Pearson *v.* Bank of England, 2 Bro. Ch. 529 (1789); Bank of England *v.* Moffat, 3 Bro. Ch. 260 (1791); Hartga *v.* Bank of England, 3 Ves. Jr. 55 (1796); Bank of England *v.* Parsons, 5 Ves. Jr. 665 (1800); Bank of England *v.* Lunn, 15 Ves. Jr. 568 (1809); Austin *v.* Bank of England, 8 Ves. Jr. 522 (1803); Marryatt *v.* Bank of England, 8 Ves. Jr. 524, n (1793); Aynsworth *v.* Bank of England, 8 Ves. Jr. 524, n. (1793); Franklin *v.* Bank of England, 1 Russ. Ch. 575 (1826); Churchill *v.* Bank of England, 11 M. & W. 323 (1843); Humberstone *v.* Chase, 2 Y. & C. Exch. 209 (1836), where the executor represented that the specific legatee had died. It is "necessary" and proper for executors to unregister registered bonds before selling them. *Re* Gasquoine, [1894] 1 Ch. 470.

2 Bayard *v.* Farmers', etc. Bank, 52 Pa. St. 232 (1866). Where the executrix has power given by the will to apply the stock to her own use in case of need, the corporation is not bound to ascertain whether such a state of need exists. Hutchins *v.* State Bank, 53 Mass. 421 (1847). See also Peck *v.* Providence Gas Co., 17 R. I. 275 (1892).

3 Taney, 310 (1848); s. c., 15 Fed. Cas. 1040. The court said: "The bank not only enabled the executor to perpetrate the wrong by permitting the transfer, but co-operated in it by certifying that the title of transferee was good. Justice, therefore, requires that it should bear the loss."

4 53 Md. 564 (1880), holding also that the corporation was bound to take notice of the contents of the will. Where the executors ask for a transfer of stock, but the company refuses on the ground that they have no power to transfer the same, and afterwards the executors declare in writing that the stock does not belong to the estate, the executors cannot hold the corporation liable for refusing to make the transfer as stated above. Livezey *v.* Northern Pac. R. R., 157 Pa. St. 75 (1893).

5 Where an executor holds stock for nine years and then sells it in breach of trust, the purchaser is bound to take notice. The executorship becomes a trusteeship. Peck *v.* Bank of America, 16 R. I. 710 (1890). Where an executrix has power by the will to sell stock held in trust for heirs, the

Where, by statute, executors' sales are to be at public auction, the corporation is bound to ascertain whether the statute was complied with, and is liable for allowing a registry when the sale was a private one.[1] In general, a corporation has a right to assume that the executor is transferring the stock for the purposes of the estate. It is not obliged to inquire into the purposes of the parties, nor to investigate whether the transaction is in good faith or is fraudulent,[2] nor to examine the will.[3] Where, however, the stock is specifically bequeathed, and the executor transfers the stock to a life tenant absolutely, the corporation, being chargeable with notice of the terms of the will, may be liable to the remainderman.[4] Where a decree

corporation is not liable for a transfer by her in breach of trust, the corporation having no knowledge thereof. The fact that the stock is transferred to banks which have no power to purchase is not notice to the corporation. The executorship in this case was merged into a trusteeship. Peck *v.* Providence Gas Co., 17 R. I. 275 (1892). Where stock is specifically bequeathed to an executor as trustee, and five years thereafter the executor is discharged, but continues as trustee, and two years thereafter he fraudulently pledges the stock as executor, the pledgee is not protected, since the lapse of time was sufficient to put him on inquiry. Schell *v.* Deperven, 198 Pa. St. 591 (1901); Schell *v.* Deperven, 198 Pa. St. 600. See also § 329, *supra*.

1 Weyer *v.* Second Nat. Bank, 57 Ind. 198 (1877). A contrary view seems to be held in Southwestern R. R. *v.* Thomason, 40 Ga. 408 (1869). In Indiana, where an administrator cannot sell personal property except in a certain way, the corporation is liable to the estate if it allows a transfer of stock on its books under a sale by the administrator who has not complied with the law. The purchaser, however, who does not see the old certificates, but takes new certificates issued by the corporation, is protected. Citizens' Street Ry. *v.* Robbins, 128 Ind. 449 (1891). A sale of stock by an executor at private sale was sustained in Wilson *v.* Central Bridge, 9 R. I. 590 (1870), although the statute declares that executors should be held liable for double the appraised value of the property if they sold at private sale. In Citizens' Street R. R. *v.* Robbins, 144 Ind. 671 (1896), the administratrix had illegally sold stock to a party, who then caused the corporation to sell all its property to another corporation. A subsequent administrator sued to set aside the sale of the corporate property or for damages. The court held that, inasmuch as the purchasing corporation had expressly assumed the liabilities of the vendor corporation, it must pay for the value of the stock, inasmuch as the vendor corporation was liable for allowing the transfer.

2 Crocker *v.* Old Colony R. R., 137 Mass. 417 (1884). See also Carter *v.* Manufacturers' Nat. Bank, 71 Me. 448 (1880); Goodwin *v.* American Nat. Bank, 48 Conn. 550 (1881).

3 Although the administrator transfers the stock to the "heirs and distributees," the corporation is protected in issuing absolute certificates to such distributees, and is not bound to learn or know of a will to the effect that the distributee had only a life interest. Smith *v.* Nashville, etc. R. R., 91 Tenn. 221 (1892), the corporation in this case having had no actual notice of the existence of a will.

4 See § 560, *infra*, and Wooten *v.* Wilmington, etc. R. R., 128 N. C. 119 (1901).

directs the transfer of certain stock in the distribution of an estate and the corporation makes such transfer, and thereafter the decree is reversed on appeal, the executors may bring suit to have the transfer canceled. The suit is properly in equity.[1] Questions relative to whether the law of the state of the corporation or the law of the state of a deceased stockholder shall govern are considered elsewhere.[2]

1 Ashton *v.* Heggerty, 130 Cal. 516 (1900). Under the statutes of California, even though stock is distributed by executors in accordance with a decree of distribution, and the distributees sell the stock and it is transferred on the books of the company, nevertheless, if the decree is reversed on appeal, the transfers are void and the company is liable for dividends paid in the meantime to such purchasers. In a suit by the executors to recover such dividends the purchasers need not be made parties. Ashton *v.* Zeila Min. Co., 134 Cal. 408 (1901). *Cf.* §§ 363, 388, *infra*.

2 See § 12, *supra*. Where a citizen of Tennessee is a stockholder in a Mississippi corporation and he dies and his will is probated in Tennessee and he gives his stock to a certain person, that person can compel the Mississippi corporation to transfer it, even though the will would not be good in Mississippi. Delta, etc. Co. *v.* Pearce, 45 S. Rep. 981 (Miss. 1908).

CHAPTER XX.

SALES OF STOCK—THE FORMATION AND PERFORMANCE OF THE CONTRACT—GAMBLING SALES—FRAUDULENT SALES.

A. FORMATION AND PERFORMANCE OF CONTRACTS TO SELL STOCK.

§ 331. Shares of stock are transferable.
332. Restrictions on right to sell stock and contracts against selling.
333. "Pools," "corners," and combinations in stock.
334. Contract for sale of stock may be valid without delivery or specific time for delivery—Construction of various contracts.
335, 336. Remedies for breach of a contract to sell stock—Tender.
337, 338. Specific performance as a remedy for breach of a contract to sell stock.
339, 340. Statute of frauds as affecting sales of stock.

B. GAMBLING SALES OF STOCK.

341. What are gambling sales of stock.
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§ 343. Test of legality of stock transaction.
344. When intent to deliver is question for the jury and when not.
345, 346. Gambling stock contracts as affecting the relations between the principal and his broker.
347, 348. Gambling stock transactions as affecting notes, bonds, mortgages, etc., growing out thereof.

C. FRAUD AS AFFECTING A SALE OF STOCK.

349. Extent of subject treated herein.
350. What has been held to constitute a fraud herein.
351. Fraudulent sale by agent, etc., in breach of trust.
352, 353. Fraud may be by corporate reports or prospectus.
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357. Fraud in selling stock may be criminal.

A. FORMATION AND PERFORMANCE OF CONTRACTS TO SELL STOCK.

§ 331. *Shares of stock are transferable.*—That shares of stock in a corporation are transferable the same as other personal property is a principal of law coeval with the existence of stock itself. The few decisions holding that shares of stock were real estate were exceptional rulings, and are no longer considered good law.[1] Courts of law and of equity have guarded jealously the facilities for the transfer of title to stock, and all unreasonable attempts to restrain

1 See § 12, *supra.*

the right of passing title have been declared void as against public policy. The right to transfer stock is of vital importance, since the two chief causes of the phenomenal growth of corporations in recent times are the limited liability of the members and the readiness of buying or selling an interest in the corporation by a transfer of the stock a person has therein. The common law regards shares of stock as personal property, capable of alienation or succession in any of the modes by which personal property may be transferred.[1]

§ 332. *Restrictions on right to sell stock and contracts against selling.*—By-laws restricting the sales of stock and contracts against selling are generally made in connection with contracts for voting at elections so as to control the management of corporations. These two classes of contracts, to sell together and to vote together, are closely allied, and consequently are treated under the subject of "Elections," in another part of this work.[2]

§ 333. *"Pools," "corners," and combinations in stock.*—This subject also is closely connected with the subjects of restrictions on the right to vote and pooling arrangements for the purpose of controlling elections, and consequently is considered elsewhere.[3]

§ 334. *Contract for sale of stock may be valid without delivery or specific time for delivery—Construction of various contracts.*—Generally a sale of stock is attended with an immediate delivery of the certificates therefor, or it is agreed that the certificates shall be delivered at some specified time in the future. If, however, the vendor offers to sell his stock and the vendee accepts the offer, the contract is complete and binds both parties, although nothing has been said as to the time when the certificates of stock shall be delivered. The law implies that the contract will be performed by a delivery of the certificates immediately or within a reasonable time, and either party may insist upon carrying out the contract.[4] It has

1 Mobile Mut. Ins. Co. *v.* Cullom, 49 Ala. 558 (1873); Cole *v.* Ryan, 52 Barb. 168 (1868); Heart *v.* State Bank, 2 Dev. Eq. (N. C.) 111 (1831); Allen *v.* Montgomery R. R., 11 Ala. 437, 451 (1847); Boston Music Hall Assoc. *v.* Cory, 129 Mass. 435 (1880); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Chouteau Spring Co. *v.* Harris, 20 Mo. 382 (1855); Poole *v.* Middleton, 29 Beav. 646 (1861); Brightwell *v.* Mallory, 10 Yerg. (Tenn.) 196 (1836).

2 See § 622, *infra*.

3 See §§ 621*a*, 622, *infra*.

4 Quoted and approved in Mason *v.* Lievre, 145 Cal. 514 (1904), holding that where an offer to buy is accepted and the vendor forwards a draft for the price the sale is binding, even though the certificates are not forwarded with the draft.

"The performance of a contract, or the tender of performance, is no part of the contract. The making of a contract is one thing, but the performance thereof, or the tender of performance, is another and quite different thing. The contract set up in the paragraph in question is an executory one, by which the plaintiff agreed to

been held that an option for which nothing is paid is unilateral, and hence, even though, by a subsequent writing, the option is exercised,

sell to the defendant the shares of the stock, and the defendant agreed to pay him therefor the sum of $25. No time was fixed for the performance; the law will imply, therefore, that it was to be performed immediately, or perhaps within a reasonable time. Had a future day been agreed upon for the performance of the contract on each side, there could have been no doubt as to its validity, or the right of either party to enforce it, he having done all he was required to do on his part. The fact that no time was agreed upon for performance does not change the character of the contract. The contract did not pass any title to the stock, but it was, nevertheless, a valid contract, and one which either party can enforce, he having been in no default himself." Such is the law as laid down in Bruce *v.* Smith, 44 Ind. 1 (1873); Kerchner *v.* Gettys, 18 S. C. 521 (1882); Cheale *v.* Kenward, 3 De G. & J. 27 (1858). An offer which is accepted with a partial payment made in cash is a completed sale, and not a mere option to purchase, even though the buyer offered to execute a collateral note, which would be the equivalent of a forfeiture of the partial payment, if the sale was not completed. Cooper *v.* Bay State, etc. Co., 127 Fed. Rep. 482 (1904). A contract by which the vendors of the entire capital stock of the company agree that the purchaser shall have entire control and management of the business for fifteen months, and elect officers and directors during that time, at the end of which time he is to pay for the stock, it appearing that third parties were not affected thereby, is legal. Borland *v.* Prindle, etc. Co., 144 Fed. Rep. 713 (1906). A contract by which the president agrees to give fifty shares of stock to an employee who lives up to his contract with the corporation, has no consideration and cannot be enforced, although it might be otherwise if the employee could prove that he entered into the contract with the corporation by reason of such promise. Petze *v.* Leary, 117 N. Y. App. Div. 829 (1907). A transfer of stock by several persons to a trust company for five years under an agreement by one of them to buy the stock at that time if the other parties wished, is not enforceable if they wait over a year after the expiration of the five years before giving notice of their wish to sell. Hollis *v.* Libby, 101 Me. 302 (1906). An offer to buy stock after six months at a price fixed may be accepted sixty days after such six months. Ellis's Adm'r *v.* Durkee, 79 Vt. 341 (1906). Usage may determine what is a reasonable time for delivery. Seven days held reasonable. Stewart *v.* Cauty, 8 M. & W. 160 (1841). In a contract by which one "agrees to deliver" to the other certain stock at a certain price, performance is to be within a reasonable time, and the vendor may tender the stock and then sue for the price. Boehm *v.* Lies, 60 N. Y. Super. Ct. 436 (1892). A contract of sale may be an executed contract, even though it reads that the parties "have agreed to sell." State *v.* Whited, etc., 104 La. 125 (1900). Where two persons own a share of stock in common, each agreeing to pay one-half of future assessments, and one of them gives his interest to the other if the latter will pay future assessments, this is a sale and transfers title. Boll *v.* Camp, 118 Iowa, 516 (1902). Specific performance of a contract to sell stock will not be enforced, where the time of performance and of payment is not fixed, and where five years have elapsed, and where the vendee, the corporate secretary, misrepresented the value of the stock to the vendor.

it cannot be enforced as against the purchaser, there being no new consideration at the time of the exercise of the option.[1] A contract

Todd *v.* Diamond State Iron Co., 8 Houst. (Del.) 372 (1889). An agreement to transfer stock at any time to a trustee for creditors is not enforceable against the insolvent estate of the deceased stockholder. Chafee *v.* Sprague, 16 R. I. 189 (1888). A vague offer to sell stock, with a statement that the stock could probably be sent with a draft, even when accepted with a direction to send it on, does not make a binding contract. Topliff *v.* McKendree, 88 Mich. 148 (1891). Where stock is sold on condition that the vendee shall be "in a position to take up the stock," the condition is fulfilled if the vendee accepts the stock and acts as a director, and holds the stock for five months. Wills *v.* Fisher, 112 N. C. 529 (1893).

1 Wescott *v.* Mitchell, 95 Me. 377 (1901). A unilateral contract is not binding. A consideration must exist or the covenants be mutual. Jordan *v.* Indianapolis, etc. Co., 61 N. E. Rep. 12 (Ind. 1901); s. c., 159 Ind. 337.

Under an option to pay a certain sum by a certain date or else return the stock, records, etc., notice of such return must be given on or before the date personally, even though the vendor lives out of the state. Otherwise the parties are liable for the price. Guss *v.* Nelson, 14 Okl. 296 (1904).

In the case of Clark *v.* Campbell, 23 Utah, 569 (1901), the court discussed the question of whether an option, given without consideration, was binding. Where an option to purchase stock provides for immediate delivery in the hands of a third person, and for payment by instalments in case the option is exercised, the payment of the first instalment constitutes an exercise of the entire option. Obery *v.* Lander, 179 Mass. 125 (1901). An option to sell mining stock, with no definite time fixed as to the duration of the option, may be revoked three months later, no sale having been made in the meantime; and a subsequent sale by the owner of the stock at an advanced price to a party whom the party receiving the option had been negotiating with does not entitle such party receiving the option to any interest in the sale. Rees *v.* Pellow, 97 Fed. Rep. 167 (1899), the court holding that such an option may be terminated at any time in good faith. The various stockholders of a company may give interchangeably a first option of thirty days to purchase their shares of stock whenever any one desires to sell, each contracting for himself, the contract further providing that such thirty days are to commence in case of the death of a stockholder, so far as his stock was concerned, and they may further contract that another person is to have a similar option in case the first option is not exercised. A party entitled to such option may have specific performance of it. The mutual covenants of the contract are a sufficient consideration to support it. Scruggs *v.* Cotterill, 67 N. Y. App. Div. 583 (1902). A contract of sale of stock, to be delivered in blocks of five shares or more as called for by the vendee, is not an option, but an obligation on the part of the vendee to purchase, and if he does not call for the stock it may be tendered within a reasonable time and the price recovered, and the vendor may obtain judgment and retain the stock until payment is made. Cragin *v.* O'Connell, 50 N. Y. App. Div. 339 (1900); aff'd, 169 N. Y. 573. An option to sell certain stock at a certain price "on or after three months from November 6, 1891," must be exercised within a reasonable time thereafter and cannot be exercised seven years thereafter. McCracken *v.* Harned, 66 N. J. L. 37 (1901). An offer to buy

whereby the vendee of bank stock agrees not to sell it until he has first offered it to the vendor at the book value of the stock, sustains a suit for damages if the vendee sells without first making such offer. The damage is nominal unless special damage is proved, and damage cannot be recovered for loss of control of the corporation by reason of such breach.[1] Where the vendor says, in his contract, "I have sold" certain stock, deliverable at seller's option, within a specified time, a sale *in praesenti* is made, and the vendor assumes to have the stock and to hold it for the benefit of the purchaser until delivery.[2] An agreement to pay for property when a corporation is created is enforceable after an organization is effected even though it is not a legal incorporation.[3] A sale of stock with an agreement to take it back whenever the vendee desires is an enforceable contract, even though the contract is oral.[4]

Great difficulty often arises in determining whether a contract of

stock, open to acceptance after January 1, must be accepted before July 9. Park *v.* Whitney, 148 Mass. 278 (1889). An option to purchase stock within three years is enforceable, though one party has an option which the other has not. Seddon *v.* Rosenbaum, 85 Va. 928 (1889). An option running to two persons cannot be exercised by one of them. Pratt *v.* Prouty, 104 Iowa, 419 (1898). A person holding stock in escrow under an option agreement may interplead between the parties in interest if they make conflicting claims. Walker *v.* Bamberger, 17 Utah, 239 (1898). Where the owner of stock offers to sell it to a person at a certain price, the offer to remain open until a certain date, the contract is not unilateral, if the latter accepts the offer within that time. If the vendor then avoids the vendee so that the vendee is unable to tender the money, tender is excused and the vendor may sue the vendee for breach of contract. Guilford *v.* Mason, 24 R. I. 386 (1902). An agreement giving the owner of stock the right to tender it to another person at a stated price must be exercised within a reasonable time. If he delays in exercising his option for sixteen months, and in the meantime the stock has declined in value, he cannot enforce it. Electric, etc. Co. *v.* Smith, 113 N. Y. App. Div. 615 (1906).

1 Cothran *v.* Witham, 123 Ga. 190 (1905).

2 Currie *v.* White, 45 N. Y. 822 (1871). When the option is exercised, the time of delivery as fixed is as though that time had been specified in the original contract. Kelley *v.* Upton, 5 Duer, 336 (1856), holds otherwise where the contract has also the words "at buyer's option in ninety days." Such a contract is executory as to time of passing title, and tender is necessary.

3 Childs *v.* Smith, 46 N. Y. 34 (1871), rev'g 55 Barb. 45. If stock is sold conditionally, and the condition does not happen, the sale is void. Mitchell *v.* Wedderburn, 68 Md. 139 (1887). See also § 335, *infra*. A sale of stock to be paid for if the buyer obtained control of the company and within four years sold its property or received profits for a certain sum, is a conditional sale and title does not pass until one of the conditions is fulfilled. Kennedy *v.* Lee, 147 Cal. 596 (1905). If both the vendor and vendee of stock are ignorant that the charter has expired, this does not invalidate the sale. Brooks *v.* Camak, 60 S. E. Rep. 456 (Ga. 1908).

4 See § 339, *infra*.

sale of stock is an executed or is merely an executory contract of sale. There are a few general rules on this subject,[1] but each contract for the sale of stock is construed and enforced by the courts according to the intent of the parties as manifested by the written terms and conditions of the contract itself. Various contracts relative to the sale of stock are explained and referred to in the notes below.[2]

1 A contract of sale of stock was worded as follows:

"I hold of the stock of the Washington and Hope Railway Company $33,250 or 1,350 shares, which is sold to Paul F. Beardsley [the appellee], and which, though standing in my name, belongs to him, subject to a payment of $8,000, with interest at same rate and from same date as interest on my purchase of Mr. Alderman's stock."

The court held that this was an executed contract by which the ownership of the stock passed to the purchaser, with a reservation of title, simply as security for the purchase-money—an equitable mortgage. The court pointed out the difference between an executed and executory contract of sale as follows:

"If an agreement to sell, the moving party must be the purchaser. If a sale, an executed contract with reservation of security, the moving party is the vendor, the one retaining security. If an agreement to sell, the moving party, the purchaser, must within a reasonable time tender performance or make excuse therefor. If an executed contract, a completed sale, then the moving party is the vendor, the security-holder, and he assumes all the burdens and risks of delay. . . . It is not always easy to determine whether an instrument is a contract of sale or one to sell; yet certain rules of interpretation have become established. . . . Where the buyer is by the contract bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Beardsley *v.* Beardsley, 138 U. S. 262 (1891).

2 An antecedent oral agreement that the vendor of stock will not engage in the same business is not admissible in a suit on the contract of sale. Osgood *v.* Skinner, 211 Ill. 229 (1904). A contract to take stock at the end of five years at a fixed price is not invalid under the statute against options. Kantzler *v.* Benzinger, 214 Ill. 589 (1905). Where the owner of stock in two corporations offers to pay for property by either of said stocks and the property owner accepts the price named, and agrees to take stock in payment "in either" of the corporations, this does not necessarily mean the stockholder's option. Aldrich *v.* Bay State, etc. Co., 186 Mass. 489 (1904). It is no defense to a note that it was for stock and was to be paid for out of dividends, where the defendant is the only witness to prove such facts. Fuller *v.* Law, 207 Pa. St. 201 (1903). A representation by the vendee that he wishes to buy all the stock and will pay the vendor any difference between the amount then paid per share and the highest price he should pay for any other of the same stock, gives no cause of action on the part of the vendor, even though the vendee as trustee buys other stock for more than that price. Schraft *v.* Fidelity T. Co., 73 N. J. L. 57 (1906). The remedy of a corporation against a person who has received stock from a third person under an agreement to

Even though a contractor, who receives practically the entire capital stock for work to be done, does not fulfill the contract, and even

sell treasury stock is not a forfeiture of the stock so given. Falk *v.* Schmitz, etc. Co., 44 Wash. 612 (1906). A pledgee may show a sale by proving that he sent the stock to a broker who reported the sale, and the pledgee credited the pledgor with the proceeds and notified him thereof, to which the pledgor assented. Smith *v.* Becker, 129 Wis. 396 (1906). Even though the company's name is signed to a contract by which the owners of the stock sell the stock, yet the company is not liable for a breach of the contract on the part of either party, or for fraudulent representations made in connection with it. Home, etc. Co. *v.* Collins, 31 Ind. App. 493 (1903). A corporation cannot enforce a contract by which the seller of its stock agrees with the purchaser that the corporate accounts will be collected and that the debts do not exceed a certain amount. Rochester, etc. Co. *v.* Fahy, 111 N. Y. App. Div. 748 (1906). See, in general, Lindley, Company Law, 6th ed., pp. 676-688. An agreement of a party to sell bonds for another party at a certain price may be enforced by the party who is to give the bonds to the other party to sell. Plumb *v.* Campbell, 129 Ill. 101 (1888). The fact that the corporation loses a large amount of money after a partner agrees to take stock as a part of his share of the partnership assets does not allow him to decrease the price which it was estimated to be worth. Donahue *v.* McCosh, 79 Iowa, 733 (1886). Only a *de facto* corporation need be proved. Reynolds *v.* Myers, 51 Vt. 444 (1879).

The memoranda of the contract, together with the certificates of stock, are sufficient presumptive evidence of the existence of the corporation and the legal issue of the stock. Mann *v.* Williams, 143 Mass. 394 (1887). Where stock is issued to a person for construction work, and he sublets the contract and agrees to divide the stock with others who are to share the expense of construction, they all are liable to the subcontractor. McFall *v.* McKeesport, etc. Co., 123 Pa. St. 259 (1889). An underwriter may be held liable, even though the entire amount is not underwritten, there being nothing in the agreement requiring that. Knickerbocker T. Co. *v.* Davis, 143 Fed. Rep. 587 (1906). Where a prospectus, offering for sale trustee's transferable certificates, states that such certificates represent stock deposited with the trustee, the stock being in an English corporation, the trustee is personally liable if it turns out that the English corporation had a prior lien on the stock to the full extent of its value. The trustee was bound to take notice of the lien created by the by-laws of the English corporation. The rule of *caveat emptor* has been relaxed so as to create an implied warranty of title on the part of the seller. Even though the trustee acted as agent, yet, the principal not being disclosed, the trustee is liable. McClure *v.* Central Trust Co., 165 N. Y. 108 (1900). A broker who claims to be acting for an undisclosed principal in contracting for the purchase of bonds, and who stipulates that he shall not be personally liable, cannot enforce such contract if in fact he was the principal himself. Paine *v.* Loeb, 96 Fed. Rep. 164 (1899). In the case of Clews *v.* Jamieson, 89 Fed. Rep. 63 (1898), where the broker was authorized to sell at 229 and actually did sell at 221, the court held that the principal could not adopt and enforce the contract, inasmuch as the broker was not authorized to sell at that price, and the contract not binding the principal when made did not bind the other parties. Even though a person

though he disposes of some of the stock, yet, unless liquidated damages for such breach are specified in the contract or actual damage is

accepts the offer of a broker to sell securities, and afterwards buys them direct from the broker's principal, the broker cannot maintain a suit against the vendee. Mason *v.* Chicago, B., etc. Ry., 156 Fed. Rep. 959 (1907). Even though the president of a corporation brings about a sale of all its stock, under a contract by which the corporation is to pay him a certain sum, nevertheless he cannot collect that sum from the corporation itself. Wood *v.* Manchester, etc. Co., 54 N. Y. App. Div. 522 (1900). It is legal for a person to contract with the directors of an insurance company to purchase at least sixty-five per cent. of the stock of the company, the same offer being made to all the stockholders, even though it is proposed to thereupon wind up the company. Garrett Co. *v.* Morton, 65 N. Y. App. Div. 366 (1901). Where a person has turned in securities under a plan of consolidation which states the aggregate capacity of properties which it is proposed to acquire, or so many of them as the organizers may deem best, the party cannot withdraw, where the plan has been carried out, even though less than half of the properties have been actually acquired. And even though the preliminary contract provided for the acquisition of a certain company, yet, if the consolidated company acquires practically all the stock and bonds of that company, the party turning in securities cannot withdraw, and especially cannot reclaim the securities as against a transferee in good faith who had no notice of personal representations. Jewell *v.* McIntyre, 62 N. Y. App. Div. 396 (1901); aff'd, 172 N. Y. 638. Where the stockholders transfer a portion of their stock to one of their number to be disposed of by him for the interests of the company and to raise money to carry on business, he may use a portion of the same to reimburse one of the stockholders for stock which the latter used in the interest of the company. Playa, etc. Co. *v.* Gage, 60 N. Y. App. Div. 1 (1901); aff'd, 172 N. Y. 630. Where the evident intent of a contract of sale of stock with partial deliveries was that the entire amount should be taken by the vendee, he cannot have specific performance to the extent of a majority of the stock only. Clowes *v.* Miller, 74 Conn. 287 (1901). A sale of stock in a company to be organized is legal. Van Dam *v.* Tapscott, 40 N. Y. App. Div. 36 (1899). Where the incorporators named in a special charter organize by subscribing one share each and allowing another person to subscribe for the remainder, he at the same time entering into a personal contract with them that he would construct the street railway called for by the charter within a certain time, and for failure so to do he was to "return the charter," a suit by the original incorporators to cancel his subscription and to obtain control of the board of directors will not lie, inasmuch as the contract was an attempt to transfer the corporate franchise. Simonds *v.* East Windsor, etc. Ry., 73 Conn. 513 (1901). See 85 N. E. Rep. 102.

Where, in order "to enable the company to keep its stock in the ownership of stockholders of its own choosing," each stockholder enters into an agreement with the corporation that in case he wishes to sell his stock it shall first be appraised and then offered to the corporation before it is offered to any one else, the refusal of the board of directors to make an appraisal, in accordance with the agreement, does not render the corporation liable in damages, inasmuch as it is clear that, even though the stock were appraised, the corporation would not buy it. Withon *v.* Batchelder, etc.

proved, the corporation itself can recover nothing for such breach, the only purpose of the corporation being that particular enter-

Corp., 179 Mass. 169 (1901). It may be shown by parol that a written sale of stock was to be binding only in case an agent had not already sold the stock. Reiner *v.* Crawford, 23 Wash. 669 (1901). Where a corporation having treasury stock in its treasury sells all its assets to another corporation, excepting its patent rights, such sale is not a sale of the treasury stock within the meaning of a prior stock-pooling contract of the old corporation that certain other stock should be sold before such treasury stock was sold. Myers *v.* Buell, 67 N. Y. App. Div. 290 (1901). Stockholders in selling their stock in connection with the transfer of all the property to a new corporation may reserve what may be thereafter realized from a suit. Independent, etc. Co. *v.* Anderson, 106 La. 95 (1901); see 106 La. 55. The vendee who agrees to pay in addition to a certain price a specified sum whenever the same is received by him from the corporation is not liable on the contract if he sells the stock before receiving anything from the corporation. Hamilton *v.* Miller, 24 Ind. App. 617 (1900). An agreement of the borrower of stock to pay for the same in case the stock is not returned accrues when the stock is sold by the pledgee on default of the borrower, and the statute of limitations then begins to run. Jones *v.* Powning, 25 Nev. 399 (1900). A contract to return borrowed stock or pay for it is a debt. Dibble *v.* Richardson, 171 N. Y. 131 (1902). A contract whereby a person receives stock and agrees to return it within a specified time or else pay a specified sum is not a bailment, and hence if the stock is not returned at the specified time the specified price may be recovered, even though the party at a later time desires to return the stock. Haskins *v.* Dern, 19 Utah, 89 (1899). A stockholder may hold liable in damages a person who has broken his agreement to loan money to the corporation, the consideration of such agreement having been furnished by the stockholder. But if the agreement did not provide for any particular duration of the loan, only nominal damages can be recovered. Kelly *v.* Fahrney, 97 Fed. Rep. 176 (1899). Where an agreement for the pooling and voting of stock provides that any holder of trustees' certificates may on six months' notice demand from the trustee repayment of the price which he paid for the stock, such demand may be enforced by a suit and the money collected from the trustee. Waggaman *v.* Nutt, 88 Md. 265 (1898). When a subscriber to stock agrees to sell $5,000 worth of the same at its "original cost," such cost is the cost to the subscriber and not the par value, nor the cost including loans by the subscriber to the corporation. Eagan *v.* Clasbey, 5 Utah, 154 (1887). Where a person sells goods to a corporation and agrees to take payment in stock, he must take the stock at par, even though its actual and market value is much less than par. Tilkey *v.* Augusta, etc. R. R., 83 Ga. 757 (1889). A contract calling for "original ground-floor, or treasury stock" means any of the stock that is issued, where the statutes prohibit fictitious stock. All the stock is then presumed to be "ground-floor" stock and to represent at par the actual value received. Williams *v.* Searcy, 94 Ala. 360 (1891). A contract by a corporation that it will issue its stock for one-fifth of its par value is void under the Alabama constitutional prohibition. The subscriber having sold his contract to another person cannot collect on such sale. Williams *v.* Evans, 87 Ala. 725 (1889). See ch. III, *supra*. An agency to sell the stock of a company

prise, and no business having been transacted by the corporation in consequence of such breach of the contract.[1] A person who makes a contract with a syndicate by which the latter agrees to sell his stock

refers to the stock then issued by the company. Gates *v.* National, etc. Union, 46 Minn. 419 (1891). An executory contract to purchase stock is not such a claim against the estate of an insolvent vendee as to be provable against the assignee. *Re* Ives, 11 N. Y. Supp. 650 (1890). A vendor of the stock of a street railway company may collect damages for breach of the contract of the vendee to construct the street railway to certain land owned by the vendor, even though the corporation, the stock of which was sold, had agreed to acquire certain rights of way and had not done so. Blagen *v.* Thompson, 23 Oreg. 239 (1892). Where a vendor of stock, in addition to the price received, is to have an additional sum equal to the highest price paid to any others for their stock, he cannot recover such additional price by proof that the vendee, in order to stop a stockholder's suit, paid a higher price for other stock. Stewart *v.* Huntington, 124 N. Y. 127 (1890). An executory agreement by the holder of a note that he will cancel it in payment for stock is a contract by itself, and is no defense to the note. It is not a satisfaction of the note nor a substituted contract. It may, however, give a right to damages. Hayes *v.* Allen, 160 Mass. 286 (1894). Where an employee is to receive certain stock if he remains in the employ of the company up to a certain date, a receiver of his property prior to that date cannot demand the stock prior to that date. Delahunty *v.* Hake, 10 N. Y. App. Div. 230 (1896). The holder of an option, who thereafter takes the stock and agrees to pay for it or return it within a certain time, must pay for it if he keeps the stock beyond that time. Stevens *v.* Hertzler, 109 Ala. 423 (1896). An agreement to sell and deliver all the stock of a corporation within a certain time is valid even though the promisor does not own or control the stock. He may be sued for damages for a breach. Wamsley *v.* H. L. Horton Co., 77 Hun, 317 (1894). Where the proposed seller offers to sell at a certain price, and the buyer accepts the offer payable on three days' sight draft, and on the next day the buyer asks for certain explanations before confirming his offer, the seller may refuse to carry out the sale. Cameron *v.* Wright, 21 N. Y. App. Div. 395 (1897); aff'd, 163 N. Y. 586. Where stock is placed in escrow to become the property of a person in case he is obliged to pay a certain obligation, and he is so obliged to pay, the creditors of the party placing the stock in escrow cannot reach the stock nor redeem it. Pabst, etc. Co. *v.* Montana, etc. Co., 19 Mont. 294 (1897). Where upon the sale of stock it is placed in the hands of a third person to be delivered when paid for, and is partly paid for, it is conversion for the person so holding the certificates to deliver them to still another person on the order of the vendor. Kahaley *v.* Haley, 15 Wash. 678 (1896). Where a person makes a contract with a corporation to sell a certain amount of its preferred stock, and in return he is made treasurer at a monthly salary for a year, and indefinitely thereafter, and he actually takes some of the stock himself and pays for it, but is discharged because he does not sell the stock as agreed, he can recover on his contract, the company having refused to return the money he has paid. Hinchman *v.* Matheson, etc. Co., 115 N. W. Rep. 48 (Mich. 1908).

[1] South African, etc. Co. *v.* Peck, 120 Fed. Rep. 88 (1903). See also § 766c, *infra*.

and securities within one year at a price not less than the price specified by contract, and agrees that he shall receive a stipulated price at the end of the year, may sue for the difference between the value of the securities at the end of the year and the price at which they were to be sold.[1] A contract whereby a stockholder delivers certain stock for money to be paid to the corporation, the money to be repaid out of dividends and in other ways, and the stock then to be returned, is a conditional sale and not a loan to the corporation.[2] A sale of stock to be paid for out of dividends, the vendee having the power to make payments in cash whenever he desires to, obligates the vendee to pay within a reasonable time, irrespective of the dividends. Such a contract is not void for uncertainty, nor as being without consideration.[3] Where a note is given in payment for stock, and recites on its face that it is for value received, parol evidence is not admissible to show that the sale was on condition that the stock would afterwards pay a certain dividend, and in case such dividend was not paid the note was not to be paid.[4] Nor can it be shown by parol that a written contract to deliver a certain amount of stock was to be satisfied by the delivery of a less amount.[5] If a contract of sale is conditional on the stock being increased, and the vendor prevents such increase, the vendee is entitled to recover back

1 Gause *v.* Commonwealth Trust Co., 111 N. Y. App. Div. 530 (1906). In a suit against a trust company for failure to sell securities, as it agreed to do for a certain price, the plaintiff must prove damage by reason of the breach of covenant to sell as distinguished from a breach of covenant to pay money. Gause *v.* Commonwealth T. Co., 100 N. Y. App. Div. 427 (1905).

2 Crimp *v.* McCormick Const. Co., 71 Fed. Rep. 356 (1896). See also § 76, *supra*, and 125 N. Y. App. Div. 399.

3 Stewart *v.* Herron, 82 N. E. Rep. 956 (Ohio 1907). A contract under which stock is transferred to be paid for by dividends, cannot be rescinded by the transferrer as being without consideration. White *v.* Cooper Co., Ohio Circuits (1903), p. 703; aff'd, 72 Ohio St. 615. A provision in the contract that the vendor of stock shall have all the dividends, may be shown to mean that he was to apply the dividends to the purchase price. Commercial, etc. Bank *v.* Pott, 89 Pac. Rep. 431 (Cal. 1907).

4 Dinkler *v.* Baer, 92 Ga. 432 (1893).

5 Where a stockholder has agreed to sell and deposit in a trust company seven hundred and twenty shares, but only deposited six hundred and eighty-seven shares, and the vendor has on his part deposited the purchase price with the trust company to be paid on the delivery of the seven hundred and twenty shares, the vendor cannot rescind on the ground that there was a contemporaneous oral understanding that six hundred and eighty-seven shares would be sufficient. Dady *v.* O'Rourke, 172 N. Y. 447 (1902). A contract by a person with another to purchase all of certain stock held by a third person is broken by a failure to purchase only a part thereof; but where there are other provisions in the contract sufficient to support it, the rule may be different. Stokes *v.* Foote, 172 N. Y. 327 (1902).

a partial payment already made by him.[1] Where a person contracts to give to another person a fourth interest in any mines which the former may buy, the former must give the latter a fourth of stock which the former purchases in a mining company.[2] But an agreement of various stockholders in several street railway companies to form a new corporation and transfer their interest thereto, and divide the new stock in a certain proportion, does not constitute such a partnership as to entitle one to sue the others for an accounting of profits, where the others had formed such a corporation with other parties, leaving out the first-named party.[3] Where the vendor guarantees that the vendee can sell the stock within a year at a certain price, and the vendee sells it after the year at a less price, he may recover the difference from the vendor.[4] The agreement of vendors of stock to protect the vendee against the payment of existing claims of a corporation is not enforceable until payment is actually made.[5] Many

1 Lovell *v.* Jacobs, 150 N.Y. 84 (1896).

2 Dennison *v.* Chapman, 105 Cal. 447 (1895).

3 Schantz *v.* Oakman, 163 N. Y. 148 (1900). *Cf.* §§ 705–707, *infra*, and § 320, *supra*.

4 Lobeck *v.* Duke, 50 Neb. 568 (1897). The vendor may guarantee that the stock will be at par within a certain time. Suit lies if it is not at par within that ime. Hill *v.* Smith, 21 How. 283 (1858). A contract guaranteeing a certain dividend over and above certain corporate expenses does not include payment of salaries, etc. Central, etc. Assoc. *v.* James, 81 Ga. 762 (1888). A guaranty upon the sale of stock that certain dividends will be declared is enforceable against the guaranteeing firm, even though they acted as agents for an undisclosed principal. Their obligation is primary, and not that of guarantors for the company. Kernochan *v.* Murray, 111 N. Y. 306 (1888). See also as to guarantees, § 775, *infra*. Where the vendors of stock guaranty that the stock shall be non-assessable until they have advanced $30,000, a stockholder who is held liable on a statutory liability may hold the guarantors liable if they have not paid the $30,000. Omo *v.* Bernart, 108 Mich. 43 (1895). A guaranty by an outside party that upon the winding up of a corporation the stock should receive so much, passes to a purchaser of the stock, the transfer having been made subject to the agreement. Bacon *v.* Grossmann, 71 N. Y. App. Div. 574 (1902). A contract whereby a stockholder sells his stock to an individual who guarantees that the former will be employed at a stated salary by the corporation for two years is enforceable against the person so purchasing the stock, even though the corporation passes into the hands of a receiver before the expiration of the two years and the employment is thereby stopped. Kinsman *v.* Fisk, 37 N. Y. App. Div. 443 (1899).

5 Cochran *v.* Selling, 36 Oreg. 333 (1899). Where in the sale of the stock of a street railroad a warranty is made that the liabilities of the company do not exceed a certain sum, a note given in payment for the stock may be defeated if the liabilities exceed that sum. Millsaps *v.* Merchants', etc. Bank, 71 Miss. 361 (1893). A corporation cannot enforce a promise made by a stockholder to a purchaser of his stock that he, the vendor, would pay the corporate debts. German St. Bank *v.* Northwestern, etc. Co., 104 Iowa, 717 (1898). See also § 354, *infra*.

cases are referred to in the notes below relative to the contracts and rights of agents, promoters, and partners, in the purchase or sale of stock.[1]

[1] For a sale of stock where the vendee was to divide with the vendor the amount for which the stock should be resold by the vendee, see Jones *v.* Kent, 80 N. Y. 585 (1880). An agreement to divide the profits on stock in consideration of information to be furnished is enforceable. Parsons *v.* Robinson, 59 N. Y. Super. Ct. 546 (1891); aff'd, 133 N. Y. 537. But an agreement to set on foot and to help carry along a congressional investigation into the affairs of a corporation, in anticipation that it would depress the market value of its stock, which it did, and to furnish the defendants with information from time to time respecting damaging facts brought out against it upon the investigation to enable them to take advantage of the market, in consideration of sharing in the profits of their speculation, is void as against public policy; and the courts will not permit a recovery upon such an agreement. Veazey *v.* Allen, 173 N. Y. 359 (1903). A contract whereby an agent, one of the partners, is to have half of what he could sell partnership shares of stock for, is legal and enforceable by him. Wight *v.* Wood, 85 N. Y. 402 (1881). A promoter who has brought about the sale of a large plant to new parties, who have agreed to organize a new corporation and give the promoter a certain amount of stock therein, cannot, upon the ground that he is being defrauded of his commissions, enjoin the parties from closing the transaction irrespective of the promoter, nor can he have specific performance of the contract to incorporate a company and deliver the stock. There is no fiduciary relation between the parties; the value of the stock can be estimated in damages; there was no allegation of defendant's insolvency, and the promoter has ample remedy at law for damages. Avery *v.* Ryan, 74 Wis. 591 (1889). A promise and contract of promoters to subscribers to certain bonds may create an equitable lien on the bonds enforceable in equity. Badgerow *v.* Manhattan Trust Co., 64 Fed. Rep. 931 (1894). Where stock is purchased to be resold on joint account, and one party refuses to live up to the contract, the other may dispose of the stock on the best terms possible. Davidor *v.* Bradford, 129 Wis. 524 (1906). Where minority stockholders agree to finance the company if they are given control of its business and under such agreement do finance the company and the majority stockholders then take control, the minority stockholders may have a receiver appointed, if the company is not able to repay money advanced on their credit. Wood, etc. Co. *v.* American, etc. Co., 62 Atl. Rep. 768 (N. J. 1906). Even though promoters send to a person a printed form of application for stock, and he signs and returns the same, this does not obligate them to allot to him such stock or any part thereof. Feitel *v.* Dreyfous, 117 La. 756 (1906). A stockholder who unites with other stockholders in depositing his stock with a third person with authority to sell, and the latter does so, may bring suit against the purchaser for the purchase price. Dowling *v.* Wheeler, 117 Mo. App. 169 (1906). The question of whether a sale or pledge was involved in the relations between a contractor and the party who financiered the matter for him was involved in Griggs *v.* Day, 58 N. Y. Super. Ct. 385 (1890), finally decided in 158 N. Y. 1 (1899). The fact that a vendee makes out a check to a person and delivers it to him in payment for stock does not prove that the latter is the vendor and liable for mis-

§ 335. *Remedies for breach of a contract to sell stock—Tender.*—A person who is under contract to sell and deliver shares of stock may fulfill the obligation on his part by tendering to the vendee certificates of stock, duly indorsed by himself, and containing a

representations. Aron *v.* De Castro, 131 N. Y. 648 (1892). For a breach of an agreement to give a certain quantity of stock in payment for services to be performed, the person entitled to the stock may sue for damages. Alford *v.* Wilson, 20 Fed. Rep. 96 (1884). The corporation is not liable for the breach of an agreement among the organizers as to the distribution of stock. Summerlin *v.* Fronteriza, etc. Co., 41 Fed. Rep. 249 (1890).

Where the promoters of a company agree to sell property to the company in consideration of a certain number of paid-up shares, specific performance may be had. See Fyfe *v.* Swabey, 16 Jur. 49 (1851), M. R. As to promoters' contracts, see §§ 705–707, *infra*. Where a party to a contract relative to an incorporation and division of the stock sues to recover his interest according to the contract, the court will decree a proper division of the stock, all parties being allowed the amounts invested by them in forwarding the enterprise. Bates *v.* Wilson, 14 Colo. 140 (1890). Where the owner of a patent agrees to convey it to a corporation for stock, and then to divide the stock with others, he may be compelled to perform his agreement. But where the patentee does not convey the patent to the corporation, but conveys to another corporation, the latter is protected in its title, though some of its incorporators and directors knew all the facts. Davis, etc. Co. *v.* Davis, etc. Co., 20 Fed. Rep. 699 (1884). Where a patentee agrees with a promoter to sell the patent to the corporation for stock, and divide the stock with the promoter, but the patentee, after obtaining the stock, sells the certificates to a *bona fide* purchaser, the latter is protected, though the transfer is not registered on the corporate books. The purchaser may come into a suit instituted by the promoter against the corporation to compel a transfer. Thurber *v.* Crump, 86 Ky. 408 (1887). Where a person holds property in trust or as agent for others, and conveys that property to a corporation for its shares of stock, the persons who had an equitable interest in the property may compel this agent or trustee to transfer to themselves such stock. But all the principals or *cestuis que trust* must be made parties to the suit. O'Connor *v.* Irvine, 74 Cal. 435 (1887). Where there is a joint operation in stocks, a "pool," the transactions being carried on in the name of one only, the others may have specific performance leading to a division of the stocks. Johnson *v.* Brooks, 46 N. Y. Super. Ct. 13 (1880); Thornton *v.* St. Paul, etc. Ry., 45 How. Pr. 416 (1873); s. c., dismissed, 6 N. Y. Week. Dig. 309 (1878). Equity has jurisdiction to compel the transfer of stock as between parties. Thus, where stock is issued in payment for property, and the party to whom the certificate is issued refuses to divide it among the owners of the property, as provided by contract, a court of equity may compel the division, and may enjoin any election of the corporation until such division is made. Archer *v.* Amer., etc. Co., 50 N. J. Eq. 33 (1892). It is a question of fact whether a person selling stock is an agent or vendee of the person from whom he obtained the stock, and whether the latter is liable on misrepresentation made by such person. Henneberger *v.* Matter, 88 Mich. 396 (1891); Florida, etc. Co. *v.* Merrill, 52 Fed. Rep. 77 (1892). A party selling stock is not liable for the false representations of the vendee

power of attorney authorizing the vendee to obtain a registry of the transfer on the corporate books.[1] If the vendor causes the stock to be transferred on the corporate book to the vendee, this is sufficient.[2] If the defendant is not in the state at the time when tender

to another person to whom the vendee is reselling the stock. Masterton *v.* Boyce, 6 N. Y. Supp. 65 (1889). A corporation cannot enforce a contract by which the seller of its stock agrees with the purchaser that the corporate accounts will be collected and that the debts do not exceed a certain amount. Rochester, etc. Co. *v.* Fahy, 111 N. Y. App. Div. 748 (1906); aff'd, 188 N. Y. 629. For the allegations in a complaint by one promoter against another for breach of contract in selling the stock for the benefit of the enterprise and for mismanaging the corporation, see Woolf *v.* Barnes, 46 N. Y. Misc. Rep. 169 (1905). Failure of the vendee to complete the purchase in accordance with the contract, in which contract certain other persons, who had agreed to purchase the stock, join, renders all of them jointly liable. Walter *v.* Rafalsky, 113 N. Y. App. Div. 223 (1906); aff'd, 186 N. Y. 543.

1 "When certificates of shares are given to a purchaser they are analogous to the sale of chattels, and the assignment and delivering of the certificates is a symbolical delivery of the shares themselves." Noyes *v.* Spaulding, 27 Vt. 420 (1855); Duchemin *v.* Kendall, 149 Mass. 171 (1889); Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454 (1879); Eastman *v.* Fiske, 9 N. H. 182 (1838); Munn *v.* Barnum, 24 Barb. 283 (1857); Bruce *v.* Smith, 44 Ind. 1 (1873). *Cf.* Moore *v.* Hudson River R. R., 12 Barb. 156 (1851). It is not a sufficient tender to deposit the certificates of stock with the clerk of the court unindorsed. Subsequent indorsement after the stock has been sold for non-payment of assessments is insufficient. Kelley *v.* Owens, 120 Cal. 502 (1898); aff'd, 52 Pac. Rep. 797 (1898). Where a firm contracts to sell stock, and then both members of the firm die, a tender of certificates standing in the names of the individual members of the firm, and not signed in blank, is not a sufficient tender. Nicholls *v.* Reid, 109 Cal. 630 (1895). See also Holmes, etc. Manuf. Co. *v.* Holmes, etc. Metal Co., 53 Hun, 52 (1889); aff'd, 127 N. Y. 252. Where the vendor brings into court a certificate for fifty-six shares of stock, and the sale was for only fifty-one shares, he cannot recover the purchase price. Hamilton *v.* Finnegan, 117 Iowa, 623 (1902). Where a stockholder "agrees to turn over" to two parties all the stock owned by him in a certain corporation it is sufficient delivery if the stock is already held by one of them in pledge, all of which is known to the other. Fuehrman *v.* McCord, 107 N. Y. App. Div. 12 (1905); aff'd, 186 N. Y. 566.

2 White *v.* Salisbury, 33 Mo. 150 (1862). See Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454 (1879); aff'd, 74 Mo. 77. Where an executory sale of stock is made, with a forfeit in case it is not completed, and the vendor, without the knowledge of the vendee, causes the stock to be transferred to the vendee on the books of the company, and the company fails, and the next day the parties, without knowledge of the failure, close the transaction, the vendor may be held liable on the statutory liability on such stock. May *v.* McQuillan, 129 Mich. 392 (1902). In Oklahoma it is held that the vendor of stock in suing for the price, must allege tender and refusal of stock, and that the plaintiff was able, willing and ready to deliver, even though the vendor had transferred the stock to the vendee on the books and had tendered the new certificate, but brought suit to enforce the contract instead of to

should be made, tender may be made when he returns.[1] A tender of a certificate indorsed in blank, not by the vendor, but by some previous owner, is insufficient. The vendee is not obliged to trace his vendor's title from the name appearing on the certificate.[2] A contract to buy stock in a West Virginia corporation cannot be enforced by tendering stock in a Connecticut corporation.[3] An agreement to deliver stock in a company to be formed, nothing being said as to any preferred stock, is not fulfilled by delivering common stock, where there is preferred issued also.[4] The vendor in order to sue for the purchase price must keep on hand or within control from the time of tender to the time of trial the stock involved.[5] Where tender of the stock is made in court and the vendor obtains judgment for the price, the tender is presumed to have been continued.[6] A tender followed up by producing the certificates in court and filing them with the clerk on the trial is sufficient.[7] A person holding an option or right to buy stock need not make a technical common-law tender of the money, inasmuch as there is something to be performed on both sides, and hence if the purchaser cannot find the vendor after due search for him and the purchaser then notifies the vendor by letter, there is a sufficient tender on his part.[8] Tender of

recover damages for its breach. Haynes *v.* Brown, 89 Pac. Rep. 1124 (Okl. 1907).

1 Edmonds *v.* Evarts, 146 Mich. 485 (1906).

2 Hare *v.* Waring, 3 M. & W. 362, 380 (1838), per Parke, B. "The party is to convey and deliver certificates showing either on the face of them or from the indorsements that the title is in the person conveying."

3 Craig Silver Co. *v.* Smith, 163 Mass. 262 (1895).

4 McIlquham *v.* Taylor, [1895] 1 Ch. 53. See also Faulkner *v.* Robinson, 70 S. W. Rep. 990 (Tex. 1902). An agreement that a note may be paid by certain stock in case the stock is not sold when the note becomes due is effective only in case the stock is tendered when the note becomes due, and if, in the meantime, the stock has been largely increased, the tender is not good. Tranter *v.* Hibbard, 108 Ky. 265 (1900).

5 Ortmann *v.* Fletcher, 117 Mich. 501 (1898).

6 West *v.* Averill, etc. Co., 109 Iowa, 488 (1899). See also Cragin *v.* O'Connell, 50 N. Y. App. Div. 339 (1900); aff'd, 169 N. Y. 573. In a partition suit, where the defendant claims that he is entitled to a deed from the plaintiff on delivering a certain amount of stock, the defendant need not bring the stock into court and make a tender upon the trial. The decree may provide that the deed shall be made upon the delivery of the stock. Heyman *v.* Swift, 91 N. Y. App. Div. 352 (1904). Where the purchaser of a plant and stock is sued for the price and judgment is recovered, he may afterwards bring suit for the stock and for dividends paid after the time when he would have been entitled to the stock, if he had fully complied with his contract. Beaty *v.* Johnston, 66 Ark. 529 (1899). See § 476 and note 1, p. 1041.

7 Wisconsin Lumber Co. *v.* Greene, etc. Co. 127 Iowa 350 (1904).

8 Guilford *v.* Mason, 22 R. I. 422 (1901); s. c., 53 Atl. Rep. 284. Even

stock may be made by the vendors depositing the same in a bank and notifying the vendees of such deposit, where the vendees are nine in number and the sale is to all of them jointly, and where such delivery is a reasonable one. Even though such tender is made after the day fixed by the contract, yet, if other features of the contract have been carried out by the vendor, a tender after the day fixed may be sufficient.[1] An owner of stock, having the option to sell the same to a person on a certain day, must tender it on that day, even though it is a holiday other than Sunday. The fact that the tender was made later, and the vendee took time to consider and then returned the stock, and the fact that the vendee afterwards offered to take a part of the stock, is not a waiver of the tender.[2] Tender need not be made where the ability to make a tender is shown, and the other party refuses to accept tender and denies the contract.[3] In England, where a transfer of shares is to be made by a deed, it is the duty sometimes of the vendor,[4] and sometimes of the vendee,[5] to furnish the necessary deed, according to the custom of the market in which the

though a promoter by agreement made with a foreign corporation, before the incorporation of a mining company, was to have one share of stock for his services for every ten shares which he obtained subscriptions for, and the company accepted the subscriptions, yet he cannot hold it liable for the value of the stock to be received by him as commissions where he merely demanded it by letter and the company offered to deliver it after suit was brought. Teeple *v.* Hawkeye, etc. Co., 114 N. W. Rep. 906 (Iowa 1908).

1 Kauffman *v.* Reader, 108 Fed. Rep. 171 (1901). It is a sufficient tender if the stock, duly assigned, is sent to a bank at the purchaser's place of business with instructions to transfer the same to the purchaser on payment of the amount due and the bank notifies the purchaser to that effect, especially where the purchaser had notified one of the vendors that he would not perform. Osgood *v.* Skinner, 211 Ill. 229 (1904).

2 Page *v.* Shainwald, 169 N. Y. 246 (1901).

3 Eames *v.* Haver, 111 Cal. 401 (1896). Where the vendor delivers a part of the securities under a contract of sale, and the vendee retains the same and claims that they had always been his property, the vendor need not tender the remainder before suing for the purchase price, but is liable to the vendee for the part not so tendered. Stokes *v.* Mackay, 147 N. Y. 223 (1895). No tender is necessary under a contract giving the right to return stock one year after date, where, before the termination of the year, the original vendor refused tender and ordered the vendee not to return and stated that the stock was worthless, which was a fact. Williams *v.* Patrick, 177 Mass. 160 (1900). A tender of the stock need not be made by the vendor if the vendee declines to complete the contract on the ground that the contract was not legal. West *v.* Averill, etc. Co., 109 Iowa, 488 (1899). No tender of the stock need be made if the vendor repudiates the contract. Maguire *v.* Halsted, 18 N. Y. App. Div. 228 (1897). A tender may be waived. Kuhn *v.* McKay, 7 Wyo. 42 (1897).

4 Shaw *v.* Rowley, 16 M. & W. 810 (1847).

5 Stephens *v.* De Medina, 4 Q. B. 422 (1843).

sale is made. If, after the vendee accepts a tender of the certificates, the corporation refuses to allow a registry and transfer on the corporate books, the vendor is liable to him, since the registry is held to have been guaranteed.[1] The vendee may decline to accept the certificates if the stock has been attached.[2] But the vendee cannot decline the tender on the ground that the corporation has issued stock at a discount, nor because it has mortgaged its property.[3] A contract whereby stock is sold to be paid for in the future is not forfeited by mere failure to pay as agreed upon.[4]

1 Wilkinson *v.* Lloyd, 7 Q. B. 27 (1845).

2 Eastman *v.* Fiske, 9 N. H. 182 (1838).

3 Noyes *v.* Spaulding, 27 Vt. 420 (1855). See also § 350, etc., *infra.*

4 Chater *v.* San Francisco, etc. Co., 19 Cal. 219 (1861), where payment was made in notes and labor, and the notes were not paid. Subsequent dividends on the stock are to be applied to the payment of such notes when the dividends have been received by the vendor. A sale of stock to take effect when a note given in payment is paid does not enable the vendee to claim the stock long subsequently, the note not having been paid. Davison *v.* Davis, 125 U. S. 90 (1888). Where, however, two parties, one owning stock, the other bonds, contract to exchange the same, delivery being in escrow at once, and absolutely after the performance of certain things, a failure of one party to perform on his part enables the other to have the contract canceled by a court of equity. Wilson *v.* Roots, 119 Ill. 379 (1887). Where no certificates of stock are issued and a stockholder delivers an assignment of her stock for a specified sum, delay in paying the sum does not enable the vendor to sell the stock in the meantime to some one else. Judson *v.* Stonnington Min. Co., 128 Mich. 103 (1901). Where fifty shares of stock are sold, but only twenty-five shares are delivered, and the vendor declines to deliver the balance, a suit by the vendor on the ground of fraud and a rescission will fail. Matthews *v.* Cady, 61 N. Y. 651 (1875). Although a party to whom bonds and stock have been sold or issued to be paid for in instalments has paid in part and is unable to pay the remainder, the vendor cannot rescind and demand back the securities unless he returns the money already paid. American Water-works Co. *v.* Venner, 18 N. Y. Supp. 379 (1892). Where the owner of a majority of the stock sells it, the purchase price being only paid in part, and retains the stock in his own name until the full price is paid, he cannot be compelled to deliver the stock or to refrain from ousting the vendee from the presidency of the corporation, where the vendee fails to meet the other payments, even though the vendee has proceeded to improve the property. Stockton *v.* Russell, 54 Fed. Rep. 224 (1892). For failure to deliver, the measure of damages is the difference in the market value at the date of the contract and at the date fixed in the contract for the delivery, or the date of the breach of the contract. The price at which the vendee had resold is not admissible unless the vendor had notice thereof. Coffin *v.* State, 144 Ind. 578 (1896). A company may give a person an option to subscribe for shares of stock in the company. If the company sells its assets before such option is exercised, the party holding the option may exercise it and sue for damages. The price at which the company sold its assets is the basis of the damage. *Re* South African, etc. Co., 74 L. T. Rep. 769

A person who is under contract to purchase stock cannot defeat that contract by the fact that the corporation was insolvent at the time the contract was entered into.[1] An agreement to deliver stock free and clear of all incumbrances does not refer to incumbrances against the corporation.[2] The legality of the sale of stock is governed by the law of the state within which it is made.[3] It is no defense to a contract to buy stock for the vendee to allege that the directors have committed an *ultra vires* act in issuing other stock at a discount.[4] A purchaser of stock in a *de facto* corporation cannot re-

(1896); aff'd, 77 L. T. Rep. 377. A person who contracts to sell to another, on or before three years from date, certain stock at a certain price, interest to be paid by the vendee in the meantime, and the stock to be deposited in escrow, cannot recover the price at the end of the three years if he has not deposited the stock in escrow as agreed. Umfrid *v.* Brooks, 14 Wash. 675 (1896). An agreement of a stockholder that if he sells a certain amount of his stock he shall sell to another stockholder his remaining stock does not apply where he transfers only a portion of the first-mentioned stock. Burden *v.* Burden, 8 N. Y. App. Div. 160 (1896); aff'd, 159 N. Y. 287 (1899). See also § 766c, *infra.*

1 See § 350, *infra.* A seller cannot treat a contract as abandoned simply because the purchaser does not make payments promptly in accordance with the contract, unless the purchaser refuses in such a way as to show that he intends to renounce the contract. Monarch, etc. Co. *v.* Royer, etc. Co., 105 Fed. Rep. 324 (1900). Where the buyer does not pay for shipments as called for by the contract, the seller may repudiate the contract. Hull, etc. Co. *v.* Empire, etc. Co., 113 Fed. Rep. 256 (1902). If the seller claims that the amount already paid is forfeited by the failure of the purchaser to pay one of the instalments when due, it is his duty to inform the purchaser of such claim, in order that he may pay or tender such amount. Cushman *v.* Jewell, 7 Hun, 525 (1876). Where an executory contract for the sale of chattels provides that the purchase price shall be paid in instalments, and that title shall not pass until the price is fully paid, and the vendor permits the vendee to retain possession and make other payments, after the whole contract price is due, he may not seize the property and terminate the contract for non-payment until he has demanded payment. O'Rourke *v.* Hadcock, 114 N. Y. 541 (1889).

2 Williams *v.* Hanna, 40 Ind. 535 (1872).

3 Dow *v.* Gould, etc. Co., 31 Cal. 629, 653 (1867). See also § 343, *infra.*

4 Faulkner *v.* Hebard, 26 Vt. 452 (1854). A preferred stockholder may agree with the corporation that his stock shall be common stock in consideration of the corporation waiving the right to redeem such preferred stock as provided by the terms of such stock in the original issue thereof. A purchaser of other stock in the corporation cannot when sued on the contract of purchase set up that such agreement in regard to the preferred stock was illegal. A pledgee of such preferred stock is not bound thereby, but if the debt is afterwards paid his objection falls. Pendleton *v.* Harris-Emerey Co., 124 Iowa, 361 (1904). That fraud is a defense, see §§ 349-357 *infra.*

pudiate the sale on the ground that the company was not properly organized.[1]

§ 336. Difficulty is often experienced in determining what the measure of damages is for breach of a contract relative to the sale of stock. In certain cases, where the stock has been delivered or tendered, the measure of damages is the purchase price fixed by the contract itself.[2] The vendor may tender the stock to the vendee and

1 Burwash *v.* Ballou, 82 N. E. Rep. 355 (Ill. 1907). See also § 334, *supra*. In a suit by the vender of the stock for the price, it is no defense that the corporation had not recorded its certificate of incorporation with the recorder of deeds as required by statute, it being shown that the certificate had been filed with the secretary of state and the corporation organized and is doing business. Marshall *v.* Keach, 81 N. E. Rep. 29 (Ill. 1907).

2 A vendor may tender the stock and sue for the purchase price. Prest *v.* Cole, 183 Mass. 283 (1903). A vendor may recover the price of the stock as specified in the contract. Osgood *v.* Skinner, 211 Ill. 229 (1904). Where the stock is sold to be delivered thereafter, and the vendee refuses to accept the stock, the vendor may tender the stock and then sue for the contract price. In Mobley *v.* Morgan, 6 Atl. Rep. 694 (1886), the court said: "The court refused to instruct the jury that it was necessary for Morgan to sell the stock on the market for the best price he could get, and that the measure of damages would be the difference between the price thus obtained and the contract price; and this refusal is assigned for error. Of course, the seller would be at liberty, after tender and refusal, to adopt this course; but it was not essential to his right of action. The measure of damages was the difference between the market price of the stock at the time of the breach and the contract price. This is the ordinary rule; but there was evidence that the stock had no value, and there is no certainty—indeed, no proof—that upon a resale any price could have been obtained for the stock, or that it had any market value when Parker finally refused to take it. Under these circumstances we see no reason why the price agreed to be paid should not be adopted as the measure of damages, if that was the only mode by which full compensation could be made for the breach of contract by the purchaser."

In Barnes *v.* Brown, 130 N. Y. 372 (1892), the court said: "In the absence of special circumstances in an action for conversion of personal property as well as one for failure to deliver it in performance of a contract where consideration has been received, the value of the property at the time of such conversion or default, with interest, is the measure of compensation." As to remedies for a breach, see also Benjamin on Sales. For the measure of damage, see ch. XXXV, *infra*. The vendor of stock which has been delivered to a third person, according to the agreement, may sue for the price irrespective of the market value of the stock. Obery *v.* Lander, 179 Mass. 125 (1901). As regards the pleadings in an action by a vendor of stock to recover damages against the vendee for refusal to accept and pay for stock which the latter had agreed to accept at a stated price, one year from date, if the former desired to sell, see Struthers *v.* Drexel, 122 U. S. 487 (1887). The vendor on tendering the stock is entitled to sue for the purchase price. Reynolds *v.* Callender, 19 Pa. Sup. 610 (1902). The remedy of a person, who has sold his stock to another person,

sue for the price, or may sell after notice to the vendee and then sue for the difference, or may retain the stock and sue for the dif-

who had agreed to pay him the same price that the latter received for other similar stock, but who paid the former less, is at law and not in equity. Martin *v.* Wilson, 155 Fed. Rep. 97 (1907). Where the contract of purchase says "I take," the vendor may tender the stock and sue for the full purchase price, this being not a promise to purchase but an actual purchase. Graham *v.* Burgiss, 59 S. E. Rep. 29 (S. C. 1907); holding also that the vendor may assign to another person his right to tender the stock and sue for the purchase price. Where the price is fixed in the contract the measure of damages in a suit against the vendee for failure to take the stock is the price agreed upon and not the difference between the market price and the contract price. Lydon *v.* Sullivan, 101 S. W. Rep. 940 (Ky. 1907). The vendor may claim damages for a breach, in that the vendee does not pay the contract price and take the stock, or he may bring an action "in effect for the specific performance thereof," in which case he must allege readiness to deliver the stock. Corning *v.* Roosevelt, 11 N. Y. Supp. 758 (1890). For breach the vendor may tender the stock and then sue for the entire price. The judgment will allow the vendor to retain the stock until the judgment is satisfied. Finlayson *v.* Wiman, 84 Hun, 357 (1895). Where the vendee agrees to give a note and the stock as collateral, but gives the note only, the vendor may return the note and sue at once for the price. Rennyson *v.* Reifsnyder, 1 Pa. Dist. Rep. 758 (1892). The court will compel the vendee to take and pay for stock where it would compel the vendor to deliver the stock if he defaulted on the contract to sell. Bumgardner *v.* Leavitt, 35 W. Va. 194 (1891). Where the vendor gets judgment for the price of the stock sold but not delivered, the court will order him to deposit the stock with the court or lose his judgment. McKeever *v.* Dady, 18 N. Y. Supp. 439 (1892).

In Perin *v.* Megibben, 53 Fed. Rep. 86 (1892), the court granted specific performance of a contract to sell stock in behalf of the vendor and against the vendee. The court said: "The agreement was in form a contract to buy all the shares of stock in the incorporated companies. The language of the contract shows that the real agreement was to buy certain real estate, together with the personal property connected with its use for milling and distilling purposes. Without discussing the question whether the sale of shares of stock can be specifically enforced in equity, it is sufficient to say that the sale here was in fact a sale of real estate, and the circumstance that personalty was included in the sale would not affect the power of a court of equity to afford relief by requiring specific performance." The measure of damages for breach of a contract to purchase stock is the difference between the contract price and the market value of the stock at the time and place of delivery, with interest. Corser *v.* Hale, 149 Pa. St. 274 (1892). Where a vendee refuses to carry out an executory contract for the sale of shares, the measure of damages is the difference between the price as fixed by the contract and the value of the stock at the time of tender and refusal of the vendee to fulfill. See Barned *v.* Hamilton, 2 Ry. & Canal Cas. 624 (1841); Tempest *v.* Kilner, 3 C. B. 249 (1846), and Stewart *v.* Cauty, 8 M. & W. 160 (1841); Shaw *v.* Holland, 15 M. & W. 136 (1846). If a person sells and conveys property to a company to be paid for in stock, which the vendee refuses to deliver,

ference between the contract and market price.[1] The supreme court of the United States lays down the rule that the vendor of stock,

the vendor may recover the value of the stock. Humaston *v.* Telegraph Co., 20 Wall. 20 (1873). Where an agent to sell stock is to have any excess of price over a sum named to him by the vendor, and the agent finds a customer at an advanced price and the vendor refuses to sell, the agent may recover such profit as he lost thereby. Mattingly *v.* Roach, 84 Cal. 207 (1890). See also, as to agents, § 334, *supra*. Where the vendor, after tendering the stock, assumes to be the owner and directs a sale and gives a proxy to vote, he can recover only the difference between the market price at the time of delivery and the contract price. Hamilton *v.* Finnegan, 117 Iowa 623 (1902). Where a party holding stock in escrow refuses to deliver when he should and in a suit for conversion, instead of depositing the stock in court, sets up a defense which is without merit, the value of the stock and dividends and interest may be recovered. Clarke *v.* Eureka, etc. Bank, 123 Fed. Rep. 922 (1903); aff'd, 130 Fed. Rep. 325. Where a person sells stock, nothing being paid down, but by the contract on specified dates any decline in the market price of the stock should be paid by the vendee to the vendor and any rise should be paid by the vendor to the vendee, and the vendor dies, his estate is entitled to the full selling price on the next accounting day, and if the vendee does not pay on a demand at that time, and the stock subsequently advances in price, the vendee cannot have specific performance, neither can he recover damages if the contract price exceeded the market value when payment should have been made. *Re* Schwabacher, 98 L. T. Rep. 127 (1907).

[1] See the cases in the preceding note. The vendor's remedies for a breach of a contract to buy stock are: (1) To hold the stock for the vendee and require payment of the entire price; (2) to sell after notice to the vendee and sue for the difference between the contract price and the selling price; (3) to retain the stock and sue for the difference between the contract price and the market value price. *In re* Ives, 11 N. Y. Supp. 650 (1890). No tender is necessary when the suit is for damages and the vendor intends to retain the stock. Nysewander *v.* Lowman, 124 Ind. 584 (1890). When suit is brought to recover the price of stock sold, a delivery or tender must be shown. Holmes, etc. Co. *v.* Morse, 53 Hun, 58 (1889); aff'd, 127 N. Y. 252. Where a party is sued on a note he may recoup by setting up that the note was given to plaintiff on plaintiff's agreement to assign and deliver certain shares of stock, which was not tendered until eight months after the time agreed upon. Hill *v.* Southwick, 9 R. I. 299 (1869). For failure to deliver, the measure of damages is the difference in the market value at the date of the contract and at the date fixed in the contract for the delivery, or the date of the breach of the contract. The price at which the vendee had resold is not admissible unless the vendor had notice thereof. Coffin *v.* State, 144 Ind. 578 (1896). An agreement to sell a certain amount of stock in a corporation to be organized with a specified capital is not fulfilled by tendering stock of a corporation with a less capital. Faulkner *v.* Robinson, 70 S. W. Rep. 990 (Tex. 1902). Liquidated damages, specified in a contract in case of failure of a party not transferring property in consideration of stock to be issued by a corporation, cannot be proved against his bankrupt estate, the stock never having been issued and the property never transferred, and no

upon the vendee refusing to fulfill, may sell the same to the highest bidder at a time and place mentioned in a notice to the vendee, and may hold the latter liable for the difference between the price agreed upon and the price realized at such sale. At such sale the vendor may purchase, wide publicity of the notice having been given and full opportunity for competition at the sale having been offered.[1] The statute of limitations may be a bar to the action.[2]

The vendee's remedy for a failure on the part of the vendor to deliver is an action for damages[3] or a bill in equity to obtain spe-

actual damage having been suffered. Northwest, etc. Co., *v.* Kilbourne, etc. Co., 128 Fed. Rep. 256 (1904). Where the vendor does not tender the stock, he cannot recover the contract price, but only the difference between that price and the market value. Andrews *v.* Watson, Ohio Circuits (1887), p. 686. This same case arose three years later in Ohio Circuit Courts (1901), p. 692, and it was then held that, there being a conflict of testimony as to whether a tender was made, that was a question for the jury, and that the measure of damages was the difference between the contract price and the market price, the purchaser having repudiated the contract and thereby waived tender. A contract whereby the vendee of bank stock agrees not to sell it until he has first offered it to the vendor at the book value of the stock, sustains a suit for damages if the vendee sells without first making such offer. The damage is nominal unless special damage is proved, and damage cannot be recovered for loss of control of the corporation by reason of such breach. Cothran *v.* Witham, 123 Ga. 190 (1905). A person who makes a contract with a syndicate by which the latter agrees to sell his stock and securities within one year at a price not less than the price specified by contract, and agrees that he shall receive a stipulated price at the end of the year, may sue for the difference between the value of the securities at the end of the year and the price at which they were to be sold. Gause *v.* Commonwealth Trust Co., 111 N. Y. App. Div. 530 (1906).

1 Clews *v.* Jamieson, 182 U. S. 461, 497 (1901).

2 The statute of limitations runs against a receipt reciting a first payment of stock "standing in my name but owned by him, and he remaining responsible for the balance of the instalments when called in," there being no agreement as to the future disposition of the stock and of dividends. Cone *v.* Dunham, 59 Conn. 145 (1890). A sale of a certificate to the effect that when stock is issued a specified amount will be issued to the holder is a valid sale and is not defeated by the statute of limitations. Meehan *v.* Sharp, 151 Mass. 564 (1890). Where certain owners of stock place it in the hands of a trustee for sale and the trustee invites subscriptions thereto, the subscription contract providing for payment of one-third down and the balance when called for, the statute of limitations is no bar to an action for the two-thirds, although six years have elapsed since the first payment was made. Williams *v.* Taylor, 120 N. Y. 244 (1890). See also note 3, p. 972, *infra*.

3 A person entitled by contract to purchase stock of another may collect damages against the latter for failure to comply with the terms of the agreement. Rand *v.* Wiley, 70 Iowa, 110 (1886). For failure to deliver, the measure of damages is the difference in the market value at the

cific performance.[1] In almost all cases, however, his remedy is an action for damages only, inasmuch as specific performance of a sale of personality is rarely granted. In a suit by the vendee for breach of warranty of title, the damage is the purchase price and interest, and not the value of the stock and the dividends.[2] Where the vendee has paid the price of the stock and has been refused delivery he may recover the value of the stock at the time of demand.[3] In a suit against the vendor for failure to deliver stock, the damages may include lost anticipated profits, if such loss was within the contemplation of the parties, as a measure of liability in case of breach,

date of the contract and at the date fixed in the contract for the delivery, or the date of the breach of the contract. The price at which the vendee has resold is not admissible unless the vendor had notice thereof. Coffin *v.* State, 144 Ind. 578 (1896). The measure of damages in a suit brought by the purchaser of stock for failure of the vendor to fulfill is the difference between the contract price and the market value of the stock on the day of delivery. Market quotations are evidence of value of stock only when such quotations are based on actual sales. Where there have been no sales, evidence of a bid for the stock is not admissible, unless it is shown under what circumstances the bid was made, and whether it was in good faith and with intent to fulfill. Wildes *v.* Robinson, 50 N. Y. App. Div. 192 (1900). In a suit by a purchaser of stock for failure of the seller to deliver, the damage is the difference between the purchase price and the actual value of the stock. Written reports of the corporation to public officials not purporting to give the value of the property are insufficient to prove value. Patterson *v.* Plummer, 10 N. Dak. 95 (1901). Where a person is paid for stock and fails to deliver, the measure of damages for a breach of the contract is what it would cost the party to purchase the stock which he is entitled to. If he cannot purchase it, then the par value of the stock is the measure of value, inasmuch as he would have had to pay that to the corporation in order to have had the stock issued to him. Barnes *v.* Seligman, 55 Hun, 339 (1890); aff'd, 130 N. Y. 372. Where a vendor of stock in a corporation which has a franchise, but nothing else, is entitled to two thousand shares of full-paid stock at a later date, according to the contract of sale, his measure of damages for failure of the vendee to deliver the two thousand shares is nominal damages, where there was no market or actual value for the stock. Barnes *v.* Brown, 130 N. Y. 372 (1892). Where the vendor of stock is unable to obtain the stock for delivery by reason of an injunction against the corporation, the vendee may sue for the return of the purchase-money. Rose *v.* Foord, 96 Cal. 152 (1892). That damages are a sufficient remedy, see 1 University Law Rev. 218 (1894).

1 See § 337, *infra*.

2 Morgan *v.* Hendrie Bros., etc., 34 Colo. 25 (1905).

3 Belden *v.* Krom, 34 Wash. 184 (1904). Where the vendee pays for bonds, but the vendor does not deliver, the measure of damages is not necessarily the market value of the bonds, but they may be shown to be worth more or less than the market value. If there is no market value the real value can be proved by other facts. Henry *v.* North American, etc. Co., 158 Fed. Rep. 79 (1907).

and if the breach was the approximate cause of the loss and if the loss is made out with reasonable certainty.[1]

§ 337. *Specific performance as a remedy for breach of a contract to sell stock.*—It frequently happens that the person who has contracted to purchase stock is particularly anxious to procure that stock, and that, under the circumstances of the case, the stock is worth to him a value not to be compensated for by mere money damages. This cannot happen in the case of a contract to sell securities issued by the government, since they may be easily purchased in the market. Accordingly it is well established, both in England and America, that a contract for the sale of government securities will not be specifically enforced by a court of equity, but the vendee may sue the vendor in an action at law for damages for breach of contract.[2]

§ 338. An entirely different rule prevails as regards contracts for the sale of stock of private corporations. If the stock contracted to be sold is easily obtained in the market, and there are no particular reasons why the vendee should have the particular stock contracted for, he is left to his action for damages.[3] But where the value of the stock is not easily ascertainable, or the stock is not to be obtained readily elsewhere, or there is some particular and reasonable cause for the vendee's requiring the stock contracted to be delivered, a court of equity will decree a specific performance and compel the vendor to deliver the stock.[4]

This rule, as applicable to contracts for the sale of railway stock, was clearly established in England in 1841, in the case of Duncuft *v.* Albrecht.[5] Contracts for the sale of stock not only in railroad, but

1 Crocker-Wheeler Co. *v.* Bullock, 134 Fed. Rep. 241 (1904), a case involving a plan to consolidate two competing corporations.

2 Ross *v.* Union Pac. Ry., Woolw. 26, 32 (1863); s. c., 20 Fed. Cas. 1245, 1247; Cud or Cuddee *v.* Rutter, 1 P. Wms. 570 (1719); s. c., 5 Vin. Abr. 538 (1720); Dorison *v.* Westbrook, 5 Vin. Abr. 540 (1722); Cappur *v.* Harris, Bunb. 135 (1723); Buxton *v.* Lister, 3 Atk. 383 (1746). *Cf.* Doloret *v.* Rothschild, 1 Sim. & S. 590 (1824); Colt *v.* Nettervill, 2 P. Wms. 304 (1725). See also South, etc. Co. *v.* Wallington, [1898] A. C. 309.

3 "It is within the power of a court of equity to decree specific performance of a contract for the sale and purchase of shares, yet when shares are dealt in largely on the market, and any one can go and buy them, as appears to be the fact in this case, there is no reason why they should not be in the same position as government stock is in the case of a contract for the sale and purchase of such stock." *Re* Schwabacher, 98 L. T. Rep. 127 (1907).

4 Quoted and approved in Ryan *v.* McLane, 91 Md. 175 (1900); Schmidt *v.* Pritchard, 112 N. W. Rep. 801 (Iowa 1907), and Hills *v.* McMunn, 83 N. E. Rep. 963 (Ill. 1908).

5 12 Sim. 189 (1841); Parish *v.* Parish, 32 Beav. 207 (1863), granting also an accounting of dividends; Poole *v.* Middleton, 29 Beav. 646 (1861);

also in mining and other private corporations will be specifically enforced under some circumstances.[1]

Turner *v.* Moy, 32 L. T. Rep. 56 (1875); Beckitt *v.* Bilbrough, 8 Hare, 188 (1850), dictum. *Contra*, dictum in Ross *v.* Union Pacific Ry., Woolw. 26, 32 (1863); s. c., 20 Fed. Cas. 1215, 1247, per Miller, J. In Cheale *v.* Kenward, 3 De G. & J. 27 (1858), the court said: "There is no doubt that a bill will lie for a specific performance of an agreement to transfer railway shares. This was set at rest by Duncuft *v.* Albrecht, 12 Sim. 189 (1841)."

1 Treasurer *v.* Commercial Coal Min. Co., 23 Cal. 390 (1863). A sale with a right to repurchase may amount to a pledge and the party may maintain a bill in equity to recover back the stock in payment, it appearing that it has no ascertainable market value and has a peculiar value to plaintiff, greater than the market value at the time of transfer. Eichbaum *v.* Sample, 213 Pa. St. 216 (1906). Where it is decided that a litigant who claims stock does not own it, he cannot afterwards in another case claim that the stock belonged to the corporation. Leigh *v.* National, etc. Co., 224 Ill. 76 (1906). Specific performance will be granted to compel a corporation to issue common stock in payment for property in accordance with a contract of the corporation, where the stock has no market value, and it appears that there have never been any sales of such stock. Selover *v.* Isle, etc. Co., 91 Minn. 451 (1904). Specific performance lies where stock in dispute carries the control of the corporation and such control is important and the stock has no certain market value, but great intrinsic value if properly controlled. Sherwood *v.* Wallin, 1 Cal. App. 532 (1905). A person having an option on bonds, which the vendor is to use in foreclosing and buying in and reorganizing the property, cannot maintain a suit against the vendor for stock issued by the reorganized company to represent such bonds, where the agreement is not sufficiently explicit for specific performance. Patterson *v.* Farmington, etc. Ry., 76 Conn. 628 (1904). Where the pledgor agrees to sell the stock to the pledgee, but the corporation claims a lien and refuses to transfer it, and for three years the pledgee does nothing and the stock quadruples in value, specific performance will not be granted at the instance of the pledgee. Schimpff *v.* Dime, etc. Bank, 208 Pa. St. 380 (1904). Where the vendee files a bill for fraud and yet asks that the vendor be required to deliver the stock, he thereby affirms the transaction. Chicago, etc. Bank *v.* Ball, 208 Ill. 256 (1904). The vendor in a contract for the sale of the stock and property of a railroad and a coal mining company may have specific performance where the railroad has been delivered and the vendee refuses to take the coal properties. McCullough *v.* Southerland, 153 Fed. Rep. 418 (1907). A construction company may maintain a bill in equity against a street railway company to compel the latter to deliver to the former four-fifths of the latter's capital stock and certain mortgage bonds in accordance with a contract between them for the construction of the road, inasmuch as such stock cannot be procured on the market and has no general market value, and whatever value it has was given to it chiefly by the construction work. Even though it turns out that prior to the commencement of the suit the railroad company had sold the stock and since the commencement of the suit had sold the bonds, yet the court may render a decree for the value of the stock and bonds. Altoona, etc. Co. *v.* Kittanning, etc. Ry., 126 Fed. Rep. 559 (1903). A vendee of stock who has filed a bill in equity for spe-

The New York court of appeals has recently held that a vendee of stock may be granted specific performance of the contract on

cific performance will not be granted an injunction against the stock being voted by the vendor in the meantime, where the former does not allege that the vendor is insolvent or is about to dispose of the stock. Lucas *v.* Milliken, 139 Fed. Rep. 816 (1905). A person who has been induced by fraudulent misrepresentations to exchange stock for other stock may have rescission without proving damage, the suit being very similiar to one for specific performance, and it being alleged that the actual value of the stock cannot be shown. Jahn *v.* Reynolds, 115 N. Y. App. Div. 647 (1906). Where a pledgee brings suit to obtain possession of the pledge, which had been wrongfully diverted, and during the suit the pledge becomes worthless, a supplemental complaint may be served alleging that fact and demanding the value of the pledge at the time demand was made therefor. Central T. Co. *v.* West India, etc. Co., 109 N. Y. App. Div. 517 (1905). A purchaser of stock cannot have specific performance where the only advantage of getting the stock is a financial advantage, even though there have been no sales of the stock, and it is not listed and it will be difficult to ascertain its value. The remedy at law is sufficient. Clements *v.* Sherwood-Dunn, 108 N. Y. App. Div. 327 (1905); aff'd, 187 N. Y. 521. A vendee cannot compel specific performance simply on the ground that there had been no sales of the stock and that it would be difficult to ascertain its value. The value may be ascertained by the corporate contracts and business and dividends, etc. Butler *v.* Wright, 103 N. Y. App. Div., 463 (1905); rev'd on another ground in 186 N. Y. 259. Specific performance to compel the delivery of stock in accordance with a contract, by which it was to be issued in payment for services, will not be granted, unless it is alleged and proven that it has a peculiar value or that the plaintiff could not recover at law the damages for the breach. Kennedy *v.* Thompson, 97 N. Y. App. Div. 296 (1904). Where a stockholder delivers his stock to the president to be used to induce a person to loan money to the corporation, and the president instead of so using it converts it to his own use, the stockholder may maintain a suit in equity to recover back the stock, and the statute of limitations does not begin to run until he has discovered or should have discovered the facts. Slayback *v.* Raymond, 93 N. Y. App. Div. 326 (1904). A bill in equity does not lie to compel an underwriting syndicate to assign to plaintiff an interest therein, which they had contracted to sell to him, even though he alleges that the value is uncertain and that specific performance is the only full and adequate relief. Gilbert *v.* Bunnell, 92 N. Y. App. Div. 284 (1904). A suit in equity does not lie to recover the value of bonds which a depository refuses to give up, even though the bonds are not dealt with on the market and are obligations of a corporation, which has been foreclosed. The remedy is trover or replevin. Sawyer *v.* Atchison, 129 Fed. Rep. 100 (1904). A contractor who constructs a road for stock to be delivered may maintain a bill in equity for the delivery of the stock after the road is completed, where he shows that he cannot prove the pecuniary value of the stock, and hence that damages at law would not be sufficient. Baumhoff *v.* St. Louis & K. R. Co., 104 S. W. Rep. 5 (Mo. 1907). Specific performance of a contract to sell stock may be had where its value is not easily ascertainable. Manton *v.* Ray, 18 R. I. 672 (1894). See also Frue *v.* Houghton, 6 Colo. 318 (1882), and

showing that the stock had never been listed on any exchange and had no quoted value or any definite market price or any certain value

§ 61, *supra*. Where the control of a railroad is deposited with a third party to be delivered to the vendee upon certain things happening, and such things do happen, he may have specific performance, the stock having no ascertainable value. Rumsey *v.* New York, etc. R. R., 203 Pa. St. 579 (1902). In Leach *v.* Fobes, 77 Mass. 506 (1858), specific performance of a contract to convey land and stock was granted chiefly because of the land part of the contract. Todd *v.* Taft, 89 Mass. 371 (1863), decreed specific performance of contract to convey railway shares. See also Baldwin *v.* Commonwealth, 11 Bush (Ky.), 417 (1875); Ashe *v.* Johnson, 2 Jones, Eq. (N. C.) 149 (1855). As to when specific performance of a contract to sell stock will be specifically enforced, see also 1 White & T. Lead Cas. 914–923, etc. As to possibility of mandatory injunction, see authorities in High on Injunctions. Specific performance of a contract relative to stock is not an absolute right and will not be granted if it would result in injustice to either party. Shinkle *v.* Vickery, 156 Mo. 1 (1900). Specific performance will be granted where the stock has no market value and cannot be purchased in the market; but where the contract is an unconscionable one and by mistake omits an important provision, specific performance will not be granted. Newton *v.* Wooley, 105 Fed. Rep. 541 (1900). An agreement of several parties to sell their property to a corporation in exchange for stock of the latter, the amount of stock going to each to be determined by arbitrators, will not be specifically enforced where the arbitrators have fixed the value in an illegal way. Any party may withdraw from such a contract prior to the time when it has been signed by all. Consolidated, etc. Co. *v.* Nash, 109 Wis. 490 (1901). Where a purchaser of stock knew or had reason to know that the stock was not owned by the vendor personally, but by a firm in which he was interested, the purchaser cannot have specific performance, but will be remitted to a court of law. Jones *v.* Tunis, 99 Va. 220 (1901). Specific performance may not be granted where the defendant has not got the stock to deliver. Booth *v.* Dingley, 111 N. W. Rep. 851 (Mich. 1907). Specific performance will not be granted at the instance of the purchaser of stock where the purchase is from the committee of a pool of such stock, where it is shown that the pooling agreement required a vote of three-fourths of the stock in the pool before a sale could be made, and it is also shown that the contract of purchase was partly an option in that the purchaser was to forfeit a deposit he had already made, in case he did not fulfill, and it being further shown that in another suit the complainant had stated the value of the stock, and it being further shown that the purpose of the contract was to obtain control of a large system of railroads, including the board of directors. Ryan *v.* McLane, 91 Md. 175 (1900). Even though stock has no market value and no dividends have been paid, yet in an action for specific performance it must be alleged that the stock had no value that could be estimated in an action for damages. Moulton *v.* Warren, etc. Co., 81 Minn. 259 (1900). A corporation cannot have specific performance of an agreement of a person to purchase its debentures. The remedy is an action for damages. South, etc. Co. *v.* Wallington, [1898] A. C. 309, aff'g [1897] 1 Q. B. 692. Where an insolvent corporation which has never issued any certificates of stock resolves by a vote of its stockholders to apply its assets

capable of exact ascertainment, and that the defendant owned ninety-two per cent. of the stock and controlled the balance. The court

to the extent of their value to the payment of the debts, and that new stock be issued to the stockholders upon their paying therefor in full, and one stockholder sells his interest in the original stock, and the purchaser for seven years does not complain, he cannot, after the corporation has become prosperous, claim that he is entitled to the old stock or any interest in the corporation. Stoddard *v.* Decatur, etc Co., 184 Ill. 53 (1900). A subscriber for stock who has given his note in payment may file a bill in equity to compel the corporation to recognize him as a stockholder, where the corporation denies that he is a stockholder and has issued all its stock to other parties who took with notice. It is unnecessary to bring into the suit the other parties who actually have the stock, the stock having been held by the company as collateral security. Morey *v.* Fish, etc. Co., 108 Wis. 520 (1901). See also § 58, *supra*. A contract between the owner of property and a promoter, by which the former agrees to sell his property to a corporation to be formed by the latter, with a specified capital stock, cannot, a year after the transaction has been carried out, be made the basis of a suit in equity to compel the promoter to cancel excessive stock which was issued to the promoter, there being no allegation that the promoter still had the stock. The remedy of the vendor is at law. Even though several vendors to the corporation had a similar claim, yet one of them cannot file such a bill in equity in behalf of himself and others. Brehm *v.* Sperry, 92 Md. 378 (1901). As applicable to manufacturing corporations, see Chater *v.* San Francisco, etc. Co., 19 Cal. 219 (1861). Granted in a towboat association case in White *v.* Schuyler, 1 Abb. Pr. (N. S.) 300 (1865). Refused in the case of stock in a land association. Jones *v.* Newhall, 115 Mass. 244 (1874). And in a paper company. Noyes *v.* Marsh, 123 Mass. 286 (1877). See Cushman *v.* Thayer Mfg. Co., 76 N. Y. 365 (1879), the court saying: "While the general rule is for courts of equity not to entertain jurisdiction for a specific performance on the sale of stock, this rule is limited to cases where a compensation in damages would furnish a complete and satisfactory remedy." This case, however, was not a case of specific performance of a sale of stock, but of compelling the corporation to register a transfer. See also, in general, Austin *v.* Gillaspie, 1 Jones, Eq. (N. C.) 261 (1854); Nutbrown *v.* Thornton, 10 Ves. Jr. 160 (1804); Shaw *v.* Fisher, 5 De G., M. & G. 596 (1855); Wynne *v.* Price, 3 G. & Sm. 310 (1849); Wilson *v.* Keating, 7 W. R. 484 (1859); aff'd, 4 De G. & J. 588; Oriental, etc. Steam Co. *v.* Briggs, 2 Johns. & H. 625 (1861); Paine *v.* Hutchinson, L. R. 3 Eq. 257 (1866); aff'd, L. R. 3 Ch. App. 388; Shepherd *v.* Gillespie, L. R. 5 Eq. 293 (1867); Bermingham *v.* Sheridan, 33 Beav. 660 (1864); Strasburg R. R. *v.* Echternacht, 21 Pa. St. 220 (1853); Fallon *v.* Railroad Co., 1 Dill. 121 (1871); s. c., 8 Fed. Cas. 977. In regard to a specific performance of a trust of stock, see Ferguson *v.* Paschall, 11 Mo. 267 (1848); Cowles *v.* Whitman, 10 Conn. 121 (1834); Clark *v.* Flint, 39 Mass. 231 (1839); Mechanics' Bank *v.* Seton, I Pet. 299 (1828); Gage *v.* Fisher, 5 N. Dak. 297 (1895). Specific performance of a contract to sell stock will be decreed where the stock has no recognized market value and cannot be bought in the market. Goodwin, etc. Co.'s Appeal, 117 Pa. St. 514 (1888). Specific performance was refused in Eckstein *v.* Downing, 64 N. H. 248 (1886), there being no evidence that the vendee had any wish

further held that the decision of such a case rests in the sound dis-

or reason for wishing to own that particular stock or stock in that particular corporation. See also Cruse *v.* Paine, L. R. 6 Eq. 641 (1868). Where a stockholder, who is also a director, contracts to give a person a certain amount of stock if he will do certain work for the corporation, and the board of directors, including this director, discharge such person without cause, and thus prevent completion, a court of equity will compel a delivery of the stock. Price *v.* Minot, 107 Mass. 49 (1871). In suits in equity to compel a transfer of stock, parties interested by a purchase from the defendant should be brought in. O'Connor *v.* Irvine, 74 Cal. 435 (1887). Specific performance of a contract to sell stock will be decreed where the property of the corporation is real estate—a distillery—and the real transaction is a sale of the entire property. Megibben *v.* Perin, 49 Fed. Rep. 183 (1892); rev'd on another point in Perin *v.* Megibben, 53 Fed. Rep. 86 (1892). Specific performance will not be decreed where there is doubt both as to the contract actually being made and as to the consideration, one party being dead. Hibbert *v.* Mackinnon, 79 Wis. 673 (1891). Where a debtor agreed to transfer stock as collateral security for a debt, and died insolvent before doing so, the court refused to enforce specific performance of the agreement to the injury of other creditors. City F. Ins. Co. *v.* Olmstead, 33 Conn. 476 (1866). The vendee may file a bill in equity for a specific performance. Willis *v.* Jefferis, 51 Atl. Rep. 1110 (N. J. 1902). Specific performance of a contract to deliver stock for services was granted in Le Vie *v.* Fenlon, 39 N. Y. Misc. Rep. 265 (1902). In general, see also Stevens *v.* Wilson, 18 N. J. Eq. 447 (1867). An alleged vendee's suit for a dividend is *res judicata* as to a suit for the stock. Shepard *v.* Stockham, 45 Kan. 244 (1891).

Where a person claims that he has a contract for the purchase of stock which the stockholder vendor is about to sell or has already sold to others, and the first-named person brings a suit in equity to obtain the stock, he must show, first, that it is a case for specific performance; and second, that the stock was impressed with a trust, and that the last purchaser took with notice of that trust. See 1 White & T. Lead. Cas. 914, 919, and Pooley *v.* Budd, 14 Beav. 34, 43, 44 (1851).

Lindley on Company Law (5th ed.), pp. 499, 500, states the rule as follows: "A contract for the sale of shares by one individual to another is distinguishable in many respects from a contract for the allotment and acceptance of shares in a company, and Lord Romilly refused to decree specific performance of a contract of this kind, on the ground that the decree would be ineffectual, as the shares might be transferred immediately after the contract was performed. Sheffield Gas, etc. Co. *v.* Harrison, 17 Beav. 294 (1853); Bluck *v.* Mallalue, 27 Beav. 398 (1859); Columbine *v.* Chichester, 2 Ph. Ch. 27 (1846). . . . In this last case there were circumstances to show that specific performance was impossible." Page 586: "In order that specific performance of an agreement to take or deliver shares in a company may be decreed, it is necessary that the agreement should be concluded and binding (which it was not in Oriental, etc. Co. *v.* Briggs, 4 De G., F. & J. 191—1861), and be untainted by fraud (which was not the case in New Brunswick, etc. Co. *v.* Muggeridge, 4 Drew. 686—1859, and 1 Drew. & Sm. 363; or in Maxwell *v.* Port Tennant, etc. Co., 24 Beav. 495—1858), or unfairness (as to agreements between co-directors, see Flanagan *v.* Great Western Ry., L. R. 7 Eq. 116—1868), and be capable of being performed by the defendant (Ferguson *v.* Wilson,

cretion of the court.[1] The stockholders in a private trading corporation may agree that, upon the death of any one or more of them the remainder shall have the right to purchase the stock of the decedent at its value. This is not invalid as against public policy or as an improper restraint of the power of alienation. The court may grant specific performance of such contract.[2] The various stockholders of a company may give interchangeably a first option of thirty days to purchase their shares of stock whenever any one desires to sell, each contracting for himself, the contract further providing that such thirty days are to commence in case of the death of a stockholder, so far as his stock was concerned, and they may further contract that another person is to have a similar option in case the

L. R. 2 Ch. App. 77—1866; Columbine *v.* Chichester, 2 Ph. Ch. 27—1846), and not involve any breach of trust (Fry, Sp. Perf., p. 177, 2d ed.; and see Flanagan *v.* Great Western Ry., L. R. 7 Eq. 116—1868), or performance by either party of obligations the performance of which a court cannot practically enforce (Flanagan *v.* Great Western Ry., 7 Eq. 116—1868; Stocker *v.* Wedderburn, 3 K. & J. 393—1857)." Page 587: "An action will lie for specific performance of a contract for the purchase and sale of shares, if it is capable of being performed (see as to this, Bermingham *v.* Sheridan, 33 Beav. 660—1864, and compare Poole *v.* Middleton, 29 Beav. 646—1861); . . . and the purchaser will be compelled to pay the price, although it may have been expressed to be paid in the deed of transfer, if, in fact, it was not thus paid (Wilson *v.* Keating, 27 Beav. 121, and 4 De G. & J. 588, aff'g 7 W. R. 484—1859). The case seems, at first sight, to have been a hard one upon the defendant; but the deed stated that *he* had paid the money, and this he knew was not the fact. He could not, therefore, be treated as having been misled by the plaintiff or by the contents of the deed; and will be compelled to accept a transfer of the shares he has bought and to indemnify the seller from all liabilities accruing subsequently to the sale (Wynne *v.* Price, 3 De G. & S. 310—1849). As to the right of a mortgagee of shares to an idemnity from his mortgagor, see Phené *v.* Gillan, 5 Hare, 1 (1845); and the seller will be compelled to account for any moneys he may have received from an improper subsequent sale to another person (Beckitt *v.* Bilbrough, 8 Hare, 188—1850). The court has, however, refused to compel a purchaser of scrip to accept shares, and indemnify the seller from calls upon them (Jackson *v.* Cocker, 4 Beav. 59—1841. Compare this with the last case); and to compel an allottee of shares to accept them, and to execute the company's deed in respect of them (Sheffield, etc. Gas Co. *v.* Harrison, 17 Beav. 294—1853); and to compel the promoters of a company to deliver shares to a subscriber to the company (Columbine *v.* Chichester, 2 Ph. Ch. 27—1846. In this case, however, the promoters did not appear to have any shares which they could allot). Neither will the court interfere to compel the completion of a gratuitous and intended transfer (see Milroy *v.* Lord, 4 De G., F. & J. 264—1862)."

1 Butler *v.* Wright, 186 N. Y. 259 (1906). See 161 Fed. Rep. 438.

2 Fitzsimmons *v.* Lindsay, 205 Pa. St. 79 (1903).

first option is not exercised. A party entitled to such option may have specific performance of it.[1]

In Pennsylvania it is held that specific performance will be granted at the instance of the vendee in a contract for the sale of five-sixths of the capital stock of the company and a portion of its bonds, inasmuch as such stock and bonds cannot be secured elsewhere and a money judgment would not afford a substitute for the sale; and it is further held that, even though the vendor has sold the stock to other parties, yet, if the latter took with notice of the prior contract, they may be joined as parties defendant and compelled to deliver up the stock.[2]

1 The mutual covenants of the contract are a sufficient consideration to support it. Scruggs *v.* Cotterill, 67 N. Y. App. Div. 583 (1902). In the case of Jones *v.* Brown, 171 Mass. 318 (1898), in a close corporation, the stockholders made a contract, the essential parts of which are set forth in the opinion of the court, providing for the purchase of the stock of a certain stockholder in case of his death, and for the purchase of the stock of any other stockholder who ceased to be connected with the corporation. The former stockholder having died, the court granted specific performance of the contract and compelled his estate to deliver the stock upon payment of the specified price. A court will enjoin a party from voting upon or disposing of his stock in a corporation *pendente lite* where the plaintiffs show that they transferred the stock to the defendant on the latter's agreement not to sell the same, except with the consent of the former, and that when he did sell the stock three-fourths of the proceeds should belong to the former, and it appearing further that the defendant had given the stock to his sister without consideration. Weston *v.* Goldstein, 39 N. Y. App. Div. 661 (1899). Where one person advances money to another to purchase a certain stock on an agreement that they will cooperate, and in case the latter wishes to sell he will not sell to unfriendly parties without giving the former the first chance to purchase, and the stock is in the possession of the former as security for the loan, a sale by the latter to an unfriendly party with notice of the facts is not sufficient to sustain a bill in equity to compel the first-named party to transfer the stock to such purchaser. The court said: "One or more stockholders in a corporation may agree to stand together in carrying out an honest business policy consistent with what they believe to be to the best interests of all the stockholders. This was not a pooling agreement, to vest the government of the corporation for a time in certain members of it, or to yield the control to a few who might dominate, regardless of the interests of the many. It was intended to maintain a status of independence for the railway company that it might be operated under the purposes of its charter." Rigg *v.* Reading, etc. Ry., 191 Pa. St. 298 (1899). See also § 622, *infra*.

2 Northern, etc. R. R. *v.* Walworth, 193 Pa. St. 207 (1899). The court held also that the fact that the contract recited that the seller merely claimed to be the owner of the stock did not render the contract so uncertain as to prevent specific performance, and that the fact that the contract provided that the buyer purchased only on condition that his examination of the books should be sat-

Specific performance is often granted as between several parties each of whom is entitled to a certain part of stock which is received by or held in the name of one of them. A court will compel him to distribute the stock in accordance with the contract.[1] Such cases arise often in "pools" of stock, and in selling property to the company in consideration of stock, and in buying stock in the names of other persons or agents. Thus, where parties to a construction contract agreed to divide the stock in a certain way, a court of equity will grant specific performance and order transfers of the stock, it having no market value and the remedy at law being inadequate.[2] A promoter cannot maintain a suit in equity to have specific performance of an agreement to deliver to him certain stock, the complaint asking for the par value of the stock if specific performance is not granted, unless it is alleged that the stock had a peculiar value or that it was difficult or impossible to ascertain the value of the stock or other facts are alleged showing that there is no adequate remedy at law.[3] A promoter who is to have five per

isfactory and should corroborate the correctness of a statement as to liabilities, did not prevent specific performance, and that the fact that the seller agreed that all debts of the company should be paid on the day of the transfer did not prevent specific performance.

1 Where it is agreed between two brothers that one shall buy stock in a corporation in joint account, and this is done, and the one purchasing charges his brother with the cost of the portion of the stock, and this account is accepted, a suit in equity lies to obtain the stock upon payment therefor, the corporation being a close corporation. Rand *v.* Whipple, 71 N. Y. App. Div. 62 (1902). Where, by contract between two stockholders owning an equal share in the corporation, future stock acquired by either of them is to belong one-half to each, such contract may be specifically enforced. Stewart *v.* Pierce, 116 Iowa, 733 (1902). See also § 320, *supra*.

2 Krohn *v.* Williamson, 62 Fed. Rep. 869 (1894); aff'd, 66 Fed. Rep. 655. See also §§ 333, 334, *supra*, and § 705, *infra*, and Jones *v.* Brown, 171 Mass. 318 (1898). See 69 Atl. Rep. 899.

3 Bateman *v.* Straus, 86 N. Y. App. Div. 540 (1903). A promoter who is entitled to a portion of the stock may have specific performance and an injunction where the defendant is not responsible and there have not been enough sales of stock to fix its value sufficient to constitute a market value. Rau *v.* Seidenberg, 53 N. Y. Misc. Rep. 386 (1907). Where a person who obtains options and purchases stock for another is to have an interest in the profits on the sale of the same, it is immaterial whether it is a technical partnership or a mere joint venture, inasmuch as the same legal rules apply, in a suit by the former for an accounting by the latter. Spier *v.* Hyde, 92 N. Y. App. Div. 467 (1904). A suit between promoters relative to the division of stock received for promoting, was sustained in Boice *v.* McCormick, 106 N. Y. App. Div. 539 (1905). A promoter cannot maintain a suit in equity to collect from an inventor one-half of what the latter received in stock and cash, even though the contract between the two gave the former such one-half. His remedy is at law. Everett *v.* De Fontaine, 78 N. Y. App. Div. 219 (1903). *Cf.* § 705, *infra*.

cent. of the stock may have specific performance where there is no stock on the market and its value cannot be ascertained.[1]

Specific performance may also be said to be granted where a corporation is ordered by a court to issue certificates of stock to its stockholders.[2] Principles of law somewhat similar to the above are involved in suits brought by a purchaser of stock to compel the corporation to transfer the stock on the corporate books,[3] and in suits instituted by claimants of stock against other parties claiming the same stock;[4] or by the corporation to recover back stock improperly issued.[5]

Specific performance will not be granted where the purpose of the purchaser of stock is to obtain control of a national bank, when the change in management would probably be to the detriment of the bank.[6] Where the vendor's contract is to deliver stock and construct a railway, the court will not decree specific performance, since part of the contract is never the subject of such compulsory performance.[7] Specific performance of a contract to deliver bonds will not be granted where the party seeking performance is not himself able to fully perform.[8] A vendor cannot have specific performance where he had told the vendee that a certain person of responsibility had offered a higher price for the stock, when in fact such person, after making the offer, had investigated and then had

1 Dennison *v.* Keasbey, 200 Mo. 408 (1906). A promoter may have specific performance of a contract by which he interested capital in a company formed to take over and work a patent, for which he was to receive one-half the stock. Butler *v.* Murphy, 106 Mo. App. 287 (1904). An oral agreement between parties, to locate and develop mining claims, was sustained in a suit by one against the other for stock received for a mining claim, which the latter transferred, and the statute of frauds was held to be no bar. Mack *v.* Mack, 39 Wash. 190 (1905).

2 See § 61, *supra*, and § 766c, *infra*, relative to contractors.

3 See § [illegible], *infra*.

4 See § [illegible], *infra*.

5 See § 387, *infra*.

6 Foll's Appeal, 91 Pa. St. 434 (1879), the court saying: "I know of no instance in this state in which a court of equity has decreed specific performance of a sale of stock."

7 Ross *v.* Union Pac. Ry., Woolw. 26 (1863), per Miller, J.; s. c., 20 Fed. Cas. 1215. The court will not decree specific performance of a contract of a company to deliver its stock to a constructor of its road, even though the latter, the complainant, is willing to perform. The court cannot compel the latter to perform and hence will not tie up the stock of the former. Peto *v.* Brighton, etc. Ry., 1 Hem. & M. 468 (1863). See also Deitz *v.* Stephenson, 95 Pac. Rep. 803 (Oreg. 1908).

8 Stokes *v.* Stokes, 148 N. Y. 708 (1896). The holder of a written option on stock cannot have specific performance decreed, where it is shown by oral evidence that it was not to be exercised, unless another option on real estate was exercised at the same time. Reynolds *v.* Hooker, 76 Vt. 184 (1904).

withdrawn the offer.[1] If the vendor is not in possession of the desired stock, specific performance will not be granted,[2] except to the amount of stock which he has.[3] But where a person, who is under contract to deliver certain stock, gives the stock to a relative for nothing, the party entitled to the stock by contract may compel such relative to give up the stock.[4] Although a court of equity refuses to grant specific performance, yet it will not always send the party to a court of law, but in some of the states will grant him damages.[5] Where a vendee of stock seeks specific performance he must tender the price, and cannot first demand that the stock be deposited in a bank.[6] In a suit for specific performance of a sale of stock, the complaining vendee may have a preliminary injunction against the vendor's selling to others.[7] Where a vendee of stock brings action for a specific performance, and obtains judgment, the judgment should be in the alternative, either for the stock or for damages specified in the decree.[8] In a suit by a claimant of stock to obtain

1 Moline Plow Co. *v.* Carson, 72 Fed. Rep. 387 (1895).

2 Columbine *v.* Chichester, 2 Ph. Ch. 27 (1846). Specific performance as to issuing stock is not decreed when performance is impossible. Summerlin *v.* Fronteriza, etc. Co., 41 Fed. Rep. 249 (1890). An injunction against a transfer in the meantime may be granted. Ruttman *v.* Hoyt, N. Y. L. J., July 19, 1890.

3 Turner *v.* Moy, 32 L. T. Rep. 56 (1875). In the case of Lamb, etc. Co. *v.* Lamb, 119 Mich. 568 (1899) where a party claiming to be the rea. owner of stock filed a bill to compel the holder of such stock to deliver up the same, but it appeared that the defendant had already disposed of the stock before the commencement of the suit, the court refused to grant relief, even though it further appeared that the defendant had other stock in the same corporation equal in amount to the stock in issue.

4 Graham *v.* O'Connor, 73 L. T. Rep. 712 (1896).

5 Wonson *v.* Fenno, 129 Mass. 405 (1880). *Cf.* Austin *v.* Gillaspie, 1 Jones Eq. (N. C.) 261 (1854). A suit to obtain stock which the defendant had contracted to obtain and deliver does not fail, even though it appears that the defendant has not obtained it, inasmuch as the complaint would sustain a judgment for damages for breach of contract. Grant *v.* Walsh, 36 Wash. 190 (1904). Even though the vendor of stock in an agreement providing for general releases and the giving of certain new notes cannot obtain a specific performance, the court being unable to grant complete specific performance, yet the court may retain the suit and assess damages for that part of the contract which cannot be specifically enforced. Lyle *v.* Addicks, 62 N. J. Eq. 123 (1901).

6 Wescott *v.* Mulvane, 58 Fed. Rep. 305 (1893), holding also that if the vendee, after obtaining an injunction against a sale of the stock by the vendor to others, withdraws his demand for specific performance and asks merely for damages, the injunction will be dissolved.

7 McLure *v.* Sherman, 70 Fed. Rep. 190 (1895). In a suit to recover stock an injunction is more readily granted than in a suit to recover other kinds of personal property. Currie *v.* Jones, 138 N. C. 189 (1905). See also §§ 363, 391, 579, *infra.*

8 Eastman *v.* Reid, 101 Ala. 320 (1893). In a suit to recover certain

the stock from another person, the corporation is a proper but not a necessary party.[1] But in a suit to compel a corporation to transfer to the plaintiff stock standing on its books in the name of a third person, the corporation and the third person are both necessary parties.[2] Laches may constitute a bar to the bill in equity to enforce specific performance.[3] Where a person claims to hold stock in a cor-

stock, even though the plaintiff alleges conversion and asks judgment for the value of the stock, yet if he makes the corporation a party defendant, and also all the parties interested in the stock, and the court decrees a cancellation of the outstanding certificate, and the issue of a new one to plaintiff, the defeated party cannot complain that the judgment should have been for money damages. Crawford *v.* Ft. Dodge, etc. Co., 125 Iowa, 658 (1904). A bill in equity to compel delivery of stock or pay its value, followed by an arbitration giving an award to that effect, is proper. Brock *v.* Lawton, 210 Pa. St. 195 (1904).

1 Quoted and approved in Lucas *v.* Milliken, 139 Fed. Rep. 816 (1905), holding that in a suit by a vendee against a vendor of stock to compel specific performance, the corporation is but a nominal party and is not considered in deciding whether the suit may be removed to the federal court. Williamson *v.* Krohn, 66 Fed. Rep. 655 (1895); Johnson *v.* Kirby, 65 Cal. 482 (1884). In a suit between stockholders as to the title to stock the corporation is a proper party defendant, but is a nominal party, and is not considered in determining whether the suit is removable to the United States court. Higgins *v.* Baltimore, etc. R. R., 99 Fed. Rep. 640 (1900). And see §§ 356, 363, 391, 579, *infra*. The corporation is a proper but not a necessary party to an action by one person to compel another person to transfer stock to him in accordance with the contract. Sayward *v.* Houghton, 82 Cal. 628 (1890). Where a citizen of Wisconsin claims stock in a Wisconsin corporation as against a citizen of Illinois in whose name the stock stands on the corporate books, the corporation is a necessary party defendant and the case cannot be removed to the federal courts. Rogers *v.* Van Nortwick, 45 Fed. Rep. 513 (1891). The corporation is a proper party defendant. Kendig *v.* Dean, 97 U. S. 423 (1878); Budd *v.* Munroe, 18 Hun, 316 (1879); Crump *v.* Thurber, 115 U. S. 56 (1885). The reason of this rule is that complete possession of the stock can be obtained only by obtaining a transfer of that stock on the corporate books to the plaintiff. Where, in a suit for specific performance, the corporation is joined as a party defendant, in order to obtain a transfer on the books, it is a necessary party, and the other defendant cannot remove the case to the federal court if the complainant and the corporation are citizens of the same state. Patterson *v.* Farmington, etc. Ry., 111 Fed. Rep. 262 (1901). A state court may decree that national bank stock standing in the name of one person belongs to another person. The bank is not necessarily a party defendant. *In re* Fisher's Estate, 128 Iowa, 18 (1905).

2 St. Louis, etc. Ry. *v.* Wilson, 114 U. S. 60 (1885). In a suit by the vendee to obtain possession of the stock in the hands of a third person, the price having been paid, the vendor is not a necessary party. Leigh *v.* Laughlin, 222 Ill. 265 (1906). See also § 391, *supra*.

3 An agreement transferring a portion of the stock in a mining corporation cannot be enforced in a court of equity eight years after the complainant had made a demand for the

poration, as against another person, and sues the corporation without joining the second claimant, the latter is not bound by the judgment, even though he is notified of the suit, it appearing that he was not allowed to take part in the trial.[1] A suit by the purchaser of a

stock, the statute of limitations at law being a bar. Moore *v.* Nickey, 133 Fed. Rep. 289 (1904). Where for fifty years a claimant of stock takes no proceedings to obtain it and during that time other persons claim the stock and have possession of it and have received dividends upon it laches is a bar to a suit by the former to recover the stock. Livingston *v.* Proprietors', etc., 15 Fed. Cas. 691 (1879); s. c., 16 Blatch. 549. Where a stockholder delivers his stock to the president to be used to induce a person to loan money to the corporation, and the president instead of so using it converts it to his own use, the stockholder may maintain a suit in equity to recover back the stock, and the statute of limitations does not begin to run until he has discovered or should have discovered the facts. Slayback *v.* Raymond, 93 N. Y. App. Div., 326 (1904). Delay in instituting a suit to compel the delivery of stock which parties had earned in common, is not fatal, short of the statute of limitations. Eno *v.* Sanders, 39 Wash. 238 (1905). Seven years' delay in bringing suit for specific performance is a bar. York *v.* Passaic, etc. Co., 30 Fed. Rep. 471 (1887). Five years' delay held fatal where "the relations of the parties have changed and the stock has greatly appreciated in value." Mundy *v.* Davis, 20 Fed. Rep. 353 (1884). Where a person sells stock to be delivered within a reasonable time, and receives the money for it, but is unable to perform his contract by reason of an injunction, the statute of limitations begins to run from the vendee's demand for the return of the purchase-money. Rose *v.* Foord, 96 Cal. 154 (1892). Three years' delay in bringing action for specific performance, the stock in the meantime having increased tenfold in value, is fatal. Rogers *v.* Van Nortwick, 87 Wis. 414 (1894). Specific performance will not be granted to the vendee of stock where he has delayed for over two years in commencing suit and in the meantime the situation has materially changed and the vendee commenced the suit for the benefit of other parties. Ringler *v.* Jetter, 35 N. Y. Misc. Rep. 750 (1901). Where one of the partners in a firm organized to locate, develop and operate mines does not turn into the firm a mine located by him, but transfers the same to a corporation for stock, and the other partners delay for two years after knowledge thereof before filing a bill claiming an interest in the stock, and in the meantime the corporation has expended money and the stock may have passed into other hands, the court will refuse relief on the ground that the firm evidently intended to deny any obligation if the mine turned out to be worthless, but to claim an interest if it turned out to be valuable. Curtis *v.* Lakin, 94 Fed. Rep. 251 (1899). A court of equity may enforce a written agreement for the delivery of stock. A court of equity has jurisdiction although the party who contracted to deliver the stock has disposed of the stock for cash. The lapse of time is no bar to the suit, there being a complete breach of trust, unless such lapse is exceptionally great, the facts having been concealed. Wood *v.* Perkins, 57 Fed. Rep. 258 (1893). See also note 2, p. 959, *supra*.

[1] Fifth, etc. Society *v.* Holt, 184 Pa. St. 572 (1898).

certificate of stock to compel delivery may be brought at the place where the certificate is, and absent defendants may be served by publication.[1] Where, pending an appeal from a decree ordering a person to turn stock over to another, the former pays assessments on the stock, he can recover these assessments from the latter if the decree is affirmed.[2] Upon an appeal from final judgment, an interlocutory judgment ordering the transfer of stock from a trustee to the party entitled to the same will not be enforced, provided the party is allowed to vote thereon.[3] If a decree directs the transfer of certain stock in the distribution of an estate, and the corporation makes such transfer, and thereafter the decree is reversed on appeal, the executors may bring suit to have the transfer canceled.[4] Where a sale of stock is decreed and an appeal taken and a bond given on appeal, and the stock depreciates during the appeal and the decree is affirmed, the liability on the bond is the amount of the depreciation.[5]

1 Ryan *v.* Seaboard, etc. R. R., 83 Fed. Rep. 889 (1897). A suit lies in a New Jersey court to compel the transfer of stock in a New Jersey corporation, even though the stockholder of record is a non-resident and is not served within the state. Andrews *v.* Guayaquil, etc. Ry., 69 N. J. Eq. 211 (1905).

A suit to recover back stock which has been illegally transferred by a trustee may be brought in the state where the corporation was incorporated, even though the holder of the outstanding certificate is a non-resident inasmuch as the latter may be served by publication. People's Nat. Bank *v.* Cleveland, 117 Ga. 908 (1903). A citizen of Alabama cannot maintain in the courts of Alabama a suit to enjoin non-residents from transferring stock in a non-resident corporation where the defendants are not personally served within the state. Rucker *v.* Morgan, 122 Ala. 308 (1899). Where a corporation has not yet issued stock as called for by a contract, a claimant of such stock may bring suit in the state where corporation was organized to obtain the stock, even though the other claimant is a non-resident. Jennings *v.* Rocky Bar, etc. Co., 29 Wash. 726 (1902). See §§ 12, 363.

2 Irvine *v.* Angus, 93 Fed. Rep. 629 (1899).

3 Potter *v.* Rossiter, 109 N. Y. App. Div. 32 (1905).

4 The suit is properly in equity. Ashton *v.* Heggerty, 130 Cal. 516 (1900). Under the statute of California, even though stock is distributed by executors in accordance with a decree of distribution, and the distributees sell the stock and it is transferred on the books of the company, nevertheless if the decree is reversed on appeal, the transfers are void and the company is liable for dividends paid in the meantime to such purchasers. In a suit by the executors to recover such dividends the purchasers need not be made parties. Ashton *v.* Zeila Min. Co., 134 Cal. 408 (1901). Where, in accordance with a judgment, stock is delivered and the party receiving it sells it and thereafter the judgment is reversed, such stock cannot be recovered back from the transferee. Thaxter *v.* Thain, 100 N. Y. App. Div. 488 (1905). See also §§ 330, 391, *supra*.

5 Welch *v.* Welch, 60 S. W. Rep. 409 (Ky. 1901).

§ 339. *Seventeenth section of statute of frauds as affecting sales of stock.*—In England the rule is firmly established that the seventeenth section of the statute of frauds, relating to contracts for the sale of "goods, wares, and merchandise," does not apply to sales of stock. No delivery, payment of earnest money, or memorandum in writing is necessary in order to render the contract of sale valid. This principle of law was doubted in the early cases,[1] but was determined by the case of Humble *v.* Mitchell, in 1839.[2] In 1838 this question arose in this country, apparently for the first time, and it was decided in Tisdale *v.* Harris,[3] chiefly on the authority of the early English cases, that a contract for the sale of stock was within the seventeenth section of the statute of frauds. This decision has been uniformly followed in America.[4]

1 Mussell *v.* Cooke, Finch's Prec. in Ch. 533 (1720), holding that the statute applied, but was not properly pleaded; Pickering *v.* Appleby, 1 Com. Rep. 353 (1721), not decided, the judges being divided six and six; Coit *v.* Nettervill, 2 P. Wms. 304 (1725), not decided, the lord chancellor saying it was too difficult to decide on a demurrer; Crull *v.* Dodson, Sel. Cas. Ch. t. King (2d ed., p. 113—1725), statute held to apply.

2 11 A. & E. 205, followed in Duncuft *v.* Albrecht, 12 Sim. 189 (1841), the court saying that the statute applies only to goods capable of part delivery; Hibblewhite *v.* McMorine, 6 M. & W. 200, 214 (1840); Tempest *v.* Kilner, 3 C. B. 249 (1846); Heseltine *v.* Siggers, 1 Exch. 856 (1848).

3 37 Mass. 9.

4 Baltzen *v.* Nicolay, 53 N. Y. 467 (1873), rigidly applying the rule; North *v.* Forest, 15 Conn. 400 (1843), where the court said: "Such contracts fall clearly within the mischiefs which the legislature by the statute intended to remedy. There is as much danger of fraud and perjury in the parol proof of such contracts as in any other;" Pray *v.* Mitchell, 60 Me. 430 (1872); Fine *v.* Hornsby, 2 Mo. App. 61 (1876); Colvin *v.* Williams, 3 Har. & J. (Md.) 38 (1810); Sherwood *v.* Tradesman's Nat. Bank, 16 N. Y. W. Dig. 522 (1883); French *v.* Sanger, N. Y. L. J., July 22, 1892. *Cf.* Brownson *v.* Chapman, 63 N. Y. 625 (1875). *Contra*, dictum, Vawter *v.* Griffin, 40 Ind. 593, 602 (1872). See Reed, Stat. of Frauds, § 234; Hagar *v.* King, 38 Barb. 200 (1862), holding that the sale of railroad bonds is within the statute. This decision was overruled in 58 Barb. 148. An oral agreement to sell stock, the price being more than $50, is void under the statute of frauds, even though the agreement involved other stock which was actually delivered and paid for. Tompkins *v.* Sheehan, 158 N. Y. 617 (1899). A sale of stock is within the meaning of the statutes of frauds relative to the sale of goods. Raymond *v.* Colton, 104 Fed. Rep. 219 (1900). The written agreement of the purchaser to buy stock does not satisfy the statute of frauds if there is no written agreement of the vendor to sell. McIlroy *v.* Richards, 112 N. W. Rep. 489 (Mich. 1907). A subscription for stock is not a contract for the sale of goods, etc., within the meaning of the statutes of fraud. Webb *v.* Baltimore, etc. R. R., 77 Md. 92 (1893). In Florida the statute applies, the word "personal" property being used. Southern Life Ins. Co. *v.* Cole, 4 Fla. 359, 378 (1852). See also Mason *v.* Decker, 72 N. Y. 595 (1878), affirming 10 Jones & S. 115; Johnson *v.* Mulry, 4 Rob. (N. Y.) 401

A broker, however, as a common agent, may make the memorandum for both parties.[1] A principal cannot defend against a suit by his agent for the price of stock purchased by the latter for the former, on the ground that the order was oral and void by the statute of frauds.[2] A part payment of the consideration makes the contract valid,[3] and a payment in property [4] or services [5] suffices. The

(1867), holding that the New York Stock Jobbing Act (Laws N. Y. 1858, ch. 134), did not affect the application of the statute of frauds. The statute is not sufficiently pleaded by alleging that the contract of sale of stock "was void in law and not binding upon him." Vaupell *v.* Woodward, 2 Sandf. Ch. 143 (1844). The question of whether there was a delivery sufficient to take a case of sale of stock out of the statute of frauds was submited to the jury in Hinchman *v.* Lincoln, 124 U. S. 38 (1888), discussed in N. Y. D. Reg., Jan. 28, 1888. A contract to sell stock at the vendee's option within three years is not void by the statute of frauds, since the option may be exercised within a year. Seddon *v.* Rosenbaum, 85 Va. 928 (1889). A subscription payable when the road reaches a certain point becomes absolutely payable then upon demand. The statute of frauds does not apply to such a subscription. Webb *v.* Baltimore, etc. R. R., 77 Md. 92 (1893). An oral subscription is not void by the statute of frauds. Reed *v.* Gold, 102 Va. 37 (1903). See § 52, *supra.*

1 Colvin *v.* Williams, 3 Har. & J. (Md.) 38 (1810). Without a memorandum in writing a contract for the sale of stock is not enforceable, although made in the Stock Exchange, whose rules provide that the contract shall be enforceable. Ryers *v.* Tuska, 14 N. Y. Supp. 926 (1891). Where a stockholder in a letter offers a commission to a broker to sell his stock, this is sufficient to satisfy the statute of frauds. Jones *v.* Wattles, 66 Neb. 533 (1902).

2 Wiger *v.* Carr, 111 N. W. Rep. 657 (Wis. 1907).

3 Thompson *v.* Alger, 53 Mass. 428 (1847). A check is a part payment, taking a sale of stock out of the statute of frauds. McLure *v.* Sherman, 70 Fed. Rep. 190 (1895). An oral agreement to purchase stock is void by the statute of frauds, notwithstanding the vendor claims that he resigned as president and delivered the stock in escrow, there being a conflict of testimony on that subject. Reynolds *v.* Scriber, 41 Or. 407 (1902). Where a partial payment is made on the stock the contract is not void by the statute of frauds. So also where an oral contract is subsequently embodied in letters the statute of frauds does not apply. Cooper *v.* Bay State, etc. Co., 127 Fed. Rep. 482 (1904). Where two oral contracts between two persons for the sale of stock are void, under the statute of frauds, a subsequent payment on one of such contracts does not validate the other, unless at the time of such payment the other is restated and validated by reason of such payment. Koewing *v.* Wilder, 128 Fed. Rep. 558 (1904). A sale of stock for $50 or more is within the statute of frauds; but if the purchaser agrees to and did give up a lucrative position and accept a fixed salary from the corporation there is part performance on his part and the vendor is bound. Hightower *v.* Ansley, 126 Ga. 8 (1906). Where a party has bought various stocks through other persons and made payment on account, the statute of frauds is not applicable to a purchase of a particular stock. Berwin *v.* Bolles, 183 Mass. 340 (1903).

4 Eastern R. R. *v.* Benedict, 76 Mass. 212 (1857).

5 White *v.* Drew, 56 How. Pr. 53 (1878), holding that the furnishing

usual transfer on the back of a certificate of stock, when signed by the stockholder, is sufficient to satisfy the statute of frauds.[1] The statute does not apply as between partners for the purpose of buying stock.[2] A contract for the sale of stock in a corporation not yet incorporated has been held not to be within the statute.[3] The statute must be pleaded in order to be effective as a defense.[4] The assignee of a contract for the sale of stock, void by the statute of frauds, takes nothing by the assignment.[5] An agreement by the vendor of stock to take it back at any time is not affected by the statute, and such an agreement is a part of the executed sale.[6] Where

of reliable information is sufficient. An oral agreement to deliver stock in part payment for services to be rendered cannot be enforced against the party agreeing to deliver the stock, even though the services have been performed. Franklin *v.* Matoa, etc. Co., 158 Fed. Rep. 941 (1908).

1 Flowers *v.* Steiner, 108 Ala. 440 (1895). Where stock is sold and the certificate transferred to the vendee, and is then attached to a note given in payment of part of the purchase price, this constitutes a delivery and acceptance of the stock, and the statute of frauds does not invalidate the sale. Dinkler *v.* Baer, 92 Ga. 432 (1893). In Cameron *v.* Tompkins, 72 Hun, 113 (1893), it was held that the statute of frauds prevented the collection of a note which was given in payment for stock, even though the stock was collateral security for the note, and even though there were letters prior to the sale in which the proposed sale was referred to. The court said: "A contract to sell shares of stock in a private corporation is within the third section of the statute of frauds of the state of New York."

2 Tomlinson *v.* Miller, 7 Abb. Pr. (N. S.) 364 (1869). Nor as between persons, one of whom buys stock in his own name for the joint benefit of both. Stover *v.* Flack, 41 Barb. 162 (1862). A division of bonds by oral agreement between partners is not a sale within the meaning of the statute of frauds. Mason *v.* Spiller, 186 Mass. 346 (1904).

3 Gadsden *v.* Lance, McMull Eq. (S. C.) 87 (1841); Green *v.* Brookins, 23 Mich. 48, 54 (1871), where a person was induced to subscribe on parol contract that a purchaser for the stock would afterwards be found. In Massachusetts, on similar facts, except that a certain person agreed to purchase, a contrary decision was rendered. Boardman *v.* Cutter, 128 Mass. 388 (1880).

4 Porter *v.* Wormser, 94 N. Y. 431, 450 (1884).

5 Mayer *v.* Child, 47 Cal. 142 (1873).

6 Fitzpatrick *v.* Woodruff, 96 N. Y. 561 (1884); Thorndike *v.* Locke, 98 Mass. 340 (1867); Fay *v.* Wheeler, 44 Vt. 292 (1872); Bank of Lyons *v.* Demmon, Hill & D. Supp. 398 (1844). An agreement by promoters with a subscriber for stock that they would take the stock from him within a certain time, if he desired, is valid and enforceable. Meyer *v.* Blair, 109 N. Y. 600 (1888); Morgan *v.* Struthers, 131 U. S. 246 (1889). An agreement to take back bonds if the vendee desires to return them is valid and enforceable. Johnston *v.* Trask, 116 N. Y. 136 (1889). A guaranty that a vendor will take back the stock sold if the vendee desires is enforceable, even after the company sells out to another company for its shares of stock, the vendee not assenting. Richter *v.* Frank, 41 Fed. Rep. 859 (1890). An agreement of the vendor to buy back the stock is enforceable. Graham *v.* Houghton, 153 Mass. 384 (1891). A broker's agreement to take bonds back

the vendor of stock agrees to take it back, and in the meantime the corporation fails and the stock is assessed, the vendor must refund

at a certain price at any time is enforceable, where the bonds were sold in 1888, and in 1890, when the bonds were tendered back, the broker delayed action and said he would take them at any time, and in 1895 a final tender was made, and in 1897 suit was commenced. Lydig *v.* Braman, 177 Mass. 212 (1900). In a suit on a note given in payment for stock the defendant may prove an oral agreement showing that he had a right to return the stock and demand back the note. Germania Bank, etc. *v.* Osborne, 81 Minn. 272 (1900). The joint guarantee by several parties of a specified dividend for a specified time on certain stock, in order to bring about its sale, together with their agreement to purchase the stock at par at the end of the time, and if they fail to do so to continue to pay the guaranteed dividends, is enforceable against all for the guaranteed dividends for the specified time, but as to the purchase is enforceable against those only upon whom a demand is made that they purchase the stock in accordance with the agreement. Rogers *v.* Burr, 105 Ga. 432 (1898). The oral agreement of the agent of the buyer that the buyer would repurchase the stock is void by the statute of frauds, because this is a separate contract. Morse *v.* Douglass, 112 N. Y. App. Div. 798 (1906). An agreement of the vendor to buy back the stock in one year if the vendee desired is not void by the statute of frauds. Gurwell *v.* Morris, 2 Cal. App. 451 (1905). An oral agreement that the vendor will buy the stock back again at the same price is so improbable that strong evidence is necessary to establish it. Blair *v.* Minzesheimer, 124 N. Y. App. Div. 177 (1908). The Illinois statute against options does not apply to a contract by which the vendor of stock agrees to buy it back at the end of five years if the vendor so desires, the vendee on his part agreeing not to sell the stock to any one in the meantime, without first offering it to the vendor. Ubben *v.* Binnian, 182 Ill. 508 (1899). An agreement of the vendor of bonds to buy them back at the same price at a certain time if the vendee wishes is not a gambling contract. Wolf *v.* Nat. Bank of Illinois, 178 Ill. 85 (1899). Where the vendee has the right to return the stock within a reasonable time, the statute of limitations on such right is not to begin to run until a reasonable time after the date of the contract. Oaks *v.* Taylor, 30 N. Y. App. Div. 177 (1898). The agreement of the vendor of stock to buy it back at the price paid, and one per cent. a month in addition, is not usurious as a matter of law. Phillips *v.* Mason, 66 Hun, 580 (1893). Where the vendor agrees to refund the money upon the return of the stock sold, the vendee cannot sue for the money unless he returns the stock. Henderson *v.* Wheaton, 139 Ill. 581 (1891). Where stock is sold with a contract on the part of a vendor that he will repurchase it if desired "at the end of one year," the time may be extended by oral agreement. Weld *v.* Barker, 153 Pa. St. 465 (1893). The vendee, in enforcing the contract of the vendor to take the stock back, must make and allege a tender. Taylor *v.* Blair, 59 Hun, 347 (1891). An agreement of the vendor to repurchase the stock at the option of the purchaser at the end of one year becomes enforceable at the end of one year, excluding the day of the contract from the count. A custom of brokers to the contrary does not apply to such a transaction. An extension of the time by the original vendor by agreement does not waive his rights. Weld *v.* Barker, 153 Pa. St. 465 (1893). Where, however, the vendee turns in his stock on a reorganization and takes new stock, he

to the vendee the assessment as well as the purchase price.[1] Where the vendee agrees in writing to resell the stock to the vendor at a specified price, an oral notice by the vendor that he wishes to repurchase is sufficient, but he must tender the money unless such tender is excused by the conduct of the vendee.[2]

So, also, the agreement of third parties to take the stock, or to

cannot enforce the vendor's contract. Kolsky *v.* Enslen, 103 Ala. 97 (1894). Where a party has a right to return the stock and receive back his money, he may, after making a tender, do any acts in regard to the stock reasonably necessary to protect his interest, and yet not lose his right to rescind. But where he directs a sale of the stock, and gives a proxy thereon and attends meetings, he waives his right to rescind. Jessop *v.* Ivory, 158 Pa. St. 71 (1893); s. c., 172 Pa. St. 44. A receipt given by a vendor may, by its wording, be a contract on the part of the vendor to take the stock back if the vendee becomes dissatisfied. Jessop *v.* Ivory, 172 Pa. St. 44 (1895). Where it is agreed between the vendor and vendee stockholder that the money should be paid to the corporation in order to meet corporate debts, and the vendor agreed to repay the money if the stock became worthless, the statute of frauds does not prevent the vendee from recovering the money, even though the contract was oral. Kilbride *v.* Moss, 113 Cal. 432 (1896). Where a corporation issues stock in payment for a patent right and agrees to take back the stock and pay the par value thereof at the end of five years, if the purchaser so wishes, the purchaser may enforce the agreement. Browne *v.* St. Paul Plow Works, 62 Minn. 90 (1895). The vendee having the right to return stock within a year does not waive that right by authorizing the vendor to sell it. Corey *v.* Woodin, 81 N. E. Rep. 260 (Mass. 1907). A contract to repurchase stock may be assigned by the holder of the stock. Mitchell *v.* Taylor, 27 Oreg. 377 (1895). A verbal agreement to take the stock back is not good as against a note given in payment. Riley *v.* Treanor, 25 S. W. Rep. 1054 (Tex. 1894). The right to rescind and tender back stock after one year can be exercised only by a tender after the year and not before; but the tender is waived if the vendor states that he will not accept the tender. The fact that the vendee has sold some of the stock is immaterial if he has other shares to take the place of the part sold. The fact that, by agreement, the property has been merged in another corporation in the meantime is immaterial. Schultz *v.* O'Rourke, 18 Mont. 418 (1896). An agreement to repurchase at the end of a year if thirty days' notice is given is effective if the thirty days' notice is given at any time before the expiration of the year. Maguire *v.* Halsted, 18 N. Y. App. Div. 228 (1897). An agreement to reimburse a party as to stock "at or before" a certain date cannot be enforced by the promisee prior to the expiration of the specified time. Wilson *v.* Bicknell, 170 Mass. 259 (1898). An agreement to take back stock on a certain day if the purchaser so desires does not enable the purchaser to tender the stock back after that day. Cabot *v.* Kent, 20 R. I. 197 (1897).

1 Gay *v.* Dare, 103 Cal. 454 (1894).

2 Hanson *v.* Slaven, 98 Cal. 377 (1893). Where the vendor of stock has the right to repurchase in case a certain event does not occur, and it does not occur, and the vendee tenders back the stock and the vendor refuses to purchase, this puts an end to his option. Hooker *v.* Midland, etc. Co., 215 Ill. 444 (1905). See 116 N. W. Rep. 869, and 95 Pac. Rep. 1061.

protect from loss the party buying it, is enforceable if founded on a sufficient consideration.[1]

1 Where a stockholder subscribes for an increased capital stock on the agreement of parties to take the stock if the subscriber does not want it, the latter may hold the former liable for the difference between what the latter pays for the stock and what he is able to sell it for. Herd *v.* Thompson, 149 Pa. St. 434 (1892). A guaranty that the vendee of stock shall not lose money by the purchase may be enforced by the vendee when he proves that the stock has no market value, and that he has tried to sell it but has failed. Phipps *v.* Sharps, 142 Pa. St. 597 (1891). A statement of a party who is endeavoring to sell stock for another, that he will see the latter whole in the matter, creates no liability on the part of the former. Martin's Estate, 131 Pa. St. 638 (1890). An agreement of a stockholder that another stockholder shall be made "whole" for any loss due to not selling stock is without consideration and void. Martin's Estate, 4 Ry. & Corp. L. J. 449 (Orphans' Ct. Phil. 1888). A person who writes to a party, when the latter subscribes for stock, that the former will pay the subscription if the road is not completed within a certain time, is a surety and may be held liable. Allison *v.* Wood, 147 Pa. St. 197 (1892). The agreement of a person with a subscriber for stock that he will pay to the latter one hundred cents on the dollar for the stock within ninety days is not enforceable unless the subscriber tenders the stock and demands the money within that time; and a guaranty to save the subscriber harmless from any loss as a stockholder does not guaranty against loss by a decline in the value of the stock itself. Morris *v.* Veach, 111 Ga. 435 (1900). Where a vendor of machinery to a corporation takes its bonds in payment therefor on the promise of the officers that they will purchase the bonds at par at any time within six months, he may tender the bonds and sue for the purchase price. Erie, etc. Works *v.* Thomas, 139 Fed. Rep. 995 (1905). A corporation in selling its stock may agree to repurchase it at a specified time if the vendee so desires and if the president also makes such agreement he also may be held liable. Ophir, etc. Co. *v.* Brynteson, 143 Fed. Rep. 829 (1906). The written agreement of a third person to purchase stock from the vendee thereof at the same price after six months is enforceable, it being made as a part of the original purchase, and if such right is to exist after six months, it must be exercised within a reasonable time after the six months expire. Moench *v.* Hower, 115 N. W. Rep. 229 (Iowa 1908). An oral promise by a stockholder that he would repay at any time after one year the amount paid by an individual to the corporation for stock, if the latter did not receive a profit of twenty per cent., is void under the statute of frauds. Moore *v.* Vosburgh, 66 N. Y. App. Div. 223 (1901). The promise of the directors of a corporation, inducing a person to purchase stock from the corporation, that they will pay enough to make the dividend eight per cent. as long as the corporation exists, is not void, under the statute of frauds, and is enforceable. People, etc. *v.* Most, 36 N. Y. Misc. Rep. 139 (1901). A person induced to subscribe by an agreement of a third person to purchase the stock at par at any time may collect from the latter the difference between the price at which the former sells and the par value, the latter having declined to perform. Lewis *v.* Coates, 93 Mo. 170 (1888). See also § 334, *supra*. A memorandum, "We agree to pay A. Rampacker the par value of this stock . . . upon

§ 340. *Other sections of statute of frauds as affecting sales of stock.*—The provision of the statute of frauds relative to answering for the debts, defaults, or miscarriages of another does not apply to a guaranty that there will be a certain dividend on stock purchased,[1] nor to broker's relation towards his client.[2] An oral agreement of the vendor to repay to the vendee any money lost by the latter by reason of the failure of the corporation is void by the statute of frauds.[3] The provision of the statute relative to transfers of land does not apply to stock,[4] since shares of stock are personal property.[5] A transfer of stock for the purpose of defrauding the transferrer's creditors is void, and a court of equity will set it aside,[6] or the stock may be attached or sold under execution the same as though no attempt at transfer had been made.[7] An oral agreement whereby one party makes a loan to the corporation in consideration of the other party keeping the former in control and giving him an option on the latter's stock does not sustain a suit for damages, even if broken by the latter, inasmuch as it is void, under the statute of frauds, as not to be performed within a year.[8]

B. GAMBLING SALES OF STOCK.

§ 341. *What are wager stock sales.*—Executory contracts for the sale of stock may be made with an intent to actually deliver the stock, or they may be made with an intent not to deliver it, but

the surrender of this certificate," indorsed on the back of the certificate enables him to tender the stock and collect the par value, even though there was no consideration for the promise. Wheaton *v.* Rampacker, 3 Wyo. 441 (1891). An agreement of persons holding a majority of the stock, they being directors also, that a person purchasing stock from them shall be general manager, and may at the end of two years sell the stock back to them at a stated price, is contrary to public policy and void. The vendors need not repurchase. The arrangement is unfair to the corporation. Wilbur *v.* Stoepel, 82 Mich. 344 (1890). Where certain stockholders agreed with a subscriber for stock that he shall receive certain dividends and that they will take his stock if he desires after three years, he has a reasonable time after the three years to exercise his right to sell to them. Rogers *v.* Burr, 97 Ga. 10 (1895); s. c., 105 Ga. 432 (1898). See also § 775, *infra*.

1 Moorehouse *v.* Crangle, 36 Ohio St. 130 (1880).

2 Genin *v.* Isaacson, 6 N. Y. Leg. Obs. 213 (1848); Rogers *v.* Gould, 6 Hun, 229 (1875).

3 Gansey *v.* Orr, 173 Mo. 532 (1903). *Cf.* note 1, p. 980.

4 Watson *v.* Spratley, 10 Exch. 222 (1854); Powell *v.* Jessopp, 18 C. B. 336 (1856); Walker *v.* Bartlett, 18 C. B. 845 (1856); Ashworth *v.* Munn, L. R. 15 Ch. D. 363, 368 (1880).

5 See ch. I, *supra*.

6 See § 481, *infra*.

7 See § 484, *infra*.

8 Gazzam *v.* Simpson, 114 Fed. Rep. 71 (1902).

to pay in cash the amount lost or won by the rise or fall of the market price of the stock. A sale with the former intent is, at common law, legal and valid.[1] A sale with the latter intent is a gambling or wager contract, and is not enforceable.[2] The essen-

1 Irwin *v.* Williar, 110 U. S. 499, 508 (1884), the court saying: "The generally accepted doctrine of this country is . . . that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and if under guise of such a contract the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void. And this is now the law in England by force of the statute of 8 and 9 Vict., c. 109, § 18, altering the common law in that respect." In England it is held that although the parties may have contemplated that, as a whole, there would be a mere payment of differences between them, yet, inasmuch as the actual contracts entered into involved the liability for the actual delivery of the stock dealt with, they were not gaming or wagering transactions. Universal Stock Exch. *v.* Stevens, 66 L. T. Rep. 612 (1892). It may be speculation; nevertheless it is valid. Clarke *v.* Foss, 7 Biss. 540 (1878); s. c., 5 Fed. Cas. 955; Smith *v.* Bouvier, 70 Pa. St. 325 (1872); Kirkpatrick *v.* Bonsall, 72 Pa. St. 155 (1872), where the court said: "We must not confound gambling, whether it be in corporation stocks or merchandise, with what is commonly termed speculation. Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly." Hatch *v.* Douglas, 48 Conn. 116 (1880); Flagg *v.* Baldwin, 38 N. J. Eq. 219 (1884); Kent *v.* Miltenberger, 13 Mo. App. 503 (1883). If deliveries are made the transaction is not gambling. Pratt *v.* Boody, 55 N. J. Eq. 175 (1896). A corporation organized to act as a broker in buying and selling grain is subject to the same rule as regards gambling contracts that individuals are. Peck *v.* Doran, etc. Co., 57 Hun, 343 (1890). An agreement of the vendor of bonds to buy them back at the same price at a certain time if the vendee wishes is not a gambling contract. Wolf *v.* Nat. Bank of Illinois, 178 Ill. 85 (1899).

2 "Wagers at common law are valid and enforceable in the courts;" and, with certain exceptions growing out of the peculiar subject of the wager, they have been held to be valid contracts. Dewey, Contracts for Future Delivery, etc. (1886), p. 10. To same effect: Good *v.* Elliott, 3 T. R. 693 (1790); Gilbert *v.* Sykes, 16 East, 150 (1812); Atherfold *v.* Beard, 2 T. R. 610 (1788); Morgan *v.* Pebrer, 4 Sco. 230 (1837); Hussey *v.* Crickitt, 3 Camp. 168 (1811); Grant *v.* Hamilton, 3 McLean, 100 (1842); s. c., 10 Fed. Cas. 978; Campbell *v.* Richardson, 10 Johns. 406 (1813); Bunn *v.* Riker, 4 Johns. 426 (1809); Johnson *v.* Fall, 6 Cal. 359 (1856); Johnston *v.* Russell, 37 Cal. 670 (1869); Dewees *v.* Miller, 5 Harr. (Del.) 347 (1851); Porter *v.* Sawyer, 1 Harr. (Del.) 517 (1832); Griffith *v.* Pearce, 4 Houst. (Del.) 209 (1870); Richardson *v.* Kelly, 85 Ill. 491 (1877); Petillon *v.* Hipple, 90 Ill. 420 (1878); Trenton, etc. Ins. Co. *v.* Johnson, 24 N. J. L.

tial difference between a wager contract and a contract not a wager is whether there is an intent to deliver the property sold.[1] Even though the original intent was not to deliver, yet a subsequent actual sale and purchase validates the transaction.[2] "In order to invalidate a contract as a wagering one, both parties must intend that instead of the delivery of the article there shall be a mere payment

576 (1854); Dunman *v.* Strother, 1 Tex. 89 (1846); McElroy *v.* Carmichael, 6 Tex. 454 (1851); Wheeler *v.* Friend, 22 Tex. 683 (1859); Monroe *v.* Smelly, 25 Tex. 586 (1860). *Contra:* In Pennsylvania—Edgell *v.* McLaughlin, 6 Whart. 176 (1841); Phillips *v.* Ives, 1 Rawle, 36 (1828); Brua's Appeal, 55 Pa. St. 294 (1867); in Vermont—Collamer *v.* Day, 2 Vt. 144 (1829); Tarleton *v.* Baker, 18 Vt. 9 (1843); in New Hampshire—Clark *v.* Gibson, 12 N. H. 386 (1841); Winchester *v.* Nutter, 52 N. H. 507 (1872); in Maine—McDonough *v.* Webster, 68 Me. 530 (1878); Gilmore *v.* Woodcock, 69 Me. 118 (1879); Missouri—Waterman *v.* Buckland, 1 Mo. App. 45 (1876); and Massachusetts—Ball *v.* Gilbert, 53 Mass. 397 (1847); Babcock *v.* Thompson, 20 Mass. 446 (1826); Sampson *v.* Shaw, 101 Mass. 145 (1869). The supreme court of the United States said, in Irwin *v.* Williar, 110 U. S. 499 (1884): "In England it is held that the contracts, although wagers, were not void at common law, . . . while generally, in this country, all wagering contracts are held to be illegal and void as against public policy," citing Dickson *v.* Thomas, 97 Pa. St. 278 (1881); Gregory *v.* Wendell, 40 Mich. 432 (1879); Lyon *v.* Culbertson, 83 Ill. 33 (1876); Melchert *v.* American U. Tel. Co., 3 McCrary, 521 (1882); s. c., 11 Fed. Rep. 193 and note; Barnard *v.* Backhaus, 52 Wis. 593 (1881); Love *v.* Harvey, 114 Mass. 80 (1873); Embrey *v.* Jemison, 131 U. S. 336 (1889). A contract for the sale and purchase of stocks with no intent of delivery, but merely to pay differences, is illegal. *Re* Gieve, [1899] 1 Q. B. 794.

1 Roundtree *v.* Smith, 108 U. S. 269 (1883); *Re* Hunt, 26 Fed. Rep. 739 (1886). Mr. Dewey (Contracts for Future Delivery and Commercial Wagers, p. 28) states the rule accurately as follows: "Where the parties to a contract in the form of a sale agree expressly or by implication, at the time it is made, that the contract is not to be enforced, that no delivery is to be made, but the contract is to be settled by the payment of the difference between the contract price and the market price at a given time in the future, such a transaction is a wager," citing many cases. If there is an intent to deliver, then the transaction is legal, though the parties "exercise the option of settling the difference in price, rather than make delivery of the property." Ward *v.* Vosburgh, 31 Fed. Rep. 12 (1887). As regards sales and margins see § 457, *infra*. In Indiana, it was held that a note given in New York to settle a gambling cotton debt was governed by New York laws as to its legality. Sondheim *v.* Gilbert, 117 Ind. 71 (1888). An order from a person in Tennessee to New York stock brokers to buy or sell stock on the New York Stock Exchange is governed by the law of New York as to its legality. Berry *v.* Chase, 146 Fed. Rep. 625 (1906).

2 *In re* Taylor, etc., 192 Pa. St. 304 (1899). Where the broker actually buys the securities for the customer the transaction is not gambling, even though the securities are afterwards resold, and where the purchaser takes up stocks still held by the broker he legalizes all the past transactions. Young *v.* Glendenning, 194 Pa. St. 550 (1900).

of the difference between the contract and the market price." [1] A sale for future delivery, although a "short" sale, is not a gambling contract *per se*.[2] An "option," "put," "call," "straddle," or other similar stock-exchange contract, may be made with an intent to actually deliver the stock, and, if so, are unobjectionable and are enforceable.[3]

The fact that stock transactions were carried on by "margins" is no evidence that they were gambling contracts,[4] excepting in

1 Clews *v.* Jamieson, 182 U. S. 461, 489 (1901).

2 Clews *v.* Jamieson, 182 U. S. 461, 489 (1901).

3 For definitions of these terms, see § 445, n., *infra*. A "put" is not *per se* conclusive evidence of an intent not to deliver. Bigelow *v.* Benedict, 70 N. Y. 202 (1877). A "straddle" follows the same rule. The parties may have intended to deliver the stock. Harris *v.* Tumbridge, 83 N. Y. 92 (1880); Story *v.* Salomon, 71 N. Y. 420 (1877). *Cf. Ex parte* Young, 6 Biss. 53 (1874); s. c., 30 Fed. Cas. 828; Webster *v.* Sturges, 7 Ill. App. 560 (1880); Tenney *v.* Foote, 4 Ill. App. 594 (1879); Lyon *v.* Culbertson, 83 Ill. 33 (1876); Gilbert *v.* Gauger, 8 Biss. 214 (1878); s. c., 10 Fed. Cas. 345. A short sale is not *per se* a wager nor is it presumed to be. Maxton *v.* Gheen, 75 Pa. St. 166 (1874); Hess *v.* Rau, 95 N. Y. 359 (1884); Knowlton *v.* Fitch, 52 N. Y. 288 (1873); White *v.* Smith, 54 N. Y. 522 (1874); Cameron *v.* Durkheim, 55 N. Y. 425 (1874); Third Nat. Bank *v.* Harrison, 10 Fed. Rep. 243 (1882). These decisions rest upon the principle of law laid down in Stanton *v.* Small, 3 Sandf. 230 (1849), that "a contract for the sale of goods to be delivered at a future day is not invalidated by the circumstance that at the time of the contract the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them at the time appointed for delivering them, otherwise than by purchasing them after making the contract." See also § 457, *infra*. There are many cases to the same effect. See Noyes *v.* Spaulding, 27 Vt. 420 (1855); Shales *v.* Seignoret, 1 Ld. Raym. 440 (1700); Frost *v.* Clarkson, 7 Cow. 25 (1827); Dewey, Contracts for Future Delivery, p. 97; Thacker *v.* Hardy, L. R. 4 Q. B. D. 685 (1878), holding that, if the intent at the time of buying was to deliver, it is not a wager, even though that intent be afterwards changed. As to the legality of a "corner," see § 621*b*, *infra*. Where there is evidence of some intent to deliver, the transaction is not gambling. Cothran *v.* Ellis, 125 Ill. 496 (1888). A sale delivery to be in twelve months, or, if vendor wishes, before then, is not a gambling contract. Perryman *v.* Wolffe, 93 Ala. 290 (1890).

4 Sawyer *v.* Taggart, 14 Bush (Ky.) 727 (1879); Wall *v.* Schneider, 59 Wis. 352 (1884); Bartlett *v.* Smith, 13 Fed. Rep. 263 (1882); Whitesides *v.* Hunt, 97 Ind. 191 (1884); Union Nat. Bank *v.* Carr, 15 Fed. Rep. 438 (1883); Hatch *v.* Douglas, 48 Conn. 116 (1880). A purchase of stock on margin is not necessarily gambling, but is gambling if there is no intention to deliver but merely to settle the loss or gain. Wagner *v.* Hildebrand, 187 Pa. St. 136 (1898). Many other cases do not directly pass on this question, but assume that the deposit of a margin, as a security to the broker, does not prove an intent not to have a delivery of the stock. Where the customer called for the stock, and it is tendered to him, the broker may

Maryland and New Jersey. In these states this fact alone seems to be sufficient evidence of a wager.[1] A cotton mill may purchase cotton to be delivered in the future and may put up a margin to carry the contract.[2] A wager contract is not proved by the fact that the party selling stock to be delivered at a future time intends to purchase that amount of stock in time for the delivery, or *vice versa*.[3] "An executory contract for the sale of goods for future delivery is not infected with the quality of a wager by reason of the fact that at its date the vendor had not the goods, and had not entered into any arrangement to provide them, and had no expectation of receiving them, unless by subsequently going into the mar-

recover the price, even though the stock was first bought on a margin. Anthony *v.* Unangst, 174 Pa. St. 10 (1896). Transactions on margins are not necessarily gambling. Hopkins *v.* O'Kane, 169 Pa. St. 478 (1895). But see Ruchizky *v.* De Haven, 97 Pa. St. 202 (1881); Dickson *v.* Thomas, 97 Pa. St. 278 (1881); Fareira *v.* Gabell, 89 Pa. St. 89 (1879); Maxton *v.* Gheen, 75 Pa. St. 166 (1874); North *v.* Phillips, 89 Pa. St. 250 (1879).

1 Flagg *v.* Baldwin, 38 N. J. Eq. 219 (1884). See also Justh *v.* Holliday, 2 Mackey, 346 (1883). A purchase on margin is gambling *per se*. Cover *v.* Smith, 82 Md. 586 (1896). A broker cannot enforce a contract between himself and his customer, where the customer testifies that he put up $100 as a margin for one hundred shares of stock, and that if the stock advanced a point he would have a profit, and if it declined a point he would lose the $100, and also another $100 to be paid. Billingslea *v.* Smith, 77 Md. 504 (1893).

2 Sampson *v.* Camperdown Cotton Mills, 82 Fed. Rep. 833 (1897).

3 In Ashton *v.* Dakin, 7 W. R. 384 (1859), the court held it not to be a wager contract to order a broker to buy stock, "and let the bargain be so as to the day of payment that you may have an opportunity of reselling it for me by such a day, when I expect the market will have risen, and then you will pay the seller for me with the money you receive from the purchaser, and I shall receive the gain from you, if any, or pay you the loss." So, also, Smith *v.* Bouvier, 70 Pa. St. 325 (1872), holds that stocks bought and sold upon speculation are not necessarily wager contracts. A person may sell without owning the stock, and at time of delivery buy to deliver, and yet the transaction be not a wager, where the jury finds that there was an intent to deliver in both the selling and buying. See also Thacker *v.* Hardy, L. R. 4 Q. B. D. 685 (1878); Sawyer *v.* Taggart, 14 Bush (Ky.) 727 (1879). In Massachusetts it is held that the contract is not gambling merely because there was an expectation that only differences would be settled. Barnes *v.* Smith, 159 Mass. 344 (1893). Where the seller of grain does not intend to deliver the property sold, but simply to settle the difference in price, the transaction is illegal under a statute, whether his brokers and the purchaser knew of his intention or not. Margins lost in such transactions cannot be recovered back. Connor *v.* Black, 132 Mo. 150 (1896). A purchase of corn may be legal although made to fill certain sales which the party had made previously. A mortgage given to a broker for advancements made in the transaction is valid. Douglas *v.* Smith, 74 Iowa, 468 (1888).

ket and buying them."[1] A *bona fide* sale of grain deliverable in a certain month, on a day to be fixed by seller, is not a gambling contract.[2]

§ 342. *Statutes prohibiting wager contracts, and also certain stock contracts.*—There are two classes of statutes affecting stock sales as regards their speculative character. One class does not specify sales of stock, but declares in general terms that all gaming and wagering contracts shall be void, thereby rendering actions for the recovery of money won on such wagers unsustainable. Such statutes exist in England[3] and New York.[4] The second class of statutes is more explicit, and prohibits specified transactions in stock, irrespective of whether such transactions be wager contracts or not. Statutes affecting speculative sales of stock exist in many of the states. In Massachusetts short sales are prohibited;[5] in Ohio, sales of stock for future delivery, which the vendor has not on hand or the vendee the means to pay for;[6] in Illinois, all options are made gambling contracts and are void;[7] in Georgia, short sales cannot be

1 Conner *v.* Robertson, 37 La. Ann. 814 (1885), the court saying also that Lorymer *v.* Smith, 1 Barn. & C. 1 (1822), has been repeatedly overruled. See also *supra*, p. 984, n. 3.

2 White *v.* Barber, 123 U. S. 392 (1887).

3 8 & 9 Vict., c. 109, § 18; Grizewood *v.* Blane, 11 C. B. 526 (1851). Agreements between buyers and sellers of stock to pay or receive the differences between their prices on one day and their prices on another day are gaming and wagering transactions within the meaning of the statute. Thacker *v.* Hardy, L. R. 4 Q. B. D. 685 (1878). The statute does not necessarily affect "corners" in stocks. Barry *v.* Croskey, 2 J. & H. 1 (1861). As to the application of this statute, see also Heiman *v.* Hardie, 12 Ct. of Sess. 406 (Sc., 4th ser., 1885).

4 1 N. Y. Rev. Stats. 662, § 8 (vol. III, p. 1962, 7th ed.). As applied to stock cases, see Kingsbury *v.* Kirwan, 77 N. Y. 612 (1879); Story *v.* Salomon, 71 N. Y. 420 (1877); Harris *v.* Tumbridge, 83 N. Y. 92 (1880); Yerkes *v.* Salomon, 11 Hun, 471 (1877).

5 Mass. Gen. Stat., ch. 105, § 6. For cases arising under this and similar statutes, see Howe *v.* Starkweather, 17 Mass. 240 (1821); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Barrett *v.* Mead, 92 Mass. 337 (1865); Brigham *v.* Mead, 92 Mass. 245 (1865); Barrett *v.* Hyde, 73 Mass. 160 (1856); Durant *v.* Burt, 98 Mass. 161 (1867); Brown *v.* Phelps, 103 Mass. 313 (1869); Price *v.* Minot, 107 Mass. 49 (1871); Colt *v.* Clapp, 127 Mass. 476 (1879); Rock *v.* Nicholls, 85 Mass. 342 (1862); Wyman *v.* Fiske, 85 Mass. 238 (1861); Pratt *v.* American Bell Teleph. Co., 141 Mass. 225 (1886), following the decisions under the New York statute, from which the statute in question was copied.

In Pennsylvania, by statute, sales for future delivery were formerly prohibited. See Pa. Laws 1841, p. 398, § 6. This statute, however, has been repealed. For decisions, see Krause *v.* Setley, 2 Phila. Rep. 32 (1856); Chillas *v.* Snyder, 1 Phila. Rep. 289 (1852).

6 Ohio Laws, 1885, p. 254. Gambling contract in grain. Lester *v.* Buel, 49 Ohio St. 240 (1892).

7 Ill. Rev. Stat. (Starr & C.), p. 791, ¶ 178. For decisions, see Wolcott *v.*

enforced.[1] A state statute declaring illegal all options to sell or buy at a future time is constitutional, even though it may interfere with what would otherwise be legitimate contracts.[2] The California constitutional provision making void all contracts for sales of stock on a margin and providing for recovery back of money paid on such contracts is constitutional, even though it applies to *bona fide* transactions as well as gambling transactions.[3] In New York, the statute of 1812,[4] re-enacted in the Revised Statutes of 1828,[5] prohibiting short sales, was repealed by implication by the statute of 1858, declaring the sale to be valid though there be no consideration or payment of consideration, or no ownership by the vendor of such stock at the time of the sale. Various other states have statutes on this subject.[6] Where a customer gives to his broker in Missouri an order

Heath, 78 Ill. 433 (1875); Pickering *v.* Cease, 79 Ill. 328 (1875); Pixley *v.* Boynton, 79 Ill. 351 (1875); Sanborn *v.* Benedict, 78 Ill. 309 (1875); Cole *v.* Milmine, 88 Ill. 349 (1878). This statute is restricted by the decisions to cases where the transaction is to be "adjusted only by differences." But see Ward *v.* Vosburgh, 31 Fed. Rep. 12 (1887). A contract to repurchase stock sold, if the purchaser desires, is not invalid under a statute prohibiting option contracts for the sale of stock for future delivery. Osgood *v.* Skinner, 211 Ill. 229 (1904). In Illinois, by statute, an option to buy coal at a future time is void. Osgood *v.* Bauder, 75 Iowa, 550 (1888). A sale with an agreement of the vendor to take the stock back at the same price and interest within a certain time if the vendee desired is not a gambling contract under the Illinois statute. Richter *v.* Frank, 41 Fed. Rep. 859 (1890). Concerning an indictment under the Illinois law for keeping a "bucket shop," see Soby *v.* People, 134 Ill. 66 (1890). In Illinois, by statute, a "put" is void. Schneider *v.* Turner, 130 Ill. 28 (1889). The statute against cornering the market applies to a purchase of corn to raise its price. Foss *v.* Cummings, 149 Ill. 353 (1894).

1 Ga. Code, § 2638.

2 Booth *v.* Illinois, 184 U. S. 425 (1902).

3 Otis *v.* Parker, 187 U. S. 606 (1903). A suit by a customer against a broker to recover back moneys paid on gambling stock transactions was sustained under the California statute in Stilwell *v.* Cutter, 146 Cal. 657 (1905). In California the relation of a broker and customer is that of vendor and vendee, and hence a completed delivery of stock is not in violation of the constitutional provision against sales of stock on margin. Conradt *v.* Lepper, 13 Wyo. 473 (1905).

4 2 R. L. 187, § 18.

5 1 R. S., p. 710, § 6. For cases coming under this statute, see Dykers *v.* Townsend, 24 N. Y. 57 (1861), disapproving Stebbins *v.* Leowolf, 57 Mass. 137, 143 (1849). See also Thompson *v.* Alger, 53 Mass. 428 (1847), on the New York statute; Staples *v.* Gould, 9 N. Y. 520 (1854), (criticising Gram *v.* Stebbins, 6 Paige, 124—1836); Frost *v.* Clarkson, 7 Cow. 24 (1827); Cassard *v.* Hinmann, 14 How. Pr. 84 (1856); aff'd, 1 Bosw. 207. In New York a director is prohibited from selling "short." Penal Code, § 610. In Arkansas a broker and others are liable criminally for doing business in futures. Fortenbury *v.* State, 47 Ark. 188 (1886).

6 A promissory note is void under

to buy stock and the order is executed in New York, the statute of Missouri rendering illegal the purchase of stock without intent to pay for the same does not apply, but the common law, which is presumed to be the law of New York, does apply, and the transaction is legal. Moreover, proof that one of the parties intended the contract to be gambling does not invalidate the transaction, and the broker may recover from the customer his losses.[1] In California the question whether stock purchased on a margin violates the constitutional prohibition is one of fact.[2] In Massachusetts also the statute enables the customer to sue the broker for any losses,[3] but

the Tennessee act against gambling in futures where such note was given therein. Snoddy *v.* American Nat. Bank, 88 Tenn. 573 (1890). The California constitution renders void a transaction wherein a broker buys stock for the customer with the broker's money and holds the stock as security and charges the customer interest and commissions. Cashman *v.* Root, 89 Cal. 373 (1891). Gambling stock transactions have been held void under the Kentucky statute in Lyons *v.* Hodgen, 90 Ky. 280 (1890).

1 Edwards, etc. Co. *v.* Stevenson, 160 Mo. 516 (1901). A sale is not gambling merely because one of the parties intended it so to be; and where orders are given in Missouri to be executed in New York, the New York law governs. Gaylord *v.* Duryea, 95 Mo. App. 574 (1902). A note given by a resident of Rhode Island, dated in Rhode Island but payable to brokers in Boston and delivered in Boston, becomes valid only upon delivery, and hence its validity is governed by Massachusetts law. Winward *v.* Lincoln, 23 R. I. 476 (1902).

2 Kullman *v.* Simmens, 104 Cal. 595 (1894).

3 Crandell *v.* White, 164 Mass. 54 (1895). The Massachusetts statute enabling the principal to recover back money paid by him to his broker on stock gambling contracts does not apply where the broker actually bought the securities and the principal knew it. Rice *v.* Winslow, 180 Mass. 500 (1902). For a case where a recovery was had against the broker, see Ballou *v.* Willey, 180 Mass. 562 (1902). In the case of Davy *v.* Bangs, 174 Mass. 238 (1899), a customer recovered against a broker the value of stock lost in a gambling contract, such recovery being based on the Massachusetts statute. A suit by a customer to recover back losses under the Massachusetts statute succeeded in Allen *v.* Fuller, 182 Mass. 202 (1902). The Massachusetts statute against gambling transactions in stock was enforced in Marks *v.* Metropolitan Stock Exchange, 181 Mass. 251 (1902), where the defendant was to deliver certain stock at a certain price on three days' notice, or by mutual consent was to pay any profit thereon above that price, and, on the other hand, the margin deposited was to be applied to any loss. And it was also enforced in Corey *v.* Griffin, 181 Mass. 229 (1902), where, in order to evade the statute, a customer agreed to indemnify the defendant against all damage. Under the Kentucky statute a customer may recover back money lost in gambling in stocks. Boyd, etc. Co. *v.* Coates, 69 S. W. Rep. 1090 (Ky. 1902). Under the Massachusetts statute a customer may file a bill to have a mortgage canceled, such mortgage having been given to pay gambling debts. Rice *v.* Winslow, 182 Mass. 273 (1902). For a decision under the Massachusetts statute to recover back money spent in connection with a gambling contract, see Wheeler *v.* Metropolitan, etc.

a cause of action given by the statute for margins paid may be released after it has accrued.[1] In England the statute of 1734,[2] prohibiting gambling in the public funds, was repealed in 1860,[3] but the statute of 1845 still exists.[4] The state may make it a criminal offense for a person to gamble in commodities with no intent to deliver even though the transactions are between parties in two different states.[5] It is evident from the history of these statutes against stock gambling that it is a difficult and delicate task to frame a statute that will cure the evil. The great danger is that any such statute will interfere with legitimate transactions—transactions which for many years have been building the railways and developing the material resources of the country.[6]

§ 343. *Test of legality of stock transactions.*—Although, as already stated, stock sales, where no delivery, but merely a settle-

Exchange, 72 N. H. 315 (1903). In a suit by a customer to recover losses from a broker under the Massachusetts statute, the broker is not liable if he actually purchased the securities and afterwards sold them on the order of the plaintiff. Post *v.* Leland, 184 Mass. 601 (1904).

1 Wall *v.* Metropolitan Stock Exchange, 168 Mass. 282 (1897).

2 7 Geo. II., c. 8, and 10 Geo. II., c. 8. For cases under this statute, see Hewitt *v.* Price, 4 Man. & G. 355 (1842); Fisher *v.* Price, 11 Beav. 194 (1848); Mortimer *v.* McCallan, 6 M. & W. 58 (1840); Ellsworth *v.* Cole, 2 M. & W. 31 (1836); Byles on Bills, 15th ed., p. 161; 2 Kent, Com., 468, note (*i*). The statute did not apply to stock in private corporations. Hibblewhite *v.* McMorine, 5 M. & W. 462 (1839), overruling Bryan *v.* Lewis, Ryan & M. 386 (1826).

3 23 & 24 Vict., c. 28.

4 Where both parties to a transaction on the stock exchange intend that no stocks shall be delivered, but only that "differences" shall be paid, the fact that the contract provides that either party may require completion of the purchase and delivery or receipt of the stock does not prevent the transaction from being a gaming and wagering contract within the Gaming Act, 1845 (8 & 9 Vict., c. 109), and therefore void. Universal, etc. Exchange *v.* Strachan, [1896] A. C. 166, holding also that securities deposited in connection with such a contract may be recovered back.

5 State *v.* Clayton, 138 N. C. 732 (1905). In Anderson *v.* State, 58 S. E. Rep. 401 (Ga. 1907), a person was convicted for violating the "Anti Bucket-Shop Law" of Georgia.

6 Dos Passos, Stock Brokers & Stock Exch. (1882), p. 405, says: "The history of these stock-jobbing acts seems to prove conclusively that they have never been effective in preventing speculations in stocks. In almost every instance in which they have been adopted, after lingering for years on the books, scorned and violated by 'the unbridled and defiant spirit of speculation,' despite the earnest efforts of the courts to enforce them, they have finally been repealed. It is, perhaps, better to allow the evil to correct itself, as it surely does, than to bring the administration of justice into contempt by filling the books with useless laws, which are at all times openly violated and laughed at, and which seem hardly more effective to prevent the practices at which they are aimed than legislation directed against the laws of nature."

ment of gain or loss, is intended, are wagers, and although such wagers are void by the statutes of some states, and by the rules of public policy in others,[1] yet difficulty is experienced in determining whether the parties really intended to deliver the stock or to pay differences. The question of intent is always difficult of ascertainment and of positive proof. It is pre-eminently a question for the jury. It is accordingly found in most of the cases involving the question whether the transaction was stock gambling, that the court submitted to the jury whether an actual delivery of the stock was intended or not. If there was no such intent, then, as a matter of law, the transaction was a wager. If a wager, it is, by statutes in some states, by public policy in others, a void transaction, and the parties have only the rights given them on void contracts.[2] The fact that the customer is speculating does not prove that he is dealing in differences, nor the fact that he buys on margin nor the fact that he buys options.[3] Yet at common law a contract to purchase stock on margin with no intent on either side to deliver and pay for the same, is a wagering contract and is illegal, and the broker cannot recover losses from the purchaser.[4] At common law and by statute in Massachusetts a broker cannot recover commissions where both parties contemplated buying and selling on a margin without the actual purchase and retaining of the stock with a view to a subsequent sale.[5]

§ 344. *When intent to deliver is question for the jury and when not.*—The question whether the parties to an executory sale of stock intended to actually deliver the stock, or merely to pay and receive the gain or loss, may be for the jury.[6] In the application of this rule, however, great care is to be exercised in submitting the question and charging the jury. The parties may be asked directly whether they intended that a delivery should be made.[7] If one party intended

1 Particularly in Pennsylvania are such stock wagers void by public policy. North *v.* Phillips, 89 Pa. St. 250 (1879); Fareira *v.* Gabell, 89 Pa. St. 89 (1879); Ruchizky *v.* De Haven, 97 Pa. St. 202 (1881); Dickson *v.* Thomas, 97 Pa. St. 278 (1881); Brua's Appeal, 55 Pa. St. 294 (1867).

2 See §§ 345, 346, *infra*. See also Greenhood, Pub. Policy, pp. 230–237.

3 Kendall *v.* Fries, 71 N. J. L. 401 (1904).

4 Gibney *v.* Olivette, 82 N. E. Rep. 41 (Mass. 1907).

5 Beers *v.* Wardwell, 84 N. E. Rep. 306 (Mass. 1908).

6 Whitesides *v.* Hunt, 97 Ind. 191 (1884); Gregory *v.* Wendell, 39 Mich. 337 (1878); s. c., 40 Mich. 432. And all the circumstances are to be taken into consideration. Beveridge *v.* Hewitt, 8 Ill. App. 467 (1881); Hawley *v.* Bibb, 69 Ala. 52 (1881); Brand *v.* Henderson, 107 Ill. 141 (1883); Barnard *v.* Backhaus, 52 Wis. 593 (1881); Kirkpatrick *v.* Bonsall, 72 Pa. St. 155 (1872).

7 Yerkes *v.* Salomon, 11 Hun, 471

to have a delivery, the transaction is valid, even though the other party intended otherwise.[1] As between a party and his broker, however, greater difficulty arises, and in some jurisdictions the intent between them governs their relations, irrespective of the intent of the party dealing with them.[2] The financial responsibility of the parties,[3] and their other transactions in the same line,[4] are admis-

(1877); Cassard *v.* Hinman, 6 Bosw. 9, 14 (1860); First Nat. Bank *v.* Oskaloosa Packing Co., 66 Iowa, 41 (1885); *Ex parte* Young, 6 Biss. 53 (1874); s. c., 30 Fed. Cas. 828. In the case of Porter *v.* Viets, 1 Biss. 177 (1857); s. c., 19 Fed. Cas. 1077, the court refused to admit parol evidence that the contract was gambling, for the reason that it varied a written contract.

1 Wall *v.* Schneider, 59 Wis. 352 (1884); Irwin *v.* Williar, 110 U. S. 499 (1884); Whitesides *v.* Hunt, 97 Ind. 191 (1884); Pixley *v.* Boynton, 79 Ill. 351 (1875); Ward *v.* Vosburgh, 31 Fed. Rep. 12 (1887); Powell *v.* McCord, 121 Ill. 360 (1887); Lehman *v.* Strassburger, 2 Woods, 554 (1875); s. c., 15 Fed Cas. 251; Conner *v.* Robertson, 37 La. Ann. 814 (1885). *Contra*, Fareira *v.* Gabell, 89 Pa. St. 89 (1879). *Cf.* Beveridge *v.* Hewitt, 8 Ill. App. 467 (1881). In Tennessee, by statute, dealing in futures is gambling, if either party does not intend to deliver. See McGrew *v.* City Produce Exchange, 85 Tenn. 572 (1887). If either of the parties intends, at the close of a series of transactions in buying and selling stocks, to accept or make actual delivery of the remaining stock, the transaction is not gambling, as between the customer and broker, although the buying and selling are done upon a margin in the hope of profit from the fluctuations. Dillaway *v.* Alden, 88 Me. 230 (1895). The intent of the principal not to have deliveries but to pay differences does not invalidate a note given in settlement, where there is no proof of any such intent on the part of the brokers. Winward *v.* Lincoln, 23 R. I. 476 (1902). A gambling intent on the part of one party is immaterial where there was no such intent on the part of the other party. McCarthy *v.* Weare, etc. Co., 87 Minn. 11 (1902). The fact that a broker advanced all the money except the margin, and never delivered any stock excepting on one occasion and remitted gains and collected losses on various occasions, is evidence to prove that the contract was a gambling contract. Sharp *v.* Stalker, 63 N. J. Eq. 596 (1902).

2 See §§ 345, 346, *infra*.

3 Kirkpatrick *v.* Bonsall, 72 Pa. St. 155 (1872); First Nat. Bank *v.* Oskaloosa Packing Co., 66 Iowa, 41 (1885); *Re* Green, 7 Biss. 338 (1877); s. c., 10 Fed. Cas. 1084; Beveridge *v.* Hewitt, 8 Ill. App. 467 (1881); Justh *v.* Holliday, 2 Mackey, 346 (1883); North *v.* Phillips, 89 Pa. St. 250 (1879); Patterson's Appeal, 16 Rep. 59 (Pa. 1883); Flagg *v.* Baldwin, 38 N. J. Eq. 219 (1884); Colderwood *v.* McCrea, 11 Ill. App. 543 (1882). The fact that one of the parties is already under obligation to other parties to purchase cotton several times greater in value than his fortune is evidence of an intent to gamble. Beadles *v.* McElrath, 85 Ky. 230 (1887). The fact that a party is financially unable to pay for property is evidence that the contract is gambling. Myers *v.* Tobias, 16 Atl. Rep. 641 (Pa. 1889).

4 Kirkpatrick *v.* Bonsall, 72 Pa. St. 155 (1872); Beveridge *v.* Hewitt, 8 Ill. App. 467 (1881); Irwin *v.* Williar, 110 U. S. 499 (1884). *Contra*, Tomblin *v.* Callen, 69 Iowa, 229 (1886). The jury, in passing upon the defense to a note that it was given in a stock-

sible as evidence as to whether there was an intent to deliver the stock or merely to pay the gain or loss. The burden of proving that a stock transaction is a gambling contract is upon him who affirms it.[1]

§ 345. *Gambling stock contracts as affecting the relations between the principal and his broker.*—A broker is but an agent of his principal. As such he may hold the principal liable for commissions and for losses paid on stock transactions where those stock transactions are legitimate and legal. Where, however, the stock contracts are of a wager or gambling nature, a more difficult question arises, and the decisions are irreconcilable. In England, in 1878, Judge Lindley, in Thacker *v.* Hardy,[2] a carefully-considered case, held that, where the principal has been carrying on gambling transactions, he cannot escape or repudiate his liabilities to his broker in those transactions, even though the latter knew of the gambling character of the business. The principal is liable to his broker as though the transactions were free from such objections. This is the well-established rule in England.[3]

gambling operation, may consider all the acts and accounts and the actual dealings. Gaw *v.* Bennett, 153 Pa. St. 247 (1893). As to the competency of evidence herein, and that evidence of custom of settling by differences is incompetent, see Scofield *v.* Blackmarr, 4 Atl. Rep. 208 (Pa. 1886). Proof of intent to deliver may be by the conduct of the parties as well as the contract. Press *v.* Duncan, 100 Iowa, 355 (1896).

1 Dewey, Contracts for Future Delivery, p. 207, says: "All the cases except Barnard *v.* Backhaus, 52 Wis. 593 (1881); Cobb *v.* Prell, 15 Fed. Rep. 774 (1883); Beveridge *v.* Hewitt, 8 Ill. App. 467 (1881); Stebbins *v.* Leowolf, 57 Mass. 137 (1849), and possibly Chandler's Case, *Ex parte* Young, 6 Biss. 53 (1874); s. c., 30 Fed. Cas. 828, hold that these contracts are presuming to be *bona fide;* and in order to show them to have been used as covers for wagers, an agreement to that effect must appear to have been made. According to these excepted cases, option contracts are presumed to be invalid, and proof must be made that they are *bona fide.*" See also Dewey, Contracts for Future Delivery, p. 46. In Illinois the burden of proof is on the defendant to prove a gambling intent on the part of both parties. In Wisconsin a contrary rule seems to prevail. See Ward *v.* Vosburgh, 31 Fed. Rep. 12 (1887).

2 L. R. 4 Q. B. D. 685.

3 *Re* Hart, 5 W. N. 95 (1870); Cooper *v.* Neil, 13 W. N. 128 (1878); *Ex parte* Rogers, L. R. 15 Ch. D. 207 (1880); Faikney *v.* Reynous, 4 Burr. 2069 (1767); Jessopp *v.* Lutwyche, 10 Exch. 614 (1854); Knight *v.* Cambers, 15 C. B. 562 (1855); Knight *v.* Fitch, 15 C. B. 566 (1855); Lyne *v.* Siesfeld, 1 H. & N. 278 (1856); Rosewarne *v.* Billing, 15 C. B. (N. S.) 316 (1863). In Pidgeon *v.* Burslem, 3 Exch. 465 (1849), the court says expressly: "The case differs altogether from those in which the contract is forbidden, as under the acts against stock-jobbing, or where the purpose for which the money was paid was illegal." *Contra*, Byers *v.* Beattie, Ir. Rep. 2 C. L. 220 (1867). A contract is not a gaming contract, and a broker may recover the balance due him on account, although the customer, a person of small means, instructed the broker to make purchases and sales

§ 346. In this country an opposite rule prevails for the most part. The great weight of authority holds that, where the broker has knowledge of the purpose to gamble in stocks and aids in carrying out that purpose, he cannot recover for services rendered or losses incurred and paid by himself.[1] A few cases hold to the same effect as the English rule.[2] Many cases which seem to favor the English rule do so only by dicta, inasmuch as the transactions involved in such cases are held not to be wager contracts.[3] In Pennsylvania and New Jersey the American rule is rigidly enforced. The broker is held to be dealing as a principal, not as an agent, in all stock-

and advanced only a small part of the purchase-money, the balance being obtained by the broker by pledge of the security, and the customer never asking for delivery of the stock, and, as the broker well knew, did not purchase as an investment, but as a speculation, to sell again when the price went up, and the broker was paid by commissions on the transactions. Forget *v.* Ostigny, [1895] A. C. 318. A customer may recover from his broker margins which he deposited, the transactions having resulted in a profit to the customer. *Re* Cronmire, [1898] 2 Q. B. 383.

1 Irwin *v.* Williar, 110 U. S. 499, 510 (1884); Flagg *v.* Gilpin, 17 R. I. 10 (1890); McLean *v.* Stuve, 15 Mo. App. 317 (1884), per Thompson, J.; Ream *v.* Hamilton, 15 Mo. App. 577 (1884). *Cf.* Kent *v.* Miltenberger, 13 Mo. App. 503, 511 (1883). See also, as supporting above rule, Everingham *v.* Meighan, 55 Wis. 354 (1882); *Re* Green, 7 Biss. 338 (1877); s. c., 10 Fed. Cas. 1084; Bartlett *v.* Smith, 13 Fed. Rep. 263 (1882); Tenney *v.* Foote, 4 Ill. App. 594 (1879); affirmed, 95 Ill. 99 (1880), defeating a note given to the broker; Colderwood *v.* McCrea, 11 Ill. App. 543 (1882); Webster *v.* Sturges, 7 Ill. App. 560 (1880); Barnard *v.* Backhaus, 52 Wis. 593 (1881), defeating notes; Beveridge *v.* Hewitt, 8 Ill. App. 467 (1881); Whitesides *v.* Hunt, 97 Ind. 191, 203 (1884); Melchert *v.* American U. Tel. Co., 11 Fed. Rep. 193 (1882); First Nat. Bank *v.* Oskaloosa Packing Co., 66 Iowa, 41 (1885), holding a note void; Stewart *v.* Schall, 65 Md. 289 (1886). Suit by broker against customer for moneys lost in purchase of grain for the customer. Mohr *v.* Miesen, 47 Minn. 228 (1891). Brokers are bound to know that banks have no power to purchase cotton futures on margins, and cannot recover commissions and losses on such transactions. The *ultra vires* contract was not executed, inasmuch as the corporation received no property. Jemison *v.* Citizens' Sav. Bank, 44 Hun, 412 (1887). A broker may recover commissions, etc., from his principal when the former knew nothing of the latter's intention to gamble. Lehman *v.* Feld, 37 Fed. Rep. 852 (1889); Edwards *v.* Hoeffinghoff, 38 Fed. Rep. 635 (1889); Boyd *v.* Hanson, 41 Fed. Rep. 174 (1890).

2 Brown *v.* Speyers, 20 Gratt. (Va.) 296 (1871); Wyman *v.* Fiske, 85 Mass. 238 (1861), on the ground that the note sued on was a voluntary payment to the broker; Warren *v.* Hewitt, 45 Ga. 501 (1872); Marshall *v.* Thruston, 3 Lea (Tenn.), 741 (1879), where also a note had been given; Jackson *v.* Foote, 12 Fed. Rep. 37 (1882), also a note case, the court saying that, as between the broker and his principal, the decision probably would be different. *Cf.* Tinsley's Case, cited in 10 Fed. Rep. 248.

3 Lehman *v.* Strassberger, 2 Woods, 554 (1875); s. c., 15 Fed. Cas. 254; Rumsey *v.* Berry, 65 Me. 570 (1876);

gambling transactions.[1] He cannot recover commissions or losses.[2] If his principal is an infant, the broker is liable to such infant for all sums received by way of margins.[3] If, however, the parties do not raise the question of the legality of the transaction, the court cannot.[4] In Ohio it is held that the broker may be made to account for profits, even though the transaction was a gambling one.[5] A note and mortgage given to the broker in settlement of a gambling transaction will not be interfered with.[6] The broker is not liable for a sale of the stock on failure of margin, without notice to the principal, where the business is gambling.[7] A partner in a partnership for the purpose of carrying on a gambling business on the market cannot have an accounting from his partner.[8] At common law a customer cannot recover margins and profits from a broker on gambling transactions.[9] A bucket-shop corporation can-

Sawyer *v.* Taggart, 14 Bush (Ky.), 727 (1879); Durrant *v.* Burt, 98 Mass. 161 (1867); Williams *v.* Carr, 80 N. C. 294 (1879).

1 Ruchizky *v.* De Haven, 97 Pa. St. 202 (1881).

2 North *v.* Phillips, 89 Pa. St. 250 (1879); Flagg *v.* Baldwin, 38 N. J. Eq. 219 (1884); Farcira *v.* Gabell, 89 Pa. St. 89 (1879), holding that notes given to the broker are void. A suit by a broker for balance of account fails where not a single delivery was made, and there clearly was no intention to deliver. Snider *v.* Harvey, 215 Pa. St. 538 (1906). The agent cannot recover commissions where he knew the transaction was gambling. Dows *v.* Glasfield, 4 N. D. 251 (1894).

3 Ruchizky *v.* De Haven, 97 Pa. St. 202 (1881). An infant gambling in stocks on a margin may recover from the brokers all that he deposited with them. Mordecai *v.* Pearl, 63 Hun, 553 (1892); aff'd, 136 N. Y. 625.

4 Gheen *v.* Johnson, 90 Pa. St. 38 (1879); Williams *v.* Carr, 80 N. C. 294 (1879). *Contra*, Minzesheimer *v.* Doolittle, 60 N. J. Eq. 394 (1900).

5 Norton *v.* Blinn, 39 Ohio St. 145 (1883). Where gambling stock transactions are closed and the account settled, and the balance due the customer is left on deposit with the broker, the latter must pay it over. Peters *v.* Grim, 149 Pa. St. 163 (1892). In winding up a solvent bucket-shop corporation a customer may prove a claim for the amount paid by him or a profit equal to the amount which he could have recovered in an action at law. Weiss *v.* Haight, etc. Co., 156 Fed. Rep. 877 (1907).

6 Clarke *v.* Foss, 7 Biss. 540 (1878); s. c., 5 Fed. Cas. 955. *Cf.* Tantum *v.* Arnold, 42 N. J. Eq. 60 (1886). At common law a mortgage and note given to a broker for commissions in buying and selling futures and for advances are legal. Where such note has been reduced to judgment in one state it will be enforced in another state. Peet *v.* Hatcher, 112 Ala. 514 (1896).

7 North *v.* Phillips, 89 Pa. St. 250 (1879).

8 Wright *v.* Cudahy, 168 Ill. 86 (1897).

9 Northrup *v.* Buffington, 171 Mass. 468 (1898). A principal cannot call his agent to account on a gambling contract. Rogers *v.* Marriott, 59 Neb. 759 (1900). Brokers receiving a draft of the president of a bank on the bank itself for margins may be compelled to refund the money to the bank. Lamson *v.* Beard, 94 Fed. Rep. 30 (1899). On this point see § 293,

not maintain a bill to compel a board of trade to furnish quotations to it.[1] A bucket-shop keeper may be required to restore trust funds which one of his customers has used in gambling in stocks.[2]

§§ 347, 348. *Gambling stock transactions as affecting notes, bonds, mortgages, etc., growing out thereof.*—The penalty of engaging in a stock-gambling operation is that, in case the transaction is declared by a court of justice to be illegal as a wager contract, the court declines to aid either party.[3] As a general rule, all liability on the part of either party is unenforceable. Money paid by the principal cannot be recovered back.[4] A customer who has made a gambling contract with a bucket-shop dealer cannot enjoin the latter from removing his money from the state.[5] Neither principal can collect the gains of the transaction, and neither is liable for a loss.[6] Notes given in settlement are void and not collectible,[7] even in the hands

supra. Money deposited with a broker to make gambling sales may be recovered back, it not having been used. Munns *v.* Donovan, etc. Co. 117 Iowa 516 (1902).

1 Central, etc. Exch. *v.* Board of Trade, 196 Ill. 396 (1902). See § 939.

2 Joslyn *v.* Downing, etc. Co., 150 Fed. Rep. 317 (1906). See § 452.

3 Rees *v.* Fernie, 13 W. R. 6 (1864), holding that the court will not aid one who has been tricked in gambling in stocks. The Chicago Board of Trade cannot obtain an injunction against the use of its quotations by a bucket-shop concern, where the evidence shows that the transactions of the Chicago Board of Trade were chiefly in futures, which were settled by the payment of differences in violation of law. Board of Trade *v.* O'Dell, etc. Co., 115 Fed. Rep. 574 (1902).

4 Gregory *v.* Wendell, 39 Mich., 337 (1878); s. c., 40 Mich. 432 (1879); Wyman *v.* Fiske, 85 Mass. 238 (1861). *Cf.* Norton *v.* Blinn, 39 Ohio St. 145 (1883). In Tennessee, by statute, a contrary rule prevails. McGrew *v.* City Produce Exchange, 85 Tenn. 572 (1887); Dunn *v.* Bell, 85 Tenn. 581 (1887), holding also that where there are several partners or co-conspirators who take the principal's money they are liable therefor jointly and severally. Under the New York statute money paid by a customer to a broker on gambling speculations may be recovered back. Peck *v.* Doran, etc. Co., 57 Hun, 343 (1890). Where a gambling contract is illegal by statute, a customer who gave money to the broker to gamble with, according to orders, cannot recover it back. White *v.* Barber, 123 U. S. 392 (1887); Sowles *v.* Welden Nat. Bank, 61 Vt. 375 (1889). A certificate of deposit given to a broker in the course of gambling transactions may be recovered back. Dempsey *v.* Harm, 12 Atl. Rep. 27 (Pa. 1887). The customer may recover back money deposited in the hands of a third person for margins on a gambling contract. Dauler *v.* Hartley, 178 Pa. St. 23 (1896).

5 Baxter *v.* Deneen, 98 Md. 181 (1903).

6 Grizewood *v.* Blane, 11 C. B. 526 (1851); Webster *v.* Sturges, 7 Ill. App. 560 (1880); *Ex parte* Young, 6 Biss. 53 (1874); s. c., 30 Fed. Cas. 828; Thompson *v.* Cummings, 68 Ga. 124 (1881); Yerkes *v.* Salomon, 11 Hun, 471 (1877). A partner, however, may have contribution for losses paid at the express request of the other member of the firm. Petrie *v.* Hannay, 3 T. R. 418 (1789).

7 Barnard *v.* Backhaus, 52 Wis. 593

of *bona fide* purchasers;[1] but the better rule is that such *bona fide* holders are protected.[2] Bonds and mortgages given in payment are void.[3]

(1881); Farcira *v.* Gabell, 89 Pa. St. 89 (1879); Lowry *v.* Dillman, 59 Wis. 197 (1884); Davis *v.* Davis, 119 Ind. 511 (1889); Justh *v.* Holliday, 2 Mackey, 346 (1883); Cunningham *v.* Augusta Nat. Bank, 71 Ga. 400 (1883); Tenney *v.* Foote, 4 Ill. App. 594 (1879); affirmed, 95 Ill. 99. *Cf.* Wyman *v.* Fiske, 85 Mass. 238 (1861). A person loaning money and taking notes therefor cannot be defeated in a suit on the notes by evidence that he knew the loan was to be used in gambling operations. Defendant must prove, also, that plaintiff intended that the money should be so used. Waugh *v.* Beck, 114 Pa. St. 422 (1886). Checks, notes, etc., in gambling contracts are void. Kahn *v.* Walton, 46 Ohio St. 195 (1889); Embrey *v.* Jemison, 131 U. S. 336 (1889). Sales and purchases in Ohio on margins are gambling and void, and a note in settlement of such transactions is void. Morris *v.* Norton, 75 Fed. Rep. 912 (1896). Notes given by the customer to the broker on dealings in stock, merely margins being paid, are illegal and not enforceable. Mechanics', etc. Bank *v.* Duncan, 36 S. W. Rep. 887 (Tenn. 1896). A note given by a broker for profits in gambling in grain is not enforceable. Nave *v.* Wilson, 12 Ind. App. 38 (1894). If delivery was intended and made, a note by one of the principals to the other is good, although the warehouse receipts were left with the broker to secure advances. Fisher *v.* Fisher, 8 Ind. App. 665 (1894).

1 Barnard *v.* Backhaus, 52 Wis. 593 (1881); Steers *v.* Lashley, 6 T. R. 61 (1794); Tenney *v.* Foote, 4 Ill. App. 594 (1879); aff'd, 95 Ill. 99; Cunningham *v.* Augusta Nat. Bank, 71 Ga. 400 (1883); Lowry *v.* Dillman, 59 Wis. 197 (1884); Root *v.* Merriam, 27 Fed. Rep. 909 (1886).

2 A *bona fide* holder of a note given in stock-gambling transactions can enforce the same in Pennsylvania. Northern Nat. Bank *v.* Arnold, 187 Pa. St. 356 (1898); Crawford *v.* Spencer, 92 Mo. 498 (1887); Third Nat. Bank *v.* Harrison, 10 Fed. Rep. 243 (1882); Lilley *v.* Rankin, 55 L. T. Rep. 814 (1886). An accommodation indorser to the note may set up the defense of illegality. Justh *v.* Holliday, 2 Mackey, 346 (1883). A note given to a bank is valid, though the proceeds were to pay a stock-gambling debt and the bank knew that fact. Marshall *v.* Thruston, 3 Lea (Tenn.) 741 (1879). *Cf.* Cannan *v.* Bryce, 3 B. & A. 179 (1819).

3 Amory *v.* Meryweather, 2 B. & C. 573 (1824); Flagg *v.* Baldwin, 38 N. J. Eq. 219 (1884); Griffiths *v.* Sears, 112 Pa. St. 523 (1886); Barnard *v.* Backhaus, 52 Wis. 593 (1881). A judgment entered by confession on a bond given for a gambling debt may be set aside. Everitt *v.* Knapp, 6 Johns. 331 (1810); Beveridge *v.* Hewitt, 8 Ill. App. 467 (1881). A court of equity will enjoin the transfer of a note and will decree the cancellation of a mortgage given by a married woman in payment of her husband's stock-gambling debts. Tantum *v.* Arnold, 42 N. J. Eq. 60 (1886). But will not where given by the party himself to his brokers. Clarke *v.* Foss, 7 Biss. 540 (1878); s. c., 5 Fed. Cas. 955. A mortgage to a broker to pay losses on gambling speculations is void and not enforceable. Walters *v.* Comer, 79 Ga. 796 (1887). But see Crawford *v.* Spencer, 92 Mo. 498 (1887). Where a citizen of Alabama gives to a New York broker a deed of land in Alabama in settlement of futures, its validity as to the futures depends on the law of New York. Hubbard *v.* Sayre, 105 Ala. 440 (1895).

Due-bills,[1] acceptances,[2] and guarantees[3] of notes are not valid or enforceable. If a part of the consideration is void the whole contract and all securities given thereunder are void.[4] In Illinois, by statute, a customer who deposits securities with a broker on a gambling stock contract may recover them back, even though he has not paid losses incurred by the transaction.[5] In New Jersey it is held that purchases and sales of cotton for future delivery, the arrangement being to pay differences on the rise and fall of prices, are illegal, and even though a judgment is obtained thereon in New York state and a judgment on that judgment obtained in New Jersey, yet a court of equity will not set aside a deed of land as being in fraud of such judgment, even though the gambling nature of the transaction is not pleaded,[6] but a later case is somewhat to the contrary.[7] A board of trade has a property interest in its quotations, and may enjoin persons obtaining and using them without its permission, even though transactions of the board of trade are gambling.[8]

C. FRAUD AS AFFECTING A SALE OF STOCK.

§ 349. *Extent of subject treated herein.*—In a previous chapter of this treatise the effect of fraud and fraudulent representations on

1 Rudolf *v.* Winters, 7 Neb. 125 (1878). If a broker proves that he intended to purchase the stock and was ready to deliver it, a due-bill given by the customer to him is valid. MacDonald *v.* Gessler, 208 Pa. St. 177 (1904).

2 Steers *v.* Lashley, 6 T. R. 61 (1794). Rawlings *v.* Hall, 1 Car. & P. 11 (1823), holds that the broker on the witness stand need not admit that the consideration was a gambling debt, since it would subject him to a common-law criminal prosecution.

3 Tenney *v.* Foote, 95 Ill. 99 (1880).

4 Tenney *v.* Foote, 95 Ill. 99 (1880). See also Fareira *v.* Gabell, 89 Pa. St. 89 (1879). But where, upon the close of a successful "corner," which is illegal by statute, one of the parties leaves his share of the profits with the other party to invest, the latter must account for it when called upon so to do. Where, upon the close of an unsuccessful "corner," the parties losing settle among themselves, but one of them fraudulently overstates the losses, he is liable to account for the amount fraudulently allowed him. Wells *v.* McGeoch, 71 Wis. 196 (1888).

5 Jamieson *v.* Wallace, 167 Ill. 388 (1897).

6 Minzesheimer *v.* Doolittle, 60 N. J. Eq. 394 (1900).

7 After the broker has obtained judgment against his customer and then brings suit to set aside an illegal transfer of property by the customer it is no defense that the original claim was a gambling one. Moreover, purchases and sales by the broker for the customer are legal unless it is proven that it was agreed or understood that only differences were to be paid. Thompson *v.* Williamson, 67 N. J. Eq. 212 (1904).

8 Board of Trade *v.* Christie, etc. Co., 198 U. S. 236 (1905), rev'g Christie, etc. Co., *v.* Board of Trade, 125 Fed. Rep. 161 (1903). See § 939.

a subscription for stock was fully treated. There is little difference in the principles of law governing fraud as affecting sales of stock from fraud as affecting subscriptions for stock. Most of the cases assume that the same principles apply to both kinds of transactions. Consequently, the questions of what constitutes fraud herein; what remedies the defrauded person has; and the general principles governing this branch of the law, will be fully understood only by a comparison of these two parts of this work.[1]

§ 350. *What has been held to constitute a fraud herein.*—It is difficult to lay down rules as to what does and what does not amount to fraudulent misrepresentations. The courts, consequently, let each case stand upon its own facts. Certain states of fact have, however, been passed upon as constituting fraud, and as such they aid in coming to a conclusion on facts in somewhat similar cases. Thus, it has been held to be a fraudulent representation to make false statements as to the location, explorations, and developed state of a mine;[2] or that a patent owned by the company was of great value, and that certain other persons were owners of stock;[3] that the company was prosperous, when in fact large overissues of stock had been made;[4] or that the corporate property was free from incum-

1 See ch. IX, *supra*. In the important case of Western Bank *v.* Addie, L. R. 1, Sc. App. (H. L.) 145 (1867), part of the shares had been subscribed for and part purchased. The courts applied the same principles to both.

2 Morgan *v.* Skiddy, 62 N. Y. 319 (1875). In Crocker *v.* Manley, 164 Ill. 282 (1896), the court held that it was not fraudulent to represent that the mines owned by the company were rich and would pay more than twenty per cent. dividends, and that the ore on hand was of a certain value, where it is shown that the vendee made a personal examination and was satisfied, and no actual fraud is shown. Rescission was refused.

3 Miller *v.* Barber, 66 N. Y. 558 (1876). A person induced to buy stock on representations that the company owns a valuable patent when in fact it does not own it, can recover back his money, and it is no defence that the stock was worth the price paid. A suit to recover money paid may be treated as a suit for rescission under the California code. Spreckels *v.* Gorrill, 92 Pac. Rep. 1011 (Cal. 1907).

4 Cazeaux *v.* Mali, 25 Barb. 578 (1857). In a suit for false representations as to the condition of a company a subsequent mortgage foreclosure may be proved if the condition of the company has not changed between the time of the representations and such foreclosure. Walker *v.* Russel, 186 Mass. 69 (1904). Plaintiff need not allege that he relied solely on the misrepresentations. A false statement that the company is perfectly solvent is a material misrepresentation and the fact that two or three years thereafter all the corporate assets have disappeared and it went into liquidation, is proof of such misrepresentation. It may be shown that at the time of the misrepresentation the company owed its officers and employees a large sum of money. It may be shown that the corporate books and statements overvalued the assets. The treasurer, secretary and

brance;[1] or that the corporation would guarantee certain dividends;[2] or any false statement or general fraudulent act, or fraudulent concealment of a material fact, whereby the purchaser is induced to complete the sale of stock.[3] It may or may not be a fraudulent repre-

bookkeeper is a competent witness to prove that at a certain time the company was not solvent. In an action against the president for damages for false representations it need not be proved that he had actual knowledge of the falsity of the statements in regard to corporate affairs, inasmuch as he was bound to know thereof. Norvell *v.* Pye, 95 S. W. Rep. 666 (Tex. 1906). False representations as to solvency and financial condition of the corporation are material, and the purchaser may testify that he would not have purchased the stock except for the representations. Pridham *v.* Weddington, 74 Tex. 354 (1889). It is fraud to state falsely that the company is prosperous, that there was no stock for sale, and that defendant was selling stock of others and not his own. Miller *v.* Curtiss, 13 N. Y. Supp. 604 (1891).

1 It is fraudulent to represent that the corporation is free from debts where it appears that it owns land subject to a very large mortgage debt. Tinker *v* Kier, 195 Mo. 183 (1906). Southwestern R. R. *v.* Papot, 67 Ga. 675, 693 (1881), the court saying: "It is, we think, sufficient to show that the misrepresentation or suppression of fact was of such a nature as to prove that the property purchased was of no value to the purchaser for the purposes for which it was bought, or that it would be reasonable to suppose that the purchaser would not have contracted for it had he had knowledge of the existence of this defect." It is fraudulent to make misstatements to the effect that the corporation is out of debt and is making certain profits. It is no defense that the defendant might have ascertained the facts from the corporation. Redding *v.* Wright, 49 Minn. 322 (1892). A misrepresentation as to the amount of corporate indebtedness is material. McElwee *v.* Chandler, 198 Pa. St. 575 (1901). A jury decided that a false representation, on the part of corporate officers, that the company was without debt, was a fraud on the vendee, and held its perpetrators liable in damages. Faville *v.* Shehan, 68 Iowa, 241 (1885). Where a corporation issues bonds having the words printed on their face "first-mortgage bonds," when, as a matter of fact, there was an underlying mortgage which the party to whom the bonds were sold agreed to pay, but did not pay, except in part, the officers and directors who took part in the issue of the bonds are liable to an innocent purchaser who relied on the statement contained on the face of the bonds. His measure of damages is the difference between the value of the bonds as first-mortgage bonds and second-mortgage bonds. Bank *v.* Byers, 139 Mo. 627 (1897). A purchaser of bonds and stock may rescind on the ground that the vendor falsely represented that there was but one mortgage on the property. It is immaterial that the vendor paid off the other mortgage after suit was brought. Stevenson *v.* Marble, 84 Fed. Rep. 23 (1897). A purchaser of a majority of the stock of the corporation from a stockholder may rescind where a misrepresentation was made that the corporation had practically no debts. Merritt *v.* Ehrman, 116 Ala. 278 (1897). See also 124 N. Y. App. Div. 758.

2 Gerhard *v.* Bates, 2 El. & Bl. 476 (1853). Representations that dividends would soon be paid are not fraudulent, but statements as to present condition and prospects may be for the jury. Warner *v.* Benjamin, 89 Wis. 290 (1895).

3 See further illustrations in ch.

sentation to state that the stock is worth a certain sum, according to the circumstances of the case.[1] Statements of the seller, as to the

IX, *supra*. A vendor of stock is not obliged to mention the fact that the corporation owes debts. Furber *v.* Fogler, 97 Me. 585 (1903). Even though the president of a company in inducing the stockholders to sell their stock to another company conceals the fact that he is largely interested in the latter company, this does not constitute fraud. Wann *v.* Scullin, 109 S. W. Rep. 688 (Mo. 1908). Declaring a dividend in good faith and sound discretion is not fraud by reason of its turning out to have been ill-advised. Burnes *v.* Pennell, 2 H. L. Cas. 497 (1849). A representation that the stock "is good property or investment and is about to make a dividend" is a false representation when untrue, and where the person taking the stock as trustee from a preceding trustee objected to receiving it on account of his doubt or ignorance as to its character. Lawton *v.* Kittredge, 30 N. H. 500 (1855). Representations that a corporate property is valuable and one of the best properties in Colorado, when in fact the company was a bubble company, raises a question of fraud for the jury to pass upon. Bradley *v.* Poole, 98 Mass. 169 (1867). The payment of an excessive and speculative price for stock is not fraud and is no ground for setting the sale aside. Moffat *v.* Winslow, 7 Paige Ch. 124 (1838). The vendor warrants the title to the stock, but not its quality or value. Allen *v.* Pegram, 16 Iowa, 163 (1864). A sale of stock in a company formed to purchase a railroad cannot be set aside merely because its title to the railroad fails. State *v.* North Louisiana, etc. R. R., 34 La. Ann. 947 (1882). In Wright's Appeal, 99 Pa. St. 425 (1882), it was held that the corporation was not liable for the conversion of stock by its president, who obtained the certificates indorsed in blank from the owner on false representations that the corporation wished to use them. Newlands *v.* National, etc. Assoc., 53 L. T. Rep. 242 (1885); March *v.* Eastern R. R., 43 N. H. 515 (1862); s. c., 40 N. H. 548, holding that the fact that the earnings were not distributed by dividends until after a sale of stock does not constitute fraud. A confidential agent who uses his position to obtain stock of which the principal has been deprived wrongfully must turn it over to the principal. Hardenbergh *v.* Bacon, 33 Cal. 356 (1867). Statements that a large part of the capital stock had been taken by the parties themselves, and that the parties themselves would continue the management of the concern, and concealment of the fact that a large quantity of the stock was to be issued for the good-will of the business, and statements leading to the conclusion that all subscribers for stock stood on an equal footing, constitute material misrepresentations, and will sustain a rescission of the subscription if untrue. Such statements and concealments made to agents or brokers who are selling stock are the same as though made to the subscribers for the stock. Walker *v.* Anglo-Am. etc. Trust Co., 72 Hun, 334, 341 (1893).

[1] That it is not, see Union Nat. Bank *v.* Hunt, 76 Mo. 439 (1882). A false representation that the stock sold is worth eighty cents on the dollar—it being worth but forty cents—will not sustain an action for deceit. Ellis *v.* Andrews, 56 N. Y. 83 (1874). A representation as to the value of stock is material where the vendor was a director, and evidence may be introduced to show that the stock was issued for property at an overvaluation and that some of the stock was issued without being paid for. Shelton *v.* Healy, 74 Conn. 265 (1901). Where the vendor misstates the divi-

value of the mining stock which he is selling and the prospects, are not fraud unless it is proved that he knew or believed to the contrary.[1] A representation by the vendor of bonds that the bonds are good and will be paid is a matter of opinion merely.[2] False representations that the surplus is intact and the securities good for their face value, and that another party was trying to buy the stock, are material.[3]

It is a fraud on the vendee of stock to sell him as paid-up stock that which is not paid up, although issued as paid up, the vendor having participated in the issue.[4] It is fraud in the vendor to rep-

dends paid and represents that the stock is worth par, it may be shown that at the same time he sold similar stock to others at fifty-five cents on the dollar. Gilluly *v.* Hosford, 88 Pac. Rep. 1027 (Wash. 1907). It is fraudulent to represent that the stock is worth par when in fact it is worthless. If the vendor persuades the vendee to make no inquiries, the latter may recover, although he made none. The measure of damages is not the value of the land given for the stock, but the difference between the actual and the represented value of the stock. Nysewander *v.* Lowman, 124 Ind. 584 (1890). False representations may consist of statements that the stock is worth a certain price and is sold to plaintiff at a reduced price in order to obtain his services. Maxted *v.* Fowler, 94 Mich. 106 (1892). False statements as to the value of stock and the dividends it would pay and the purpose for which it was incorporated are sufficient to sustain rescission. Murray *v.* Tolman, 162 Ill. 417 (1896). Misrepresentations as to the value of the stock and the condition of the company are material. Blacknall *v.* Rowland, 116 N. C. 389 (1895). The statements by the vendor of what purports to be a certificate of bank stock, that the bank was organized and that the stock was worth par, and that the vendor knew this to be the case because he was one of the first stockholders, and that the stock was a good high dividend-paying stock, constitute a warranty, and the vendee may sue for damages if the facts are not as stated, the measure of damages being the difference between the value of the stock as represented and its actual value. Titus *v.* Poole, 73 Hun, 383 (1893); aff'd, 145 N. Y. 414 (1895). Where an heir sells stock at a nominal figure, it being considered worthless, and then learns that it has value and buys it back at a low figure on his statement that it had no value and that he wished to keep it on acount of its having been held by his father, an action for damages for deceit lies. Edelman *v.* Latshaw, 180 Pa. St. 419 (1897). *Cf.* s.c., 159 Pa. St. 644 (1894). See Lynch *v.* Murphy, 171 Mass. 307 (1898). See 126 N. Y. App. Div. 257.

1 Crosby *v.* Emerson, 142 Fed. Rep. 713 (1906). "'Puffing' mining claims or making glowing predictions as to how such claims will 'pan out' does not amount to such false representations as will authorize a court of chancery to set aside a sale of stock in a mining company when the parties are *compos mentis* and deal at arm's length." Burwash *v.* Ballou, 82 N. E. Rep. 355 (Ill. 1907).

2 Kimber *v.* Young, 137 Fed. Rep. 744 (1905).

3 Hawley *v.* Wicker, 117 N. Y. App. Div. 638 (1907).

4 Sturges *v.* Stetson, 1 Biss. 246 (1858); s. c., 23 Fed. Cas. 311, holding that the vendee is not liable on a note given in payment thereof; Fos-

resent that property is to be turned in by him to the corporation at a certain price and then to refuse to carry out the latter contract.[1] Where the vendor agrees to sell at a value to be ascertained by an examination of the corporate books and affairs, it is fraud in the vendee to cause false memoranda to be made by the employees of the corporation.[2] The vendee of stock may sue for damages for deceit, where the vendor fraudulently represented the dividends that had been paid on the stock.[3] A misrepresentation as to the amount of property held by the corporation is material.[4] Where a person owns a majority of the stock of the corporation and sells it, and agrees with the purchaser to obtain the stock held by others

dick *v.* Sturges, 1 Biss. 255 (1858); s. c., 9 Fed. Cas. 501, holding that the vendee may recover back money paid; Reeve *v.* Dennett, 145 Mass. 23 (1887), s. c., 141 Mass. 207, where the capital of $1,000,000 was issued for a worthless patent; holding also that the misrepresentations may invalidate also a second and subsequent purchase of stock, even though in the meantime the vendee has become a director in the corporation. A person who deeds land in exchange for stock which is represented to be full paid may have the sale rescinded where only $3 a share had been paid in on the stock. Coolidge *v.* Rhodes, 199 Ill. 24 (1902). The purchaser of stock may maintain a suit to recover back the price on the ground that the vendor sold to the company, for three million dollars par value of its stock, property worth not more than two hundred and fifty thousand dollars and made misrepresentations in regard to it and also misrepresented the capacity of the property. Stern *v.* Stern, 122 N. Y. App. Div. 821 (1907).

1 Seaman *v.* Low, 4 Bosw. 337 (1859).

2 Hager *v.* Thomson, 1 Black, 80 (1861). S. 126 N. Y. App. Div. 257.

3 Handy . Waldron, 18 R. I. 567 (1894). A claim by a purchaser of stock against the directors for falsely representing that the stock was earning dividends, when in fact the stock was sold to raise money to pay illegal dividends, is assignable. Keeler *v.* Dunham, 114 N. Y. App. Div. 94 (1906).

4 Boddy *v.* Henry, 113 Iowa, 462 (1901). A representation by the vendor of a bond that it was secured by a mortgage on real estate worth half a million, when, in fact, the corporation owned no real estate, is sufficient to support an action for false representations, even though the vendor referred to other people as authority for the statement. Whiting *v.* Price, 172 Mass. 240 (1898). A statement to a mercantile agency as follows: "Capital stock paid in, $500,000," is false as to a creditor relying on such a statement where a large part was paid in by supposed profits, consisting of second mortgages which turned out to be worthless. Bradley *v.* Seaboard Nat. Bank, 167 N. Y. 427 (1901). If the vendor falsely represents that the accounts receivable are equal to the debts, it is no defense that the stock was worth all that was paid for it. Drake *v.* Holbrook, 78 S. W. Rep. 158 (Ky. 1904). In the case of Burnham *v.* Lutz, 8 Kan. App. 361 (1898), where a mercantile corporation had been organized and twenty-six shares of stock only were issued to supply a board of directors, but not paid for, the court held that a vendor of goods to the corporation might show that such an organization of the corporation was fraudulent, and hence that the parties interested were liable as partners.

at as low a figure as possible, and misstates to such persons the price which he obtained for his own stock, he is liable in an action for deceit to parties who sell their stock relying on such statements.[1] In a suit for damages for misrepresentations inducing the purchase of bonds, the fact that the interest has been paid on the bonds does not prevent the recovery of damages, inasmuch as the bonds may not be marketable or adequately secured.[2] It is fraud, in the sale of bonds, to represent falsely that they had been pledged to a bank for a certain price, and that they were a good and safe investment, and a broker as well as the principal may be held liable.[3] It is not fraud, however, for a director or other corporate officer to buy or sell stock at a profit, due to his official knowledge of the condition of the corporation;[4] not to obtain the stock by a threat of a call.[5] The fact that a check given in payment for stock is not honored, although the money is in bank, is not fraud where payment was refused because of other frauds of the vendor;[6] nor is it fraud to issue certificates before anything has been paid thereon, there being no participation by the vendor.[7] It is fraud,

1 Weaver *v.* Cone, 174 Pa. St. 104 (1896). Where the president induces a stockholder to give up his stock on repayment of the amount paid thereon, on the representation that another party will take all the stock and complete the enterprise, and the fact is that the president himself gets some of the stock so surrendered, a stockholder may have the agreement canceled. Simrall *v.* Williamson, 35 S. W. Rep. 632 (Ky. 1896).

2 Currier *v.* Poor, 155 N. Y. 344 (1898).

3 Adams *v.* Collins, 82 N. E. Rep. 498 (Mass. 1907).

4 Tippecanoe County *v.* Reynolds, 44 Ind. 509 (1873). Where one of the partners in the building of railroads, and in owning stocks, bonds, etc., dies, and his executor, after an examination of all the assets by means of experts, etc., makes a settlement with the other partner, such settlement is binding although the other partner did not impart all the knowledge or information he might have given. The subsequent rise in value of some of the securities is immaterial. Colton *v.* Stanford, 82 Cal. 351 (1890). The purchaser of stock from the secretary of the company cannot rescind on the ground of fraud, the secretary having given at the time of the sale all the information which he had concerning the company. No confidential or fiduciary relation exists. Krumbhaar *v.* Griffiths, 151 Pa. St. 223 (1892). Representations made by the manager of the company in purchasing the stock of a stockholder do not entitle the latter to a rescission on the ground of fraud, where there were no personal relations between them and the vendor did not rely upon any statements made, but on his own judgment, and received a price nearly equal to the actual value of the stock. Sullivan *v.* Pierce, 125 Fed. Rep. 104 (1903). See § 320, and 126 N. Y. App. Div. 257.

5 Grant *v.* Attrill, 11 Fed. Rep. 469 (1882). As to other cases of fraud by the vendee, see Johnson *v.* Kirby, 65 Cal. 482 (1884); Hempfling *v.* Burr, 59 Mich. 294 (1886).

6 Comins *v.* Coe, 117 Mass. 45 (1875).

7 Woodruff *v.* McDonald, 33 Ark. 97 (1878).

however, to represent the company as having a full-paid capital stock when in fact the stock was wholly issued in payment of a worthless mine. The person making such representation is liable to the vendee.[1] It is fraudulent for a vendor to represent that he is selling the stock of others, when in fact he is selling his own stock.[2] Statements that the stock sold is treasury stock, and that others paid the same price to the treasury, are material.[3] A representation as to the cost of the stock, with an agreement to sell at cost, is different from an agreement to sell at a fixed figure which is represented to be cost. A misrepresentation as to the cost of the stock to the vendor is not actionable.[4] Although a contractor, taking stock and bonds in payment for work, subcontracts the work for the stock and then forecloses the mortgage and buys in the property, the subcontractor cannot hold him liable for the stock.[5] The fact that the stock is worthless or that the only property that the company owns consists of worthless patents, being infringements on other patents, is no defense to notes given for stock, there being no warranty or fraud. The value is immaterial.[6] A vendor of stock is not bound to

1 Cross *v.* Sackett, 2 Bosw. 617 (1858). See also §§ 40, 48, *supra;* Colt *v.* Woolaston, 2 P. Wms. 154 (1723). When a promoter misrepresents to a subscriber the price paid by the promoter for property conveyed by him to the company, the subscriber may sue him for damages. Teachout *v.* Van Hoesen, 76 Iowa, 113 (1888). A sale or pledge of stock stamped "non-assessable," when in fact it was not legally paid up, renders liable for false representations the president and secretary who made such sale or pledge and who knew that it was not paid-up stock. Windram *v.* French, 151 Mass. 547 (1890). A suit by the purchaser of stock for damages for fraud, in that the stock had been fraudulently paid up by property conveyed to the corporation at an overvaluation, is barred by the statute of limitations applicable to frauds. Smith *v.* Martin, 135 Cal. 247 (1901). A statement filed with the state commissioner as required by statute, in regard to the amount of the paid-up stock, is not such a representation as will sustain an action for damages for fraudulent representations inducing a person to take the notes of the company. Hunnewell *v.* Duxbury, 154 Mass. 286 (1901). But see Heard *v.* Pictorial Press, 182 Mass. 530 (1903).

2 Mayo *v.* Knowlton, 134 N. Y. 250 (1892); Maturin *v.* Tredinnick, 2 New Rep. 514 (1863). Where a person, upon the statement of the president that the company has no stock for sale, but will get some, authorizes the president to buy for him, and the president turns out stock which the company already has, the contract is voidable by such vendee. McDoel *v.* Ohio, etc. Co., 36 S. W. Rep. 175 (Ky. 1896).

3 Caswell *v.* Hunton, 87 Me. 277 (1895).

4 Gassett *v.* Glazier, 165 Mass. 473 (1896).

5 McLane *v.* King, 144 U. S. 260 (1892). A contractor taking payment in stock cannot complain that the property was foreclosed under a mortgage which he assented to. Kelley *v.* Collier, 11 Tex. Civ. App. 353 (1895).

6 Watts *v.* Stevenson, 165 Mass. 518 (1896). Where a note is given for entirely worthless stock, the defense

tell the vendee the company is insolvent, even though the former knew that fact at that time;[1] nor is the vendee bound to tell what he knows.[2] A misstatement as to what the corporation received for the stock issued by it is material.[3] A statement that the vendor is selling at the same price to others is fraudulent if such is not the case.[4] Where several subscribers refused to take their stock, and finally, to induce them to do so, a party agrees secretly with one of them to purchase his holdings, such an agreement may be en-

of total failure of consideration may be set up against the note, even though no offer to return stock has been made. Taft *v.* Myerscough, 197 Ill. 600 (1902).

1 Rothmiller *v.* Stein, 143 N. Y. 581 (1894); Jones *v.* Garlington, 44 S. C. 533 (1895). See also § 335, *supra*. A vendor of stock may collect the price although the stock was worthless and known so to be by the vendor. Hunting *v.* Downer, 151 Mass. 275 (1890). Where worthless stock is sold by an agent on false representations, the principal may be held liable for deceit and the stock need not be returned. Campbell *v.* Park, 128 Iowa 181 (1904). A person who sells worthless stock to a married woman who is represented by her husband, is bound to know that the husband misrepresented the matter to his wife or that she was incompetent in a business way to protect herself, and hence cannot enforce a note given in payment therefor. Ditto *v.* Slaughter, 92 S. W. Rep. 2 (Ky. 1906). A contract is binding, the consideration of which is the issue of stock which is valuable at the time, even though it subsequently declines in value. Pittsburg, etc. Co. *v.* Pennsylvania, etc. Co., 208 Pa. St. 37 (1904). A person who is under contract to purchase stock cannot defeat that contract by the fact that the corporation was insolvent at the time the contract was entered into. Rudge *v.* Bowman, L. R. 3 Q. B. 689 (1868); Gordon *v.* Parker, 10 La. 56 (1836), where the question of whether fraud was involved was submitted to the jury. Crabb *v.* Miller, 19 W. R. 419 (1871), where, by reason of a winding up, a transfer on the corporate books was no longer possible; Kerchner *v.* Gettys, 18 S. C. 521 (1882), holding that a loss by the corporation of its property is no defense. Damages cannot be recovered for the breach of an executory contract to purchase stock, if at the time of making the contract the corporation had been dissolved and the purchaser was not aware of that fact. Kip *v.* Monroe, 29 Barb. 579 (1859). The fact that stock was worthless at the time of the sale thereof is no defense to an action for the purchase price, unless there was fraud or a specific warranty. Peck, etc. Co. *v.* Stratton, 95 Fed. Rep. 741 (1899). A person who pays for land by transferring worthless mining stock is not a *bona fide* purchaser. Sewell *v.* Nelson, 113 Ky. 171 (1902). The vendor is not liable in an action for deceit, even though the stock was worthless, it having a market value and he having no knowledge of its intrinsic value. Kirtley's Adm'x *v.* Shinkle, 69 S. W. Rep. 723 (Ky. 1902).

2 A sale of stock July 6th, "including all dividends due or to become due thereon," carries a stock dividend declared June 5th and payable to stockholders of record July 1st, and the sale is not fraudulent although the seller did not know of such stock-dividend and the buyer did know. Rose *v.* Barclay, 191 Pa. St. 594 (1899).

3 Hoxie *v.* Small, 86 Me. 23 (1893).

4 Kilgore *v.* Bruce, 166 Mass. 136 (1896).

forced.[1] A person who contracts to purchase stock may defend against an action for the price by setting up that the vendor falsely represented that the vendee was about to be deprived of the presidency of the company, and that thereby the vendee was induced to make the contract of purchase at an unconscionable price.[2]

There are various facts which constitute fraud herein, and various principles of law applicable to the remedy to be pursued. Such cases are arising constantly, and various decisions on this subject are given in the notes below.[3]

1 Traphagen *v.* Sagar, 63 Minn. 317 (1895).

2 Delano *v.* Rice, 23 N. Y. App. Div. 327 (1897).

3 Where a debtor turned over to his creditor, as trustee, the controlling stock of a corporation, for the latter to manage, and the latter afterwards, by threats of abandoning the enterprise, forced the debtor to sell him the stock outright, a court of equity will set aside such sale and hold the creditor liable as a trustee. Ryle *v.* Ryle, 41 N. J. Eq. 582 (1886). A failure of the vendor to state that the company is a joint-stock association and not a corporation is not fraud avoiding the sale of the stock. Curtiss *v.* Hurd, 30 Fed. Rep. 729 (1887). It is a question for the jury whether it was fraud in representing that the stock was paid up, when in fact the first payment only had been made, and the balance had been paid by dividends. Kryger *v.* Andrews, 65 Mich. 405 (1887). Fraud may be by directors in fraudulently making dividends. See ch. XXXII, *infra*. Where a person owning all the stock of a corporation sells it under circumstances which induce the purchaser to believe that the former has no claim against the corporation, he may be enjoined from enforcing any such claim. Given *v.* Times-Republican, etc. Co., 114 Fed. Rep. 92 (1902). Where, after an agreement to sell land for stock, the owner of the stock attends a corporate meeting and votes to sell all corporate property at sixty cents on the dollar, which is done, the purchaser of the stock may have the land returned. Harris *v.* Piatt, 64 Mich. 105 (1887). Cases of fraud on the part of the vendee sometimes occur, where the vendee is given a majority of the stock, and then uses his control of the corporation to defraud the vendor in the execution of his contract to pay for the stock. Hardenbergh *v.* Bacon, 33 Cal. 356 (1867); Johnson *v.* Kirby, 65 Cal. 482 (1884). Where a stockholder sells a controlling interest to a person who is to pay therefor by improving the corporate property, but who elects a board of directors and defrauds the vendor, the latter's remedy is a difficult one. Cates *v.* Sparkman, etc. Co., 73 Tex. 619 (1889). The vendor cannot rescind on the ground that the vendee said that he was buying for himself alone and such was not the case. Downs *v.* Self, 28 Tex. Civ. App. 356 (1902). The fraud or mistake must have been such that the agreement would not have been made in its absence, where a rescission of the contract is sought by decree. Means *v.* Rees, 26 Fed. Rep. 210, 216 (1886). Even though an inventor is persuaded to turn in his inventions to a corporation for stock on an oral assurance that plenty of money would be forthcoming to take the stock of the company and make the business successful, and even though the parties making such representations do not advance the money, but allow the company to become insolvent and buy in the assets, including the patents, yet the inventor cannot maintain an

Fraud in the sale of stock frequently arises in the organization of the company. The parties who cause the company to be organ-

action for fraud in failing to furnish money according to promise. Smith *v.* Parker, 148 Ind. 127 (1897). Where a promoter induces an owner of timber land to convey it to a corporation for stock, one-quarter to go to the owner and three-quarters to the promoter, for which the promoter pays nothing, the owner may cause the whole transaction to be set aside. Cranor Co. *v.* Miller, 147 Ala. 268 (1906). Where a corporation has issued stock for services which have never been performed it may maintain a bill in equity to cancel such stock. Hillside, etc. Ass'n *v.* Holmes, 97 Minn. 261 (1906). An older brother who buys for $70,000 stock from his younger brother, which is worth $95,000, the latter being a drunkard, may be compelled to rescind the transaction. Shevlin *v.* Shevlin, 96 Minn. 398 (1905). A purchaser of stock in a company which both the vendor and the vendee believe to be incorporated, and which has not been incorporated, may rescind, where the vendor stated that the company was incorporated, and it is no defense that the property of the company has since depreciated in value. In this case the attorney was instructed to procure a charter, but made no attempt to do so. Bolton *v.* Prather, 35 Tex. Civ. App. 295 (1904). In the case Donnelly *v.* Baltimore, etc. Co., 102 Md. 1 (1905) a suit by a purchaser of bonds against a trust company that has offered them for sale and made various representations, failed, the deceit not being clearly proven, and the representations having been practically correct. A fraud upon a vendee of stock may consist in the defendant saying to the former that the latter had investigated the stock enough to know that he wanted some of it. The fact that the vendee already owned some of the stock was not material. McDonald *v.* Smith, 139 Mich. 211 (1905); holding also that it may be shown that the vendor promised that the corporation would employ the vendee as secretary and treasurer at a specified salary, and that this promise was not carried out, such promise not being the main fraud complained of. A promise of employment is not fraud, even though not performed. Hubbard *v.* Long, 105 Mich. 442 (1894). Fraud may be by the agent's representations as to the cost of mining the coal, of transportation, and of the market price. Booth *v.* Smith, 117 Ill. 370 (1886). On a question of testimony by the defendant, see Reeve *v.* Dennett, 141 Mass. 207 (1886); s. c., 145 Mass. 23. It has been held that one who was induced by fraud to purchase stock in an insolvent corporation may bring suit to have his part of the corporate assets ascertained, to the exclusion of a debt due from the corporation to the person inducing him to purchase. Poole *v.* West Point, etc. Assoc., 30 Fed. Rep. 513 (1887). A lawyer who sells to his client mining stock at a dollar a share when the company is selling it at fifty cents a share, and does not tell the client that he is selling his own stock, may be compelled to rescind the sale, even though the client attended a stockholders' meeting after the suit was commenced. Landis *v.* Wintermute, 40 Wash. 673 (1905). The mere fact that a man purchases stock through his brother, as his agent, and allows the stock to stand in his brother's name and thereby gives him credit, is not fraud on the part of the former. Shields *v.* City Nat. Bank, 138 N. C. 185 (1905). A corporation itself cannot claim that a sale of stock was for its benefit, even though the vendor fraudulently misrepresented to the vendee that he was selling treasury

ized are called the "promoters" of it. As such they are disqualified from making a profit by selling property to the company at a

stock belonging to and for the corporation. Chilkat, etc. Co. *v.* Fos, 42 Wash. 201 (1906). False statements as to the character of the officers and the financial basis of the company and its ownership of land are material. Gurney *v.* Tenney, 81 N. E. Rep. 428 (Mass. 1908). If both the vendor and vendee of stock are ignorant that the charter has expired, this does not invalidate the sale. Brooks *v.* Camak, 60 S. E. Rep. 456 (Ga. 1908). A person making sales of stock by false representations may be indicted for obtaining money by false representations. Commonwealth *v.* Wood, 142 Mass. 459 (1886). The statute of frauds as to the answering to the debt, defaults, etc., of another person has no application to a sale of stock herein. The fact that the corporate property sold several years later for a small amount is immaterial and not admissible. French *v.* Fitch, 67 Mich. 492 (1887). A misstatement as to the reason why the vendee purchases is not material. Byrd *v.* Rautman, 85 Md. 414 (1897). Where an insolvent pledgor sells the pledge to the pledgee for the debt itself, $7,000, the transaction is legal, even though a jury find that the stock was worth $1,500 more. Wachovia L. & T. Co. *v.* Forbes, 120 N. C. 355 (1897). See § 479, *infra*. Where an agent to sell a mine induces his principals to place in his name all their stock, and he sells the property and accounts to them for part only of the price, and refuses to return the stock, they may sue him for an accounting without previously tendering back the amount they received or demanding the stock. Wooster *v.* Nevills, 73 Cal. 58 (1887).

False representations as to the corporate property, business, and prospects, and the use of a corporate prospectus which the vendee knows contains false statements, sustain rescission of a transfer of land for stock. A person purchasing the land with full knowledge of the fraud is not protected. The certificates may be filed with the clerk of the court, awaiting the retransfer of the land. Ormsby *v.* Budd, 72 Iowa, 80 (1887). The vendee of stock cannot rescind or collect damages on the ground that the corporation was not legally incorporated. If it is a *de facto* corporation the vendor is not liable. Harter *v.* Eltzroth, 111 Ind. 159 (1887). The vendee of stock for which he gave real estate may have a reconveyance of the real estate decreed, where the sale of stock was induced by fraudulent representations. Gray *v.* Robbins, 11 Atl. Rep. 860 (N. J. 1887). A managing director who buys stock on credit, and then aids in levying an attachment on the stock against the vendor, and conceals the same from the vendor, and buys in the stock at a low price, and then repudiates his debt to the vendor, is guilty of fraud. Young *v.* Fox, 37 Fed. Rep. 385 (1888). Where the president in selling stock makes false representations, the vendee is not bound to investigate them. He may defeat a note given in payment. Wannell *v.* Kem, 57 Mo. 478 (1874). A representation that a bond is an "A No. 1" bond is not a material representation. Deming *v.* Darling, 148 Mass. 504 (1889). See also instances in § 334, *supra*. The vendee fails in his suit for damages if he does not contradict the defendant's testimony that the plaintiff vendee knew all the facts at the time of the sale. Nelson *v.* Luling, 62 N. Y. 645 (1875), aff'g 36 N. Y. Super. Ct. 544.

A statement on April 10 that the last semi-annual dividend was seven per cent., and that the fiscal year ended on June 1, is a fraudulent suppression of the truth where but one dividend had been declared, and that

much larger price than they gave for the property. The promoters act in a fiduciary capacity. Hence, when they have made a profit

twenty-two months before the date of the statement. Tyler *v.* Savage, 143 U. S. 79 (1892). Where the contract of sale contains express warranties, parol representations as warranties are not admitted to prove false representations. Humphrey *v.* Merriam, 46 Minn. 413 (1891). The fact that statements as to the affairs of the company are not filed as required by statute does not amount to fraud in the sale of stock; nor do representations that the stock will pay twenty per cent. dividends amount to fraud. The question as to the validity of stock having once been litigated cannot be again raised in an action for deceit in the sale of the stock. The mere act of conspiracy is not sufficient to sustain the action unless damage is shown. Robertson *v.* Parks, 76 Md. 118 (1892). A representation in a transaction involving water-company stock, as to the amount of water that can be obtained, is material. A tender of the certificate is sufficient where there has been no transfer on the books. Hill *v.* Wilson, 88 Cal. 92 (1891). Expressions of opinion as to the future, although exaggerated, are not representations. Columbia Electric Co. *v.* Dixon, 46 Minn. 463 (1891). Notes given in the purchase of stock in a corporation whose sole business is to carry on an infringing telephone business are without consideration and void. Clemshire *v.* Boone County Bank, 53 Ark. 512 (1890). Under the New York statute it may be legal for an insurance company to transfer its business and liquidate its affairs by dissolution proceedings, in accordance with the statute, and hence a purchaser of the business may maintain a suit for false representations as to the condition of the company. L. D. Garrett Co. *v.* Morton, 65 N. Y. App. Div. 366 (1901).

Where stock is issued to several persons for a patent, and they return part of it to a trustee for the company to sell for working capital, and a subscriber to the company's stock gives his note to the company, and the company indorses the note to one of the first-named parties, who turns out his own stock to fill the subscription, the latter may recover on the note, and is not liable for false representations of one of his associates and an agent of the company. King *v.* Doane, 139 U. S. 166 (1891). A sale of stock will not be set aside on the ground of inadequacy of price unless so gross as to shock the conscience and give decisive evidence of fraud. Perry *v.* Pearson, 135 Ill. 218 (1890). It is not sufficient to prove that defendants managed the manufacturing business of the company, to sustain an action for fraud in stating that the company was doing a good business and making ten per cent., it appearing that the business was new, and defendants did not state that they knew of the financial condition. Hatch *v.* Spooner, 13 N. Y. Supp. 642 (1891); s. c., on second appeal, 1 N. Y. App. Div. 408. A statement that drill-holes in coal-fields showed certain results are material, and not matters of opinion. Martin *v.* Hill, 41 Minn. 337 (1889). Where a banker sells stock to a lawyer and informs the latter that the company, the owner of land in Mexico, had a right, though an alien to Mexico, to own land therein, as the banker had been informed by his attorney, a note of the vendee in payment of the stock cannot be defeated on the ground that such corporation could not legally hold the land. Daly *v.* Brennan, 87 Wis. 36 (1894). It is not fraud on the vendee that his vendor took the stock from the corporation and paid for it with funds embezzled from another party. The corporation is not liable for the fraud

at the expense of the company, they may be compelled to turn over that profit to the company, or, if they have sold stock of the

of the president in selling his own stock. Dunn *v.* State Bank, 59 Minn. 221 (1894). A sale of bonds is not revocable even though bonds are invalid and the vendor innocently stated that they were valid. Ruohs *v.* Third Nat. Bank, 94 Tenn. 57 (1894). *Cf.* § 296, *supra*. False statements as to the condition of the company constitute fraud. Carruth *v.* Harris, 41 Neb. 789 (1894). In Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897), the court held that if a pledgee, being in control of the corporation, refuses to develop the property and to accept subsidies which are offered, and to accept profits under a contract which are possible, and to sell the property at a large price, all for the purpose of depreciating the pledged stock and thus obtain the stock himself, the pledgor may call the pledgee to account for the loss suffered from this conspiracy and wrong. The court held also that although the damage was directly to the corporation, yet that indirectly it was a damage to the pledgor, and that hence the pledgor could sue in his own behalf alone, and that the measure of damage is the difference between the market value at the time of suit and what it would have been if the conspiracy had not been set on foot. The court held, however, in the case before it, that the proofs did not sustain the allegations. The purchasers of stock which they suppose is the original stock, but which is really increased capital stock, cannot sustain a bill to cancel the original capital stock, even though the latter is held by the parties who issued the increased stock without amending the charter as required by statute. Byers *v.* Rollins, 13 Colo. 22 (1889). The fact that the company has not paid dividends does not prove that a representation that it was making ten per cent. profit was false. Hatch *v.* Spooner, 1 N. Y. App. Div. 408 (1896). In Kountze *v.* Kennedy, 147 N. Y. 124 (1895), an action was brought by a vendee of stock and bonds against an officer of the company, who upon the application of the vendee, before the purchase was made, made a false statement of the liabilities of the company. The suit, being at law, failed, because no fraudulent intent was proved. Where two parties exchange securities of various kinds, and in the contract to that effect place a value upon the same, there is no fraud arising from the fact that the value given to particular stocks is greater than their actual value, the transaction really being one of barter. Rockefeller *v.* Merritt, 76 Fed. Rep. 909 (1896). Where an agent or broker is employed to buy stock for a "pool," and agrees to do so for a compensation consisting of a part of the profits, he is liable in damages for fraud if he charges the "pool" more than the stock cost him. Manville *v.* Lawton, 19 N. Y. Supp. 587 (1892). The purchaser of bank stock may rely upon the statement of its president as to the bank's condition, and, the purchase having been from the bank itself, it may be rescinded. Merrill *v.* Florida, etc. Co., 60 Fed. Rep. 17 (1893). An action for fraud in inducing plaintiff to buy stock of defendant is defeated by proof that the stock was sold by the corporation itself. Hubbard *v.* Long, 105 Mich. 442 (1895). Misrepresentations as to the value of stock as investment and relating chiefly to the future will not sustain an action of deceit. Lynch *v.* Murphy, 171 Mass. 307 (1898). No fraud is proved by showing that the certificate of stock recited the capital stock as being $25,000 when it was claimed to be $50,000, nor by a general statement that the company's affairs were in good shape and that it was

company, the purchasers of the stock from them may rescind the purchase and hold them personally liable therefor.[1] The vendors of a mining property of a corporation are not liable for the misstatements of such corporation in selling its stock, in order to pay for the mine, even though they knew that a prospectus had been issued and they accepted payment from the corporation.[2] Where brokers and promoters issue bonds greatly in excess of the value of the corporate property and by fictitious sales give a high market quotation of the bonds and borrow money thereon, the lender may hold them liable in a suit for loss due to a conspiracy.[3]

It may be fraudulent for the directors to issue to themselves

making money, such statement being practically correct. Hoeft *v.* Koch, 119 Mich. 458 (1899); s. c., 123 Mich. 171. It is no defense to notes given in payment for stock that the agent of the vendor stated that he would not sell the notes and that they could be paid out of future dividends. State Bank *v.* Gates, 114 Iowa, 323 (1901). A stockholder cannot prevent other stockholders from selling their stock on the ground that the purchaser may manage the company to the detriment of minority stockholders, and the fact that the plaintiff's stock was on deposit with the trust company and that he cannot get the stock and thus accept the order to purchase his stock also is no ground for an injunction. Ingraham *v.* National Salt Co., 72 N. Y. App. Div. 582 (1902); appeal dismissed, 172 N. Y. 642. A purchaser of stock who makes a partial payment and gives back the stock as collateral security cannot abandon the contract and claim such part of the stock as the payment already made would pay for, on the ground that the seller has again obtained control of the corporation and is guilty of a breach of trust. The fact that the seller as pledgee has sold the stock and bought it in himself is immaterial, inasmuch as such a sale is illegal. Reid *v.* Caldwell, 110 Ga. 481 (1900); 114 Ga. 676.

purpose of creating a corporation to take it over from him and to pay him therefor an excessive price in cash and stock, netting a large profit to him, the stock being offered to the public, and he causes the incorporation to be made and directors to be named, who are his dummies, he is a promoter and can be held liable by such corporation for the profit he has made, unless he fully disclosed in a prospectus the fact that he had formed the corporation and that he had made such profit. Especially is this the rule where the prospectus gave a false impression. He occupies a fiduciary relation towards the purchasers of the stock. It is immaterial that the directors approved of the transaction with full knowledge. Nondisclosure in such a case is a misfeasance in the nature of a breach of trust. *Re* Leeds, etc. Co., [1902] 2 Ch. 809. In the case Home, etc. Co. *v.* Barber, 67 Neb. 644 (1903), where the purchaser of stock sued to hold former stockholders liable for corporate assets appropriated by them, the court found that such use of assets had been taken into consideration in fixing the price at which the stock had been sold, and hence refused to hold the parties liable.

1 See § 651, *infra*. Thus where a person purchases property for the sole

2 Wiser *v.* Lawler, 189 U. S. 260 (1903).

3 McElroy *v.* Harnack, 213 Pa. St. 444 (1906).

shares of the company's unissued stock in order to control elections or to make a profit.[1]

An agent is not liable for misrepresentations made by his principal, but it may be a question of fact whether the vendor is a principal or agent.[2] A contract in regard to stock may be illegal in itself, as, for instance, a contract to use stock to rob a railroad and bribe a judge.[3] Where a stockholder receives an offer for his stock, and is persuaded not to sell by fraudulent representations of a director, he may hold the latter liable in damages.[4] False representations made by a committee of the directors inducing parties to purchase a majority of the stock are not binding on stockholders and directors who knew nothing about such representations. Representations of an agent do not bind the seller unless the agent was authorized to make representations.[5] A misrepresentation by an agent of a corporation as to the property held by it, made to a purchaser of stock, not from the corporation but from a stockholder, does not render the vendor of the stock personally liable.[6] A director selling stock cannot be defeated in his action for the price by reason of fraudulent representations of the corporate treasurer inducing defendant to purchase.[7] Where the president of a bank is acting as the agent of a person and sells to the latter securities of the bank by means of false representations, the bank is liable, even though the purchaser did not know that the sale was in behalf of the bank.[8] A broker is liable for fraudulently inducing

1 See § 70, *supra*.

2 See § 334, *supra*.

3 Tobey *v.* Robinson, 99 Ill. 222 (1881). Although a stockholder has transferred certain stock to the president to be used to bribe governmental officials in obtaining a renewal of governmental contracts with the corporation, yet the stockholder may recover back the stock, it not having been used for that purpose. Mulvane *v.* O'Brien, 58 Kan. 463 (1897). See also § 39, *supra*. Although a person transfers stock to another in order to evade a statute which prohibits any one stockholder from voting on any more than one-eighth of the capital stock, yet the person to whom it is transferred may make a valid agreement to retransfer the same, and the court will enforce this agreement. Scott *v.* Scott, 68 N. H. 7 (1894).

4 Rothmiller *v.* Stein, 143 N. Y. 581 (1894). See also § 355, *infra*. A party making a false representation may be liable even though the stock was purchased from another. Hindman *v.* First Nat. Bank, 112 Fed. Rep. 931 (1902).

5 Garrett Co. *v.* McComb, 58 N. Y. App. Div. 419 (1901).

6 Boddy *v.* Henry, 113 Iowa, 462 (1901).

7 Doane *v.* King, 30 Fed. Rep. 106 (1887).

8 Carr *v.* National Bank & L. Co., 167 N. Y. 375 (1901). A bank may be liable for falsely representing the condition of a company, thereby inducing a party to purchase stock in the latter. Hindman *v.* First Nat. Bank, 112 Fed. Rep. 931 (1902).

a customer to cancel an order to sell stock, even though the decline in value is due to causes not contemplated at the time.[1] Misrepresentations made to others to induce them to buy the stock are immaterial where no sale had resulted therefrom and no fraud actually perpetrated.[2] Where the vendor making fraudulent representations as to the financial condition of the company is secretary and treasurer, he cannot claim that he was ignorant of the facts.[3] A statute to the effect that a person making a representation as to the trade or dealings of another person shall not be liable therefor, unless they are made in writing signed by him or by his agent, does not apply to representations as to a corporation, in selling stock in such corporation.[4] But a statute that a person shall not be liable for representations as to the credit of another person, unless the representations are written, applies to representations by a director in regard to the corporation, which lead to a person subscribing to its stock.[5] A vendee who is in the employ of the company and has opportunity to know all about it cannot claim that he was deceived as to the value of the stock.[6] Misrepresentations as to matters which did not affect the purchaser's judgment are immaterial especially where the purchaser is invited to look at all the books and papers.[7] Although a statement is made that a certain amount of money had been paid in, yet where other statements show clearly that this was not so, no cause for complaint exists.[8]

Misrepresentations as to the amount of ore in sight, and its value, where the party has full opportunity afterwards to inspect the mine and visits the mine and buys more stock, and, after knowing all the facts, negotiates for machinery for the company, are no de-

1 Fottler *v.* Moseley, 185 Mass. 563 (1904).

2 Darling *v.* Klock, 33 N. Y. App. Div. 270 (1898); aff'd, 165 N. Y. 623.

3 Drake *v.* Holbrook, 66 S. W. Rep. 512 (Ky. 1902). A purchaser of stock from the president cannot hold him liable for misrepresentation that the company's last dividend was six per cent., it appearing that the dividend was actually paid, even though it is proved that it was not paid out of profits, the president, however, having acted in good faith, and supposed that the profits existed. Nash *v.* Rosesteel, 94 Pac. Rep. 850 (Cal. 1908).

4 Walker *v.* Russell, 186 Mass. 60 (1904).

5 Getchell *v.* Dusenbury, 145 Mich. 197, (1906). A misrepresentation by a director as to the value of the corporation and its stock, with a view to selling the stock, is not affected by a statute that a person is not liable for making representations as to the character, etc. of another person, unless they are in writing. Grover *v.* Cavanaugh, 82 N. E. Rep. 104 (Ind. 1907).

6 Weaver *v.* Shriver, 79 Md. 530 (1894).

7 Garrison *v.* Technic, etc. Works, 59 N. J. Eq. 440 (1900).

8 McEacheran *v.* Western Transp., etc. Co., 97 Mich. 479 (1893).

fense.[1] A purchaser cannot rescind for fraud where he has investigated for himself or had the means at hand to ascertain the truth or falsehood of any representation.[2] A purchaser is not bound to investigate the truth of a representation where it is shown that even if he had investigated he would not have become aware of the facts.[3] A provision in a contract of subscription to the stock of the company, whereby the subscriber waives notice of all contracts between the promoters and the company, is not binding on the stockholder, if such waiver is tricky and fraudulent.[4] Where the various stockholders of a corporation join in a contract for the sale of their stock, but secretly one of them receives a bonus from the purchaser, the others may compel him to account therefor proportionately.[5]

§ 351. *Fraudulent sale by agent, etc., in breach of trust.*—A *bona fide* purchaser for value and without notice of stock from a vendor who delivers the certificates therefor indorsed in blank by another, or indorsed by the vendor himself, is protected and entitled to the stock, although it afterwards transpires that the agent was selling as agent of another and had been guilty of a breach of trust.[6] But

1 Eldridge *v.* Young America, etc. Co., 27 Wash. 297 (1902).

2 Grindrod *v.* Anglo-American, etc. Co., 34 Mont. 169 (1906). A stockholder in one company which is consolidated with another cannot hold a stockholder in the latter liable for misrepresentations that the latter was in a prosperous condition where there was no concealment and the stockholder could have examined into the condition of the latter and perhaps did so. Pigott *v.* Graham, 93 Pac. Rep. 435 (Wash. 1908).

3 Dow *v.* Swain, 125 Cal. 674 (1899).

4 Greenwood *v.* Leather, etc. Co., Ltd., [1900] 1 Ch. 421.

5 See § 320, *supra*, and § 351, *infra*. Where a party desires to purchase a majority of the stock of a corporation and makes an offer to all the stockholders to purchase their stock, provided a majority in interest will sell, and agrees to pay for the amount so offered a specified sum per share, he may legally pay more than that price for a portion of the stock, and need not divulge that fact to the others who sell at the price first mentioned. Newman *v.* Mercantile T. Co., 189 Mo. 423 (1905).

6 McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325 (1871). This is not only the leading case on the estoppel of a principal from repudiating the sale or pledge of his stock by his agent, whom he intrusted with the certificates indorsed in blank, but it is one of the leading cases on the law of the quasi-negotiability of stock. See also Honold *v.* Meyer, 36 La. Ann. 585 (1884); Strange *v.* Houston, etc. R. R., 53 Tex. 162 (1880); Dovey's Appeal, 97 Pa. St. 153 (1881). A *bona fide* pledgee of fraudulently issued warehouse receipts can enforce them only to the extent of the loan and interest. Corn, etc. Bank *v.* American, etc. Co., 163 N. Y. 332 (1900). A bill in equity filed by a partner to hold his copartners and third persons liable for a misappropriation of stock owned by the firm cannot be sustained where it is not alleged that the third persons knew of such misappropriation at the time of such misappropriation. Wall *v.* Old Colony, etc. Trust Co., 174 Mass. 340 (1899). Even though the agent

the transferee is not protected where he is not a *bona fide* pur-

of a corporation represents to it that a party owns certain property and will sell it to the corporation for $7,500 in bonds and $30,000 in stock, and the purchase is made on those terms, and the vendor keeps the bonds and gives the stock to such agent, and the agent sells a portion of the stock to a *bona fide* purchaser, yet the latter cannot rescind the sale on the ground of fraud. Foushee *v.* Snyder, 54 S. W. Rep. 730 (Ky. 1900). Where four shares of stock are transferred to a person by the corporation to qualify him as a director, and he agrees to return the same to the corporation when ceasing to be a director, but thereafter and before he ceases to be a director he agrees with the indorsers of his note that they shall have the stock as collateral security, they are protected, even though the stock was actually delivered to them after they had notice of the first agreement, it being shown, however, that they had no notice of such agreement at the time they became sureties. Dueber, etc. Co. *v.* Daugherty, 62 Ohio St. 589 (1900). Where a stockholder indorses a certificate of stock in blank and delivers it to an agent, and the agent pledges it for his own purposes, the pledgee, if he took without notice of the breach of trust, is protected. The court held also that the statute of 1884 applied to such a case. Russell *v.* American, etc. Co., 180 Mass. 467 (1902). The *bona fide* purchaser of stock from an agent without knowledge of the agency is protected. Garvin *v.* Pettee, 15 So. Dak. 266 (1901). Where certificates of stock are deposited with the broker, duly transferred in blank, a *bona fide* holder of such certificates from the broker is not protected as against the real owner, where the facts were sufficient to give him notice. Ryman *v.* Gerlach, 153 Pa. St. 197 (1893). Where the vendor of stock sends the certificates endorsed in blank to a supposed bank by mail, and the vendee, who has organized the bank for fraudulent purposes, thereby obtains possession of the certificates and sells them without the draft attached to the stock being paid, a *bona fide* purchaser of the certificates is protected. Beckwith *v.* Galice, etc. Co., 93 Pac. Rep. 453 (Ore. 1908). Where the owner of a certificate of stock endorsed in blank puts it in his safe-deposit box and allows a clerk to have a key of the box and the clerk abstracts the certificate and sells it to a *bona fide* purchaser, it is a question for the jury as to who stands the loss. Aull *v.* Colket, 2 W. N. Cas. 322 (1875). And see many cases in chapter XXV, *infra*, where this principle of law is often involved. The books are full of cases wherein an agent has committed a breach of trust in the sale of stock. For many instances of this kind of fraud and the various principles of law applicable thereto, see ch. XIX, *supra*, and chs. XXII and XXIV, *infra*. An assignee in insolvency of the agent does not take the stock. See § 320, *supra*. Moodie *v.* Seventh Nat. Bank, 3 W. N. Cas. 118 (1876), holds that if the purchaser takes partly for an antecedent debt he is not a *bona fide* holder to that extent. See also Dovey's Appeal, 97 Pa. St. 153 (1881). An agent to collect dividends who loans the stock at a profit is liable for its loss, even though he informed the owner of the loan and she did not object. Persch *v.* Quiggle, 57 Pa. St. 247 (1868). A *bona fide* purchaser from the agent is protected. State Bank *v.* Cox, 11 Rich. Eq. (S. C.), 344 (1860); West Branch, etc. Co.'s Appeal, *81 Pa. St. 19 (1870); Otis *v.* Gardner, 105 Ill. 436 (1883); Zulick *v.* Markham, 6 Daly, 129 (1875); Martin *v.* Sedgwick, 9 Beav. 333 (1846); Linnard's Appeal, 6 East. Rep. 877 (Pa. 1886). In England certificates of

chaser.[1] Where forgery is involved the purchaser takes nothing.[2] A person buying stock from an agent, with knowledge that the latter is acting as agent, is bound to inquire into the scope of his authority, and if the agent is authorized only to sell for cash his agreement to sell on time cannot be enforced by the purchaser.[3] Where the same person acts as agent for both the transferrer and the transferee, and absconds with the purchase price after the certificates have been delivered, but before registry on the corporate books, the transferee is protected.[4] Where the corporation knows that the vendor is selling as the agent of the stockholder, who has given to

stock are not negotiable in any sense, and hence the English decisions on the point now under consideration have no weight in America. See §§ 377, 412, *infra*, and § 325, *supra*. Where a stockholder delivers his stock to the president to be used to induce a person to loan money to the corporation, and the president instead of so using it converts it to his own use, the stockholder may maintain a suit in equity to recover back the stock, and the statute of limitations does not begin to run until he has discovered or should have discovered the facts. Slayback *v.* Raymond, 93 N. Y. App. Div., 326 (1904). Even though brokers in sending stock to a customer endorse it in blank and entrust it to a messenger, and the messenger converts it to his use by having other brokers sell it in good faith, yet such latter brokers are liable to the customer for the value of the stock. Hall *v.* Wagner, 111 N. Y. App. Div. 70 (1906).

1 Talmage *v.* Third Nat. Bank, 91 N. Y. 531 (1883); Crocker *v.* Crocker, 31 N. Y. 507 (1865); Weaver *v.* Barden, 49 N. Y. 286 (1872), where the agent fraudulently bought in his own name and then fraudulently sold; Williamson *v.* Mason, 12 Hun, 97 (1877). A purchaser from an agent with notice of the fact that he held as agent, and that he had sold to himself, is not protected. Bank of Louisville *v.* Gray, 84 Ky. 565 (1886). Where a person holds stock under an agreement with another that after the profits have repaid the cost of the stock the further profits should be divided equally between them, such agreement is binding upon a person who buys such stock with notice of the agreement. Morris *v.* Shepard, 53 Atl. Rep. 172 (N. J. 1902). Where a street railway company employs a person as its agent to purchase a majority of the stock of another street railway company, and he does so, and the former pays him for the stock and for his services, he cannot refuse to deliver the stock on the ground that the company had no power to purchase, or on the ground that it had passed no resolutions authorizing him to purchase, and the former may recover the stock from a transferee with notice from the agent. Manchester St. Ry. *v.* Williams, 71 N. H. 312 (1902).

2 See §§ 365–370, *infra*. Where an agent of a stockholder forges his name to the certificates of stock and pledges them with a party to secure a loan to the agent's principal, such loan cannot be collected, even though the proceeds went to the credit of the principal and were afterwards embezzled by the agent under a power of attorney to check out the principal's money, the party loaning the money on the certificates of stock not having any knowledge of such power of attorney at the time. Fay *v.* Slaughter, 194 Ill. 157 (1901).

3 Norton *v.* Nevills, 174 Mass. 243 (1899).

4 *Ex parte* Shaw, L. R. 2 Q. B. D. 463 (1877).

the agent the certificates indorsed in blank, it must see to it that the agent has full power to sell the stock, and is liable for allowing a registry where the agent has not such power.[1] A stockholder whose stock has been wrongfully pledged may enjoin the corporation from allowing a transfer by the pledgee who has applied for the same.[2] If the principal authorized the sale or ratified it, he of course cannot afterwards complain.[3] Where an agent to sell is able to sell for more than he accounts for to his principal, the latter cannot recover the difference unless the sale was actually made.[4] Even though the seller's broker divides a secret profit with the purchaser's broker without the purchaser knowing thereof, yet the purchaser cannot hold the seller's broker liable for his profits. The remedy is rescission.[5] Where a stockholder in an insolvent corporation turns over his stock to another person to deposit under a reorganization agreement, the latter agreeing to pay the assessment on the stock and to deliver to the stockholder the new securities upon repayment of such assessment, and he refuses so to do thereafter, he is guilty of a conversion and of a fraud upon the stockholder.[6] Where a customer may rescind a purchase of stock made for him by his broker, upon discovering that the broker sold him stock owned by such broker, the

1 Woodhouse *v.* Crescent Mut. Ins. Co., 35 La. Ann. 238 (1883), holding that the transferee who is charged with receiving with notice may be joined as a party defendant. St. Romes *v.* Levee, etc. Co., 127 U. S. 614 (1888).

2 The pledgor need not allege that the pledgee took with notice. It is for the pledgee to intervene and prove that the pledge was *bona fide*. Reynolds *v.* Touzalin Imp. Co., 62 Neb. 236 (1901).

3 As to the admissibility in evidence of a receipt showing that the agent was authorized to sell by order of the principal's brother, see Dwyer *v.* Fuller, 144 Mass. 420 (1887). A pledge of stock by an agent is not a conversion, where the principal received without objection and retains a receipt from the agent setting forth such pledge. Metcalf *v.* Williams, 144 Mass. 452 (1887).

4 Edison *v.* Gilliland, 42 Fed. Rep. 205 (1890). An agent may of course be held liable for misrepresenting the price which he received on the sale of stock and for retaining the difference. Horner *v.* Perry, 112 Fed. Rep. 906 (1901).

5 Illingworth *v.* De Mott, 59 N. J. Eq. 8 (1900). See also § 320, *supra*. An agent who secretly takes a commission from a party dealing with his principal cannot enforce a contract by which he was to share in the stock purchased by the principal. York *v.* Searles, 97 N. Y. App. Div. 331 (1904). Where the general manager acts as an intermediary in selling all the stock of the company and he makes a secret profit, the stockholders may compel him to pay it over. Barbar *v.* Martin, 67 Neb. 445 (1903). Where three persons own all the stock of a corporation and one of them represents all three in selling the stock, but secretly takes an additional price for his sole benefit, the others may hold him liable for their portion thereof in an action at law. Graham *v.* Cummings, 208 Pa. St. 516 (1904).

6 Miller *v.* Miles, 58 N. Y. App. Div. 103 (1901); aff'd, 171 N. Y. 675.

customer, if he has exchanged such stock for reorganization stock, may tender back old stock which he borrows for that purpose.[1] In England the courts do not protect a purchaser of certificates of stock unless the latter has not only purchased, but has obtained a registry on the corporate books.[2]

An agent's power to sell stock does not authorize him to pledge it.[3] A person who knows, or has the means of knowing, that another person holds stock as an agent to sell only, cannot take such stock in pledge from the agent, although the latter represents that the money is to be used for his principal. The principal may recover the stock if he has not authorized the pledge.[4] A *bona fide* purchaser of certificates of stock from a pledgee is protected.[5] Where no certificates of stock have been issued, a purchaser of a subscriber's right to the stock is not protected as a purchaser of a certificate of stock is protected.[6] When an agent has an option on stock and sells it to his principal, who thinks he is purchasing from an outsider, the principal may rescind.[7] An agent who makes representations in good faith is not personally liable if made on behalf of his principal.[8]

§ 352. *Fraud may be by corporate reports or prospectus.*—A report of corporate officers to the stockholders, setting forth the condition of the affairs of the corporation, is deemed to be a statement to the public also, and it may be relied upon by any one in purchasing shares. This principle of law was first clearly established in England in 1860, in the case of Davidson *v.* Tulloch.[9] It was there

1 Mayo *v.* Knowlton, 134 N. Y. 250 (1892).

2 See § 412, *infra*.

3 Merchants' Bank *v.* Livingston, 74 N. Y. 223 (1878). See §§ 321, 326, *supra*.

4 Fisher *v.* Brown, 104 Mass. 259 (1870). A *bona fide* pledgee of a certificate of stock from an agent having power to pledge, but who had so pledged the stock for purposes not authorized by the owner, is nevertheless protected, and even though such pledgee sells the stock at private sale without notice he cannot be held liable if the stock was not worth more than the debt secured. Brittan *v.* Oakdale, etc., 124 Cal. 282 (1899).

5 See § 473, *infra*. A bank taking a pledge of negotiable bonds in good faith may hold them, though it turn out that the pledger was not the owner of them, but held them as security that a mortgage would be canceled. Saloy *v.* Hibernia Nat. Bank, 39 La. Ann. 90 (1887). Where the pledgee of stock transfers it into his own name on the books of the company and takes out new certificates, a *bona fide* purchaser or pledgee from him is protected. Westinghouse *v.* German, etc. Bank, 196 Pa. St. 249 (1900). As to sales by trustees, etc., see ch. XIX, *supra*.

6 Manchester St. Ry. *v.* Williams, 71 N. H. 312 (1902). *Cf.* § 373, *infra*.

7 Montgomery *v.* Hundley, 103 S. W. Rep. 527 (Mo. 1907).

8 Englesfield *v.* Londonderry, H. L. 26 W. R. 540 (1878).

9 6 Jur. (N. S.) 543; s. c., 3 Macq. (H. L.) 783.

held that there need be no privity between the officers issuing the report and the person purchasing shares of stock from third persons. If such purchaser made his purchase relying upon material statements in corporate reports which were false, he has his remedy against all persons who knowingly made or issued the report.[1] The leading case in this country on the liability of corporate directors for fraudulent representation as to the condition of the company, not made to a purchaser of stock personally, but to the public generally, is Cross *v.* Sackett,[2] decided in 1858, where fraudulent

1 Scott *v.* Dixon, 29 L. J. (Exch.) 62, n. (1859), explained in Peek *v.* Gurney, L. R. 6 H. L. 398 (1873), as follows: "The report, though originally made to the shareholders, was intended for the information of all persons who were disposed to deal in shares; and the representation must be regarded as having been made not indirectly, but directly to each person who obtained the report from the bank where it was publicly announced it was to be bought, in the same manner as if it had been personally delivered to him by the director;" Gerhard *v.* Bates, 2 El. & Bl. 476 (1853); Cullen *v.* Thomson, 6 L. T. Rep. 870 (1862), holding that, where directors of a joint-stock company issue false and fraudulent reports to the public, and the manager, secretary, and other officers of the bank supply the detailed statements for such report, knowing them to be false and that they are to be used for purposes of deceit, and a third party, acting on such reports, purchases shares in the company and suffers loss thereby, each of the officers of the company who knowingly assisted in the fraud is personally liable to such third party for the loss caused by such misrepresentation in the report, though the report was signed only by the directors and not by the subordinate officers.

2 2 Bosw. 617; 6 Abb. Pr. 247; 16 How. Pr. 62, the court saying: "When an instrument is made to deceive the public generally, and is adapted, as well as intended, to deceive some portion of the public, and as well one person as another, and is used as it was designed it should be, and fraudulently induces some one to act to his prejudice by acting in the mode it was intended to influence them to act who might be deceived by it, the person who made the instrument and caused it to be thus fradulently used is liable to the person who has been defrauded by it. In such a case the person injured has been subjected to damage by his fraudulent acts, and the fraudulent wrong-doer is liable for the consequences." In Cazeaux *v.* Mali, 25 Barb. 578 (1857), the court said: "It is not essential that the representation should be addressed directly to the plaintiff; if it were made with the intent of its influencing every one to whom it might be communicated, or who might read or hear of it, the latter class of persons would be in the same position as those to whom it was directly communicated, but they must have come to a knowledge of it before their purchase." In Morse *v.* Swits, 19 How. Pr. 275 (1859), a bank officer was held liable for false statements in a report published in accordance with the requirements of a statute, the court saying: "Being published, the public, or any individual of the public, has a right to believe it. . . . And if, believing it, any one of the public acts on that belief, the makers and publishers of this falsehood are to be held liable for the consequences they have caused." (See cases cited in Reporter's note to the foregoing.) See also Salmon *v.* Richardson, 30 Conn. 360

dividends and representations based thereon were made. A corporation may be held liable for false representations in a prospec-

(1862); Fenn *v.* Curtis, 23 Hun, 384 (1881), holding the secretary liable to a purchaser of shares from an individual, the secretary having signed the certificate of stock and also a circular stating that the corporation was a corporation, when in fact it was not. And see §§ 40, 48, *supra*. The treasurer may be liable in an action for fraud and deceit to a purchaser of stock who bought relying on false statements made by him to the public as to profits. Keeler *v.* Seaman, 47 N. Y. Misc. Rep. 292 (1905). A common-law action for damages due to a purchase of stock induced by a false report made by the defendant as treasurer may be joined with the remedy given by the New York statutes. Hutchinson *v.* Young, 93 N. Y. App. Div. 407 (1904). A claim by a purchaser of stock against the directors for falsely representing that the stock was earning dividends, when in fact the stock was sold to raise money to pay illegal dividends, is assignable. Keeler *v.* Dunham, 114 N. Y. App. Div. 94 (1906). A person buying stock in what was supposed to be a corporation, but is a partnership, cannot recover back his money from all of the participants. Perry *v.* Hale, 143 Mass. 540 (1887). A corporation is not liable for misrepresentations of the president in selling stock belonging to himself. Prosser *v.* First Nat. Bank, 106 N. Y. 677 (1887). Where stockholders in an apartment-house corporation are entitled to rent apartments at a rental to be fixed by a majority vote of the stockholders, an increased rental so voted is legal. The by-laws providing for such a vote override a general statement in a prospectus to the contrary, the stockholders knowing of the by-law. Compton *v.* Chelsea, 128 N. Y. 537 (1891). The fact that the false statements as to the condition of the corporation are made to a director, who is acting as agent for the vendee, is not fatal to the suit for fraud. Trimble *v.* Ward, 97 Ky. 748 (1895). A person loaning money to an individual and taking bank stock as collateral security cannot hold the bank liable in an action for damages for deceit, on the ground that its published statements were false and fraudulent, and that he relied on those statements. Merchants' Nat. Bank *v.* Armstrong, 65 Fed. Rep. 932 (1895). A vendor who sells knowing that the corporation has issued a false report that it was earning two per cent. a month, and that the vendee relied on this report, is guilty of fraud, and the sale may be rescinded. Foley *v.* Holtry, 43 Neb. 133 (1894). A person who purchases bank stock from the bank itself may hold the bank liable for damages where the public statement of the bank which he relied on in purchasing was false. The measure of damages is the difference between the value of the stock if the statement had been true and its actual value. Exchange Bank *v.* Gaitskill, 37 S. W. Rep. 160 (Ky. 1896). A stockholder sued by a corporation on an ordinary debt, and who sets up in defense that he was induced to buy stock from outside parties by fraudulent statements made by the company, cannot have a *mandamus* to compel the company to allow him to examine its books. His application in such a case is as a creditor and not as a stockholder. Investment Co. *v.* Eldridge, 2 Pa. Dist. 394 (1903); aff'd, 175 Pa. St. 287. Plaintiff need not allege that he relied solely on the misrepresentations. A false statement that the company is perfectly solvent is a material misrepresentation and the fact that two or three years thereafter all the corporate assets have disappeared and it went into liquidation, is proof of such misrepresenta-

tus issued by it to sell stock of another corporation.[1] A purchaser of stock in an insurance company, however, cannot hold a bank liable on a misstatement by the bank to the insurance commissioner as to the cash which the insurance company has on deposit with it.[2] An officer of a bank is personally liable to a purchaser of its stock who relied on the published statement signed by the officers in which overdrafts are described as loans and discounts.[3] Although a corporate creditor may hold the incorporators liable for a false statement in their sworn statement obtaining incorporation in regard to the amount of capital stock that has been paid in, yet the action

tion. It may be shown that at the time of the misrepresentation the company owed its officers and employees a large sum of money. It may be shown that the corporate books and statements overvalued the assets. The treasurer—secretary—bookkeeper is a competent witness to prove that at a certain time the company was not solvent. In an action against the president for damages for false representations it need not be proved that he had actual knowledge of the falsity of the statements in regard to corporate affairs, inasmuch as he was bound to know thereof. Norvell *v.* Pye, 95 S. W. Rep. 666 (Tex. 1906).

1 Such a cause of action is assignable under the New York statute. Benedict *v.* Guardian T. Co., 58 N. Y. App. Div. 302 (1901). A trust company which issues a prospectus offering for sale stock in a mining corporation, and making in the prospectus misstatements as to the earnings, is liable to purchasers of stock for the difference between its actual value and what its value would have been if the representations had been true. Benedict *v.* Guardian T. Co., 91 N. Y. App. Div., 103 (1904); aff'd, 180 N. Y. 558.

2 Hindman *v.* First Nat. Bank, 86 Fed. Rep. 1013 (1898).

3 Gerner *v.* Yates, 61 Neb. 100 (1900). A purchaser of stock in a national bank cannot hold the directors liable for a false statement in their report to the comptroller of the currency unless they knew it to be false or by ordinary care and prudence would have so known. Mason *v.* Moore, 73 Ohio St. 275 (1906). A person who buys stock in a national bank relying on a report of the condition of the bank signed by directors, in accordance with the acts of congress, may hold the directors so signing the report personally liable in damages if it transpire that the report was absolutely false and that the stock was worthless, but he cannot hold liable the directors who did not sign the report. Gerner *v.* Mosher, 58 Neb. 135 (1899). See also Stuart *v.* Bank of Staplehurst, 57 Neb. 569 (1899). Directors of a bank are not liable in an action for deceit to a purchaser of stock, although they signed the cashier's annual statement, which was false, there being proof that they believed it to be true. Foster *v.* Gibson, 38 S. W. Rep. 144 (Ky. 1896). Directors of a national bank are at common law liable for false reports to any party injured thereby. Yates *v.* Jones Nat. Bank, 105 N. W. Rep. 287 (Neb. 1905). At common law a purchaser of national bank stock may hold the directors liable for his loss in purchasing the stock in reliance on a report of the directors to the comptroller of the currency, which report stated the "loans and discounts" by including the par value of paper which was worth much less than its face value. Smalley *v.* McGraw, 111 N. W. Rep. 1093 (Mich. 1907).

is in tort and an assignee of the claim cannot maintain it.[1] The president is liable in an action of deceit where he sells stock after referring the purchaser to a published statement of the corporation signed by him, which statement was false. Where, however, the sale is to a director, such a director is bound to show that he did not know the statement was untrue, and he may show that fact although he also signed the statement.[2] In a suit by a purchaser of national bank stock against the directors for fraudulent published reports, the recovery rests entirely on the national bank law, if that is the same as the New York common law. The measure of damages is the price paid for the stock less its actual value.[3]

§ 353. A somewhat different rule prevails in England as to false statements contained in a prospectus of a corporation. A prospectus is issued for the purpose of inducing persons to subscribe for stock. Its object is not to promote the sale of that stock. Accordingly it was decided in Peek *v.* Gurney,[4] in 1873, that "the purchaser of shares in the market, upon the faith of a prospectus which he has not received from those who are answerable for it, cannot, by action upon it, so connect himself with them as to render them liable to him for the misrepresentation contained in it, as if it had been addressed personally to himself." In New York

1 Haines *v.* Franklin, 87 Fed. Rep. 139 (1898).

2 Ward *v.* Trimble, 103 Ky. 153 (1898). Where one director sells his stock to another relying on a corporate statement prepared by a clerk of the company, he cannot hold the vendee liable in damages, even though the statement was false. Goodwin *v.* Daniel, 93 S. W. Rep. 534 (Tex. 1906). A purchaser of stock relying on a prospectus cannot hold liable for deceit the persons whose names are signed to the prospectus unless he proves that the prospectus did not state the information which they had, even though such information was false. Proof must be given of intent to deceive, and if the defendants believed the information given to them or had reasonable cause to believe it, they are not liable. Duryea *v.* Zimmerman, 121 N. Y. App. Div. 560 (1907). The president is liable in an action for deceit where he sells stock of the bank of which he is president, and which has published a false statement of its condition by order of the president and others. Trimble *v.* Reid, 41 S. W. Rep. 319 (Ky. 1897). In an action at law the directors are not liable to a person who purchases stock, relying on the directors' report, unless fraudulent intent is proved. Parker *v.* McQuesten, 32 Q. B. Rep. (Can.) 273 (1872).

3 Taylor *v.* Thomas, 124 N. Y. App. Div. 53 (1908).

4 L. R. 6 H. L. 377, overruling Bagshaw *v.* Seymour, 18 C. B. 903 (1856), and Bedford *v.* Bagshaw, 4 H. & N. 538 (1859); explaining Scott *v.* Dixon, 29 L. J. (Exch.) 62, n. (1859), and Gerhard *v.* Bates, 2 El. & Bl. 476 (1853), and itself explained in Cargill *v.* Bower, L. R. 10 Ch. D. 502 (1878). In Bellairs *v.* Tucker, L. R. 13 Q. B. D. 563 (1884), the court seems to have assumed a different position, and to have treated the prospectus the same as any other method of misrepresentation.

a directly opposite rule prevails. In the case of Morgan *v.* Skiddy,[1] in 1875, the court of appeals held that, "if the plaintiff purchased his stock relying upon the truth of the prospectus, he has a right of action for deceit against the persons who, with knowledge of the fraud and with intent to deceive, put it in circulation. The representation was made to each person comprehended within the class of persons who were designed to be influenced by the prospectus; and when a prospectus of this character has been issued, no other relation or privity between the parties need be shown except that created by the wrongful and fraudulent act of the defendants in issuing or circulating the prospectus, and the resulting injury to the plaintiff." It has recently been held in England that where a person purchases stock in the open market, being induced to do so by a prospectus and published telegram, both of which are fraudulent, he may hold the promoters personally responsible, although the stock was not purchased from them nor from the corporation.[2]

§ 354. *Remedies for the fraud.*—There are three methods by which a person who has been fraudulently induced to buy or sell stock may remedy the wrong.[3] He may bring an action at law

1 62 N. Y. 319. In Kountze *v.* Kennedy, 147 N. Y. 124 (1895), it was held that the fact that an officer, in a statement of the liabilities of the company omitted a claim which was afterwards established, was not guilty of such fraud as would sustain a suit at law for damages for deceit.

2 Andrews *v.* Mockford, [1896] 1 Q. B. 372. Where a party purchases stock, relying on a prospectus which states that reports had been "prepared for the directors" by the engineers and giving extracts therefrom, the directors are not personally liable in an action for deceit, even if it is shown that the reports were prepared on instructions not from the directors, but from the vendors of the property to the company. It is necessary to prove that the reports were untrue. Angus *v.* Clifford, [1891] 2 Ch. 449.

3 "A person who has been induced by fraudulent representations to become the purchaser of property, has, upon discovery of the fraud, three remedies open to him, either of which he may elect. He may rescind the contract absolutely and sue in an action at law to recover the consideration parted with upon the fraudulent contract. To maintain such action he must first restore, or offer to restore, to the other party, whatever may have been received by him by virtue of the contract. He may bring an action in equity to rescind the contract, and in that action have full relief. Such an action is not founded upon a rescission, but is maintained *for* a rescission, and it is sufficient, therefore, for the plaintiff to offer in his complaint to return what he has received and make tender of it on the trial. Lastly, he may retain what he has received and bring an action at law to recover the damages sustained. This action proceeds upon an affirmance of the contract, and the measure of the plaintiff's recovery is the difference between the article sold and what it should be according to the representations." Vail *v.* Reynolds, 118 N. Y. 297 (1890). Where

for the consideration, or an action at law for damages for the deceit, or he may file a bill in equity to have the transaction set aside. The second remedy is the most difficult and the last the most easy to maintain. At common law an action to recover back the whole of the purchase-money upon a rescission for fraud is virtually a suit for money had and received.[1]

In special cases other remedies are open to the purchaser. He may compel the defrauding party to abide by the statements that were made. Thus, where the vendor represented that the corporate property was unincumbered, equity may, at the instance of the purchaser of stock, enjoin the vendor from enforcing a lien which he has on such property.[2] If the contract is executory it may be canceled by mutual agreement.[3] Where a consolidation is brought

the sale of stock has been induced by fraud, the vendee may follow the money paid by him and recover it back if the identity of the fund can be shown. Moore *v.* Williams, 62 Hun, 55 (1891).

[1] Gassett *v.* Glazier, 165 Mass. 473 (1896).

[2] Jones *v.* Bolles, 9 Wall. 364 (1869). See also §§ 334, 354 and 771. Where a person organizes a railroad corporation and takes a contract for its construction, and causes all the stock and a large quantity of bonds to be issued to himself, and then sells these stocks and bonds and has knowledge of representations made by corporate officers to his vendee that the company owes nothing except the bonds, he cannot afterwards enforce a claim for doing extra work under a contract, where such contract did not appear on the books of the company. The transaction is a fraud on his part. Chicago, etc. Ry. *v.* Miller, 91 Mich. 166 (1892). Where the vendor of a majority of the stock of a corporation agrees that the company owes no debts except certain specific ones, the vendee may recover back any excess of debts over those specified. Where the debts of one class were not to exceed a certain sum, but did exceed that sum, the vendee may recover the difference, even though the debts of another class were less than a sum specified in the contract of sale. Chicago, etc. Ry. *v.* Hoyt, 89 Wis. 314 (1895). See German State Bank *v.* Northwestern, etc. Co., 104 Iowa, 717 (1898). Although a purchaser of stock cannot rescind, he having been guilty of delay, yet he may sue the vendor upon a warranty that the stock will be worth more than what it was sold for. Maxted *v.* Fowler, 94 Mich. 106 (1892). Stockholders cannot defeat a vendor's lien on the ground that the vendor, before they bought their stock, represented that he had no lien, where they do not set up that defense in a suit by him to establish his lien. Wilson *v.* Seymour, 76 Fed. Rep. 678 (1896). Where a person owning all the stock of a corporation sells it under circumstances which induces the purchaser to believe that the former has no claim against the corporation, he may be enjoined from enforcing any such claim. Given *v.* Times-Republican, etc. Co., 114 Fed. Rep. 92 (1902). Where the stockholders in a power company sell their stock and then obtain control of water rights on which the company had an option, which option has expired, the party purchasing the stock may by a suit in equity compel them to turn over such water rights. Valentine *v.* Berrien, etc. Co., 128 Mich. 280 (1901).

[3] A subscription may be canceled

about by the fraudulent representations of a stockholder in one of the corporations, the remedy of the consolidated company against him is not a suit for money received by him as a stockholder, but is an action for damages for fraud or a suit to rescind.[1] Trover cannot be maintained by a vendor of stock, even though he claims that he was fraudulently induced to sell, inasmuch as he is no longer the owner of the stock and is not entitled to possession thereof.[2] Misrepresentations may sustain an action for breach of warranty in the sale of stock, even though not sufficient to sustain an action for deceit or for the recovery of money had and received. In an action for breach of warranty the stock need not be tendered back.[3] A person induced by fraudulent representations to sell his stock may recover damages for the fraudulent conversion thereof and for fraudulent conspiracy, the fraud consisting in representations that the purchaser was responsible and that security given by him was good.[4] Where the secretary and treasurer of the corporation by fraudulently misrepresenting the condition induces a stockholder to sell his stock to the former, the latter may maintain a suit in equity to set aside the sale and may have an injunction restraining any transfer and may join the corporation in order to obtain a retransfer.[5] The pleadings in enforcing the remedies which the vendee has, vary, of course, according to the remedy which is pursued.[6]

by and with the consent of the directors when fraud is involved. Four years afterwards corporate creditors cannot attack it. McDermott *v.* Harrison, 9 N. Y. Supp. 184 (1890). See ch. X, *supra*. If there has been a mutual mistake in regard to what the stock really represented in property, an action for money had and received or a suit to cancel the sale will lie. Norton *v.* Bohart, 105 Mo. 615 (1891).

1 Anderson, etc. Co. *v.* Pungs, 134 Mich. 79 (1903). See s. c., 134 Mich. 475.

2 Newman *v.* Mercantile T. Co., 189 Mo. 423 (1905).

3 Phillips *v.* Crosby, 69 N. J. L. 612 (1903).

4 McNaughton *v.* Smith, 136 Mich. 368 (1904).

5 Morrison *v.* Snow, 26 Utah, 247 (1903).

6 In the case of Smith *v.* Tracy, 36 N. Y. 79 (1867), the vendee sued the vendor for a breach of warranty, alleging that the vendor's agent made certain representations as to the condition of the corporation. The action failed on the ground that the vendor did not authorize the agent to make a warranty. In Ayres *v.* French, 41 Conn. 142 (1874), the court held that fraud, inducing the owner of stock to part with it, may be remedied by the action of trover, with a count in case for a fraudulent procurement and conversion of the stock. In National Exch. Co. *v.* Drew, 2 Macq. (H. L.) 103 (1855), it was held that where a person is induced by the fraudulent reports and representations of corporate officers to purchase stock, and the corporation loans him money to do so, it cannot recover back the money so loaned. See Lightfoot *v.* Creed, 8 Taunt. 268 (1818), holding that the vendee should declare, not for money paid, but specially on the contract. Fraud in the purchase of stock is not a good defense to a note

§ 355. *Action for deceit.*—In order to sustain an action for damages for deceit, whereby plaintiff was induced to buy or sell shares of stock, it is necessary for the plaintiff to prove that statements were made or acts done which were fraudulent, that the person guilty of them knew that they were fraudulent, and that the plaintiff acted on such statements or acts in buying or selling the stock.[1] "Fraud without damage or damage without fraud gives no cause of action." [2] In England a statement made recklessly, or without regard as to whether it is true or untrue, may constitute a fraudulent intent.[3] In New York the rule is more stringent. The case of Wake-

given for such stock for the purchase price, unless it is averred that the purchase was induced by the fraud and that the purchaser was ignorant of the truth of the misrepresentations made. Spencer *v.* Johnston, 58 Neb. 44 (1899).

1 Quoted and approved in Trimble *v.* Reid, 97 Ky. 713 (1895); aff'd, 41 S. W. Rep. 319 (1897), where a vendee sued the president for publishing a false statement as to the condition of a bank.

2 Stratton's Independence *v.* Dines, 135 Fed. Rep. 449, 458 (1905).

3 In the important case of Derry *v.* Peek, L. R. 14 App. Cas. 337 (1889), the House of Lords decided that in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Fraud is proved when it is shown that a false statement has been made (1) knowingly; (2) without belief in its truth; (3) recklessly. But if a man make a false statement honestly believing it to be true it is not sufficient, to support an action of deceit, to show that he had no reasonable grounds for his belief. The directors of a tramway company issued a prospectus in which they stated that they were authorized to use steam power, and that by this means a great saving in working would be effected. The special act incorporating the company conferred this authority subject to the consent of the board of trade, but at the time of making the statement they had not in fact obtained consent to use steam power although they honestly believed that they would obtain it as a matter of course. *Held* (reversing the judgment of the court below), that they were not liable in an action of deceit brought by a shareholder who had been induced to apply for shares by the statement in the prospectus. In an action for deceit by a misrepresentation in a prospectus as to the net profit on the capital employed, the action being against one who was a promoter and also one of the vendors, and whose name appeared in the prospectus and who became a director, the plaintiff must prove (1) that the defendant's statement was untrue; (2) that it was dishonest; (3) that he believed it to be untrue. See also Glasier *v.* Rolls, L. R. 42 Ch. D. 436 (1889), following the House of Lords in Derry *v.* Peek, L. R. 14 App. Cas. 337. In Peek *v.* Gurney, L. R. 6 H. L. 377, 391 (1873), the court said: "It is said that the prospectus is true as far as it goes, but half a truth will sometimes amount to a real falsehood." See also ch. IX, § 148, *supra*. In Bellairs *v.* Tucker, L. R. 13 Q. B. D. 562, 579 (1884), however, the court said: "The action is one for deceit. It is necessary . . . not only to prove that the statements in a prospectus or any other document are not true, but it must be proved that they are fraudulently put forward with intent to deceive."

man *v.* Dalley[1] applies to this class of cases the rule that "an action founded upon the deceit and fraud of the defendant cannot be maintained in the absence of proof that he believed, or had reason to believe, at the time he made them, that the representations made by him were false, and that they were for that reason fraudulently made, or that he assumed or intended to convey the impression that he had actual knowledge of their truth, though conscious that he had no such knowledge." This case held that a director is not liable for false representations on the company's printed business cards, of which he was ignorant, even though his name was attached thereto. The same rule has been applied in other jurisdictions.[2] In New York a vendee of stock and bonds who sues

1 51 N. Y. 27, 35 (1872); Nelson *v.* Luling, 36 N. Y. Super Ct. 544 (1873); aff'd, 62 N. Y. 645; Schwenck *v.* Naylor, 102 N. Y. 683 (1886). The case of Holmes *v.* Moffat, 120 N. Y. 159 (1890), was an action for false representations and deceit in the sale of stock, but the decision turned upon technical rules relative to the trial. The action for deceit does not lie against the corporation, at least where no fraudulent intent is proved. Pinedo *v.* Germania, etc. Co., N. Y. D. Reg., July 29, 1885 (Supreme Ct.). See also § 157, *supra*.

2 In an action of tort for deceit against a director for inducing a person to purchase stock, "the plaintiff must prove representations of material facts which are false, and which induce him to act; and either that the defendant knew them to be false, or that, the facts being facts susceptible of knowledge, he represented as of his own knowledge that they were true, when in fact he had no such knowledge." Cole *v.* Cassidy, 138 Mass. 437 (1885). In an action for deceit intent must be alleged and evidence of fraud not alleged is inadmissible. McComb *v.* Brewer, etc. Co., 184 Mass. 276 (1903). A misrepresentation is not alone sufficient to sustain an action for deceit. Boulden *v.* Stilwell, 100 Md. 543 (1905). In an action of deceit, fraud, and not negligence, must be proved, and hence it cannot be shown that a party by the exercise of ordinary care would have known that his statements were false. Cahill *v.* Applegarth, 98 Md. 493 (1904). An allegation that the vendee relied on or was induced to purchase by reason of false representations is necessary. Dahlman *v.* Antes, 109 N. W. Rep. 784 (Iowa 1906). A vendor is not liable, even though his statements are not true, if he acted in good faith and stated that he had received the statements from somebody else and that he did not know whether they were true. Krause *v.* Cook, 144 Mich. 365 (1906). In an action for fraud inducing the purchase of stock scienter must be proved. It is sufficient that the defendant has no good reason to believe that material representations made by him were true. A statement that $1,500,000 worth of ore was lying on the ground around the mine is a material representation. Barndt *v.* Frederick, 78 Wis. 1 (1890). In Wisconsin, in a suit by a vendee of stock against the vendor for damages for obtaining money and property by false and fraudulent representations, the defendant may be arrested. Warner *v.* Bates, 75 Wis. 278 (1889), giving the complaint and affidavit. See also Clark *v.* Edgar, 84 Mo. 106 (1884); Gee *v.* Moss, 68 Iowa, 318 (1886).

An allegation that the plaintiff was induced by the false and fraudulent

at law to recover damages for fraud and deceit inducing the purchase of the stock, the fraud and deceit consisting of a misstatement by an officer of the liabilities of the company, must prove that the officer did not believe the statement to be a true exhibit of the company's affairs and was guilty of dishonesty. It is insufficient to prove that the statement was grossly inaccurate, and largely understated the actual liabilities of the company. Actual fraud must be proved. It must be shown that the representation was not only false and material, but was known by the defendant when he made it to be false, or, not knowing whether it was true or false, and not caring what the fact might be, that the defendant made it recklessly, paying no heed to the injury which might ensue. "Misjudgment however gross, or want of caution however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an

misrepresentations of the defendant to buy from the latter certain stock which was valueless, and that the defendant knew that the statements were untrue, and that the plaintiff relied on the statements and bought the stock, constitutes a cause of action in tort. Freeman *v.* Trickett, 6 Kan. App. 83 (1897). A person who makes false statements in regard to a corporation, and then advises the party to whom the statements are made to buy the stock, is liable, in an action for deceit to such party. Heintz *v.* Mueller, 19 Ind. App. 240 (1898); s. c., 59 N. E. Rep. 414 (1901); Arkwright *v.* Newbold, L. R. 17 Ch. D. 301 (1881); Arthur *v.* Griswold, 55 N. Y. 400, 410 (1874), the court saying: "The rules of law require a reasonable degree of certainty as to each requisite necessary to constitute the cause of action, viz., representations, falsity, scienter, deception, and injury."

In a sale of stock by a director, a misstatement made by him in good faith, as to the property owned by the corporation, does not render him liable in an action for deceit. Boddy *v.* Henry, 113 Iowa. 462 (1901). To sustain an action for deceit it must be proved that the representation was false and that the party making it knew it to be false, but if such party had means of knowledge, but actually had no knowledge, this is sufficient to hold him liable. Hindman *v.* First Nat. Bank, 112 Fed. Rep. 931 (1902). A bank which, as pledgee, causes by its statements a party to purchase the stock held in pledge, may be held liable in damages if such statements were false. Hindman *v.* First Nat. Bank, etc., 98 Fed. Rep. 562 (1899). Where a purchaser of goods misrepresents the value of stock which is to be given as a pledge for the purchase price and refers the vendor to a bank, which bank repeats the misrepresentations, the pledgee may sue the bank for damages and may show that the bank at that time held such stock in pledge and that the goods so purchased were substituted for the stock of the bank upon the transaction being closed. Am. Nat. Bank, etc. *v.* Hammond, 25 Colo. 367 (1898). In an action for deceit it is not necessary to allege that the plaintiffs would not have purchased but for the false representations. Drake *v.* Holbrook, 66 S. W. Rep. 512 (Ky. 1902). In a suit by a subscriber against persons inducing him to subscribe by fraudulent misrepresentations, the corporation is not a necessary party defendant. Austin *v.* Murdock, 127 N. C. 454 (1900).

action for deceit."[1] When a stockholder receives an offer for his stock, and is persuaded not to sell by fraudulent representations of a director, he may hold the latter liable in damages.[2] So also where the principal gives an order to the broker to sell certain stock, which the principal owns, and the broker, by fraudulent representations, dissuades him from selling, the principal may hold the broker liable in damages.[3] The vendee of stock may sue for damages for deceit where the vendor fraudulently misrepresented the dividends that had been paid on the stock.[4] Where a person owns a majority of the stock of a corporation, and sells it, and agrees with the purchaser to obtain the stock held by others at as low a figure as possible, and misstates to such persons the price which he obtained for his own stock, he is liable in an action for deceit to parties who sell their stock relying on such statements.[5]

The purchaser of stock who has given a note in payment cannot defeat an action on the note by setting up that the purchase was induced by fraud. He must first disaffirm the contract and return the certificate, and such return must be made before the trial.[6] But where the purchaser brings an action for deceit he need not return the consideration nor rescind the contract.[7] His injury is to be duly measured, and credit may be given for the real value of the stock.[8] A director is not liable for the misrepresentations and frauds of his co-directors, unless he has expressly authorized or tacitly permitted commission thereof.[9] The mere fact of being a director "is not *per se* sufficient to hold a party liable for the frauds and misrep-

1 Kountze *v.* Kennedy, 147 N. Y. 124 (1895).

2 Rothmiller *v.* Stein, 143 N. Y. 581 (1894).

3 Fottler *v.* Moseley, 179 Mass. 295 (1901).

4 Handy *v.* Waldron, 18 R. I. 567 (1894).

5 Weaver *v.* Cone, 174 Pa. St. 104 (1896).

6 Gifford *v.* Carvill, 29 Cal. 589 (1866). A transferee claiming to be defrauded is nevertheless liable on the statutory liability where he brought a suit for damages for the fraud and recovered judgment. Such a suit is a ratification of the transfer. Stuart *v.* Hayden, 72 Fed. Rep. 402 (1895); aff'd, 169 U. S. 1.

7 Miller *v.* Barber, 66 N. Y. 558, 564 (1876); Newbery *v.* Garland, 31 Barb. 121 (1860). See Parsons *v.* Johnson, 28 N. Y. App. Div. 1.

8 See § 586, *infra*. In an action for false representations inducing the purchase of stock, the defendant may show that the stock was worth as much as it would have been had the representations been true. Doran *v.* Eaton, 40 Minn. 35 (1889).

9 Weir *v.* Barnett, L. R. 3 Exch. D. 32 (1877). Where a person induced to purchase stock, claims that it was on account of fraudulent representations of some of the directors, and sues to hold all the directors liable, she may be compelled to state in her complaint which of the defendants were directors at the time of the statements. Viner *v.* James, 92 N. Y. App. Div. 542 (1904).

resentations of the active managers of a corporation. Some knowledge of and participation in the act claimed to be fraudulent must be brought home to the person charged." [1] The secretary of a company cannot sustain an action for deceit against the president and vice-president on the ground of fraud inducing him to sell them his stock even though they misrepresented the condition of the business, especially where he waited five months before selling and where the only damage was future contingent profits.[2] Where, however, proof is given tending to show that the defendants were jointly engaged in a common scheme to defraud the plaintiff, the acts and declarations of one are admissible in proof against all; [3] and fraud of a similar nature, at or near the same time as the one complained of, may be shown.[4] The fraud practiced need not have been the sole inducement to the purchase.[5] A party may be liable herein although he was neither a corporate officer nor the vendor of the stock. If, with intent to cheat and defraud the vendee, he induces him, by fraudulent means, to purchase for value stock which he knows to be worthless, he is liable for the damage sustained, although the purchase is actually made from another.[6] A person who purchases stock induced by misrepresentations may recover full damages in an action for deceit, even though he causes a portion of the stock to be transferred to members of his family.[7] A sale of stock does not transfer a right of action for damages caused by false representations made to the vendor by the party from whom the vendor purchased.[8] In an action by a purchaser of stock against the

1 Arthur *v.* Griswold, 55 N. Y. 400, 406 (1874); Morgan *v.* Skiddy, 62 N. Y. 319 (1875).

2 Boulden *v.* Stilwell, 100 Md. 543 (1905).

3 Miller *v.* Barber, 66 N. Y. 558, 567 (1876).

4 Miller *v.* Barber, 66 N. Y. 558, 568 (1876). See also note 6, p. 440, and note 1, p. 1035.

5 Morgan *v.* Skiddy, 62 N. Y. 319, 328 (1875); *Ex parte* Carling, 56 L. T. Rep. 115 (1887). In an action for false representations in the sale of stock the vendee need not prove that he relied solely on the representations of the vendor, provided he shows he would not have made the purchase except for those representations. Baker *v.* Mathew, 115 N. W. Rep. 15 (Iowa 1908). Plaintiff need not prove that he relied solely upon the misrepresentations. Hatch *v.* Spooner, 13 N. Y. Supp. 642 (1891); s. c., on second appeal, 14 N. Y. App. Div. 408; Hindman *v.* First Nat. Bank, 112 Fed. Rep. 931 (1902).

6 Hubbell *v.* Meigs, 50 N. Y. 480, 490 (1872). Concerning the effect of false and fraudulent representations on an action for damages, see Tockerson *v.* Chapin, 52 N. Y. Super. Ct. 16 (1885). It is no defense to such an action that the original conversion was by some one else. Kuhn *v.* McAllister, 1 Utah, 273 (1875); s. c., *sub nom.* McAllister *v.* Kuhn, 96 U. S. 87 (1877). See also § 350, *supra.*

7 Boddy *v.* Henry, 113 Iowa, 462 (1901).

8 Kennedy *v.* Benson, 54 Fed. Rep. 836 (1893). Where fraudulent repre-

company and two directors for deceit, the verdict may be against one or more of the defendants, and may be sustained by one or more of the misrepresentations alleged.[1] Even though in an action for deceit against several a conspiracy is charged, yet a recovery may be had against one, the basis of the suit being false and fraudulent representations.[2] A suit to hold the directors liable for declaring a dividend out of the capital stock, and thereby inducing the plaintiff to purchase the stock, cannot at the same time seek to hold the directors liable to the corporation for the dividend so declared.[3] Several persons defrauded of their contract whereby they were to receive stock cannot sue jointly. Each must sue separately.[4] In a suit for damages for fraud inducing the sale of stock the court will be liberal in admitting evidence showing the full nature of the transaction, and it is for the jury to decide whether the fraud was intentional and whether there was any fraud.[5] The corporation itself, all of whose stock has been issued in payment for a mine, cannot hold a vendor liable for misrepresentations as to the value of the property.[6] In a suit by a vendor of stock for fraud inducing the sale, the value of the stock should include a proportionate part of the good will, and the good will may be valued by multiplying the average profits by a number of years depending upon the nature and character of the business, all of which is a question for the jury.[7] The measure of damages for fraud inducing the purchase of stock "is the difference between the value of the stock at the time it was purchased and the price paid for it."[8] An agreement by which a suit for damages for fraud inducing the purchase of stock is discontinued does not prevent a subsequent suit on the same cause of action.[9] A vendor of stock who completes the transaction after he has knowledge of the facts, which he claims were misrepresented

sentations are made inducing a party to sell his stock, and then the purchaser wrecks the corporation, the vendor may hold the latter liable for damages. The assignee of the cause of action may sue in trover for conversion, but cannot sue for damages for fraudulent representations, inasmuch as the latter cause of action is not assignable. Smith *v.* Thompson, 94 Mich. 381 (1892).

1 Lare *v.* Westmoreland Specialty Co., 155 Pa. St. 33 (1893), holding also that the party purchasing the stock may rescind or may retain the stock and sue for damages.

2 Gurney *v.* Tenney, 84 N. E. Rep. 428 (Mass. 1908).

3 Stroud *v.* Lawson, [1898] 2 Q. B. 44.

4 Summerlin *v.* Fronteriza, etc. Co., 41 Fed. Rep. 249 (1890).

5 Townsend *v.* Felthousen, 156 N. Y. 618 (1898).

6 Stratton's, etc. *v.* Dines, 126 Fed. Rep. 968 (1904); aff'd, 135 Fed. Rep. 449.

7 Von Au *v.* Magenheimer, 115 N. Y. App. Div. 84 (1906).

8 See § 586, *infra*, and 116 N. W. Rep. 410.

9 Jacobs *v.* Marks, 182 U. S. 583 (1901).

cannot then maintain a suit for damages.[1] The statute of limitations begins to run against a suit for damages for fraud inducing the plaintiff to buy stock, when he learns of facts which put him upon inquiry, such as the fact that the company had become insolvent.[2]

§ 356. *Remedy in equity.*—A court of equity has concurrent jurisdiction with a court of law in enabling a purchaser of stock to recover back money paid, where the purchase was induced by fraud chargeable to the vendor.[3] The remedy in equity, for a sale or

1 McDonough *v.* Williams, 77 Ark. 261 (1905).

2 Coffin *v.* Barber, 115 N. Y. App. Div. 713 (1906). As to the mode of pleading the statute of limitations of another state against an action for fraud in inducing the purchase of stock, see Tudor *v.* Ebner, 104 N. Y. App. Div. 562 (1905); aff'd, 182 N. Y. 562.

3 See § 155, *supra*. Where a person is induced to subscribe for stock on the fraudulent representations of the president that the company is in a prosperous condition, the person may file a bill in equity to recover back the money, and equity has jurisdiction on the grounds of discovery, account, fraud, misrepresentation, and concealment. Both the company and the president individually were made defendants and held liable. Tyler *v.* Savage, 143 U. S. 79 (1892). See also Hill *v.* Lane, L. R. 11 Eq. 215 (1870), where the court said: "It is so well settled that this court will entertain jurisdiction in such cases that it would be a misfortune indeed to the public if there were any sufficient ground for considering that the jurisdiction is doubtful. . . . Although courts of common law may have jurisdiction in some such cases, there is clearly concurrent jurisdiction in this court," doubting Ogilvie *v.* Currie, 37 L. J. (Ch.) 541 (1868); Campbell *v.* Fleming, 1 Ad. & El. 40 (1834). A bill in equity is a proper remedy for fraud inducing a sale of stock. Andriessen's Appeal, 123 Pa. St. 303 (1889). A person induced to purchase stock and bonds from a corporation, by fraudulent statements in a prospectus as to the value of property for which the bonds and stock have been issued by a Pennsylvania corporation at a fraudulent overvaluation, may maintain a bill in equity to cancel a note given in payment, and to enjoin a suit at law on such note in the hands of a purchaser with notice. Manning *v.* Bordan, 135 Fed. Rep. 159 (1905). A bill in equity does not lie at the instance of a purchaser of stock, who has paid for the stock, to rescind on the ground that he was defrauded. The remedy is at law. Moreover, such a bill is multifarious if it asks also for a discovery. Price *v.* Hurley, 201 Pa. St. 606 (1902). Where a corporation organized to do a jewelry business is really a scheme to carry on an illegal and fraudulent investment business, a person defrauded may file a bill in equity to hold the corporation and its officers and stockholders personally liable and enjoin them from disposing of the assets and for discovery. Edwards *v.* Michigan, etc. Co., 132 Mich. 1 (1902). Where the president of a national bank induces a person who lives several hundred miles away from the bank to purchase stock in the bank by fraudulent representations, and within thirty-six days the bank is closed, the purchaser may have the sale rescinded. Stufflebeam *v.* De Lashmutt, 101 Fed. Rep. 367 (1900).

Where the president sells stock for $120 per share after he has indorsed a false statement of the company's

purchase of stock induced by fraud, is by a bill to set aside the whole transaction. This remedy follows the rules usually prescribed in such suits. It is not necessary for the complainant to prove a fraudulent intent. Innocent acts or misrepresentations

affairs, the stock being really worth but $70 per share, the vendee may have the sale rescinded. Prewitt v. Trimble, 92 Ky. 176 (1891). A lower court in New York held that in a suit to rescind for fraud the plaintiff must prove that the stock was not worth what he paid for it or could not be sold for that sum. Aron v. De Castro, 13 N. Y. Supp. 372 (1891); affirmed, 131 N. Y. 618, but a contrary rule is laid down in Harlow v. La Brum, 151 N. Y. 278 (1897). In an action in equity to rescind a sale of stock for fraud the corporation is not a necessary party. The value of the stock need not be shown, and the amount paid with interest may be recovered. But six years' delay after discovering the fraud is a bar. Higgins v. Crouse, 63 Hun, 131 (1892). In an action to rescind for fraud the defrauded subscribers need not join as plaintiffs, although they all purchased at the same time and on the same terms. Moore v. Robertson, 11 N. Y. Supp. 798 (1890). Where the vendors represent that the money will be used to buy a secret process, and the purchasers pay over the money to the company for that purpose, and it is mingled with other funds and is not used to purchase the process because the process is a fraud, the vendees may rescind as to the vendors, but cannot make the receiver of the company pay over the money. Moore v. Robertson, 11 N. Y. Supp. 798 (1890). The vendor may tender back the stock and file a bill in equity to cancel the sale on the ground that he was induced to purchase by false statements that the corporation owned the secret process; that a patent had been applied for; that it was ready to commence business, and that complainant would be made president and manager. Benton v. Ward, 47 Fed. Rep. 253 (1891). To same effect, Stainbank v. Fernley, 9 Sim. 556 (1839), where a sale by a director who has issued false reports and declared illegal dividends was set aside. The corporation is a proper party to such actions, if a registry has been obtained by the person who has obtained the stock by fraud, since a retransfer on the corporate books is asked for. See also Bradley v. Luce, 99 Ill. 234 (1881). A judgment creditor of a foreign corporation cannot enjoin it from transferring stocks and bonds owned by it. The remedy sought must be something in addition to the injunction. Rogers v. Michigan, etc. R. R., 28 Barb. 539 (1858). An equitable suit does not lie to rescind a sale of worthless bonds. A suit at law is the proper remedy. U. S. Bank v. Lyon County, 48 Fed. Rep. 632 (1892). A purchaser of stock who was induced to purchase by fraud cannot maintain a suit in equity when he fails to show more than a right to pecuniary damages for misrepresentations. Whitney v. Fairbanks, 54 Fed. Rep. 985 (1893). A contract between the owner of property and a promoter by which the former agrees to sell his property to a corporation to be formed by the latter, with a specified capital stock, cannot, a year after the transaction has been carried out, be made the basis of a suit in equity to compel the promoter to cancel excessive stock which was issued to the promoter, there being no allegation that the promoter still had the stock. The remedy of the vendor is at law. Even though several vendors to the corporation had a similar claim, yet one of them cannot file such a bill in equity in behalf of himself and others. Brehm v. Sperry, 92 Md. 378 (1901). Where

suffice for this purpose, although they would be insufficient to sustain an action for deceit. A vendee may often have relief in equity

both the purchaser and seller of stock in a mining company know at the time that there is a report that the mine has been "salted," the sale cannot be rescinded, inasmuch as neither party has clean hands. Bearden *v.* Jones, 48 S. W. Rep. 88 (Tenn. 1897). A creditor holding an unpaid promissory note cannot by bill in equity bring in the directors to hold them liable for false representations and also claim that the company was not duly incorporated; and further bring in a subsequent corporation that took all the assets of the first, and also bring in those persons who finally obtained such assets,—all in one bill brought to collect the debt. Jefferson Nat. Bank *v.* Texas Inv. Co., 74 Tex. 421 (1889). See to the effect that a court of equity has jurisdiction, City, etc. Corp. *v.* Central Trust Co. (N. Y. L. J., June 12, 1891). Where bank stock is sold by fraudulent and false representations, the bank being aware thereof and receiving indirectly the money paid for the stock, the sale may be rescinded and the money recovered back from it, even though it is insolvent. Florida, etc. Co. *v.* Merrill, 52 Fed. Rep. 77 (1892). Several subscribers who have been induced by the same misrepresentations contained in a prospectus to subscribe for stock may join in a suit in equity for the benefit of themselves and others similarly deceived to set aside their subscriptions. Bosher *v.* Richmond, etc. Co., 89 Va. 455 (1892). See also § 156, *supra*. A bill in equity lies to rescind a fraudulent sale of stock. Merrill *v.* Florida, etc. Co., 60 Fed. Rep. 17 (1893). A stockholder in a national bank who transfers his stock in order to avoid the statutory liability may be held liable, and this liability may be enforced by the receiver of the bank. In such a suit a transferee cannot be held liable also, nor can the transferee's claim that he was defrauded be tried in that suit. Stuart *v.* Hayden, 72 Fed. Rep. 102 (1895); aff'd, 169 U. S. 1. If the suit is in equity and the money went to the corporation, an officer cannot be held personally liable, inasmuch as rescission is the essence of the suit. Zimmele *v.* American, etc. Co., 1 N. Y. App. Div. 327 (1896). A promoter who has taken a contract to purchase a property at a certain price, based upon reports and representations that the business had not decreased since the reports, may, upon discovering that the business has largely decreased, refuse to carry out the contract, and may hold the party liable for his disbursements, but not for profits which he would have made if his plans had been carried out. Loewer *v.* Harris, 57 Fed. Rep. 368 (1893). Where a person turns over stock and bonds to another in order that the latter may act for the former in carrying out a reorganization, the former may file a bill against the latter for an account and need not resort to an action at law. Benedict *v.* Moore, 76 Fed. Rep. 472 (1896). See also § 321, *supra*. The vendee may rescind where false and material representations were made and the plaintiff relied upon them and was injured, even though he might have made investigations which would have shown their falsity. Olcott *v.* Bolton, 50 Neb. 779 (1897). Several purchasers of stock may contribute to the bringing of a test case to decide whether representations inducing the purchase were fraudulent. Davies *v.* Stowell, 78 Wis. 334 (1890).

Where negotiable bonds are stolen from the owners and they pass into *bona fide* hands, and then the thief obtains them by fraud from such *bona fide* hands and returns them to the first owners, the latter are entitled to

by reason of misrepresentation based upon mistake or innocent misstatements, where the common-law action of deceit would require much more stringent proof.[1] Actual fraud need not be proved in an action for rescission where the falsity of material representations is clearly proved.[2] Moreover, the contract of sale may be canceled by a court of equity on the ground of a mutual mistake where the misrepresentations were innocently made.[3] A person who has been induced by fraudulent misrepresentations to exchange stock

keep them. London, etc. Co. *v.* London, etc. Bank, L. R. 21 Q. B. D. 535 (1888). In England this remedy by bill in equity is held to be "precisely analogous to the common-law action for deceit," in that damages may be awarded. See also Peek *v.* Gurney, L. R. 6 H. L. 377, 390 (1873), the court saying: "There can be no doubt that equity exercises a concurrent jurisdiction in cases of this description, and the same principles applicable to them must prevail both at law and in equity."

[1] Kountze *v.* Kennedy, 147 N. Y. 124 (1895); Arkwright *v.* Newbold, L. R. 17 Ch. D. 301 (1881). See also Boggs *v.* Wann, 58 Fed. Rep. 681 (1893). A sale of stock may be set aside by a suit in equity for fraud, without proving fraudulent intent. Tucker *v.* Osbourn, 101 Md. 613 (1905). A suit in equity lies to rescind a sale of stock induced by fraudulent representations. Intent to defraud need not be proved. Martin *v.* Hill, 41 Minn. 337 (1889); Freer *v.* Denton, 61 N. Y. 492 (1875). Actual intent to defraud need not be shown in a suit in equity to rescind. In such a suit similar frauds practiced on others cannot be shown in evidence. Johnson *v.* Gulick, 46 Neb. 817 (1896). The rule in New York is otherwise. Chisholm *v.* Eisenhuth, 69 N. Y. App. Div. 134 (1902). *Cf.* § 165, note. In an action to rescind on the ground of fraud scienter must be alleged and proved, but this may arise by a false statement made knowingly with intent to deceive, or by representing actual knowledge of a fact which did not exist or of a fact which the seller did not know, and which was not true. Garrett Co. *v.* Appleton, 101 N. Y. App. Div. 507 (1905); aff'd. 184 N. Y. 557. A court of equity will not entertain a suit to enforce the statutory liability of directors for paying dividends in violation of the statute, even though there is no remedy in any other court, where the money is not needed to pay the company's debts and a judgment would not promote justice, but would produce inequitable results. A stockholder cannot maintain such a suit in behalf of himself or other stockholders, even though he was induced to purchase his stock by reason of such dividends. In this case the court carefully reviewed many precedents. Siegman *v.* Maloney, 63 N. J. Eq. 422 (1902); aff'd. 54 Atl. Rep. 405.

[2] Carr *v.* Nat. Bank, etc. Co., 167 N. Y. 375 (1901). If rescission is sought not on the ground of mistake, but of fraudulent representations, it must be shown that such representations were made with knowledge of their falsity and with intent to deceive, and that they had that effect; in other words, scienter must be proved. Jones *v.* Allan, 35 N. Y. Supp. 527 (1895); Mason *v.* Wheeler, 24 N. Y. Supp. 879 (1893). In a suit by a vendee to rescind a sale of stock on the ground of fraud, it must be alleged that the misrepresentations were known to the vendor to be false. Garrett Co., *v.* Astor, 67 N. Y. App. Div. 595 (1902).

[3] Garrett Co. *v.* Halsey, 38 N. Y. Misc. Rep. 438 (1902).

for other stock may have rescission without proving damage, the suit being very similar to one for specific performance, and it being alleged that the actual value of the stock cannot be shown.[1] In England it is held that to rescind a purchase of stock on the ground of misrepresentations, fraud must be alleged where the transaction has been completed.[2]

Although the buyer of stock purchased it at a small nominal price by reason of fraudulent misrepresentations, yet the seller cannot maintain a bill in equity to rescind, where the stock has no special value other than its money value, and the latter can readily be shown.[3] The fraud may be waived by the acts of the vendee.[4] The right to rescind the contract for fraud is waived by taking a bond of indemnity against liability on the stock, such bond being taken upon discovery of the fraud.[5] A party cannot rescind a purchase of stock on the ground of false representations as to the company's having a secret process, where he learned about the process before completing his purchase, and had held the stock a year, and endeavored to sell the process.[6] A person cannot rescind for fraud a purchase of stock from the corporation itself, where, subsequently

1 Jahn *v.* Reynolds, 115 N. Y. App. Div. 647 (1906). A person induced by fraud to subscribe for stock may have the subscription canceled, even though he does not show that he has been damaged. Stern *v.* Kirby, etc. Co., 134 Fed. Rep. 509 (1904). Equity has jurisdiction to rescind a sale of stock at the instance of the vendee, but the misrepresentations must be material, inducing, damaging, and calculated to deceive. Farwell *v.* Colonial T. Co., 147 Fed. Rep. 480 (1906).

2 Seddon *v.* North-Eastern, etc. Co. [1905] 1 Ch. 326.

3 Edelman *v.* Latshaw, 159 Pa. St. 644 (1894), holding also that the bill will not lie where the defendant purchaser has already sold the stock to a *bona fide* purchaser. An action for deceit was afterwards sustained. See s. c., 180 Pa. St. 419 (1897).

4 Kingman & Co., *v.* Stoddard, 85 Fed. Rep. 740 (1898). Where a purchaser of a majority of the stock of a manufacturing corporation becomes general manager and ascertains that he was defrauded by misrepresentations as to the company's condition, but concludes to go on with the business, believing he can make it succeed, but finally makes a failure of it, he cannot then complain. Spelcher *v.* Thompson, 141 Mich. 654 (1905). A person who has bought mining stock and afterwards examines the mine and deals in the stock and sells it on commission cannot then claim that his original purchase was induced by fraudulent representations. Irby *v.* Tilsley, 41 Wash. 211 (1905). A purchaser of bonds may rescind for fraud, even though he has sold the bonds, where he sold on the advice of his vendor. Findlay *v.* Baltimore, etc. Co., 97 Md. 716 (1903). Where the vendee files a bill for fraud and yet asks that the vendor be required to deliver the stock, he thereby affirms the transaction. Chicago, etc. Bank *v.* Ball, 208 Ill. 256 (1904).

5 Bridge *v.* Penniman, 51 N. Y. Super. Ct. 183 (1885).

6 Benton *v.* Ward, 59 Fed. Rep. 411 (1894).

to discovering the fraud, he attended a stockholders' meeting, and voted to assess the stock, and afterwards attended another stockholders' meeting and paid the assessment.[1]

Where a party has a right to return the stock and receive back his money, he may, after making a tender, do any acts in regard to the stock reasonably necessary to protect his interest, and yet not lose his right to rescind. But where he directs a sale of the stock and gives a proxy thereon and attends meetings, he waives his right to rescind.[2] Where the vendee sues to obtain the stock after he knows of the fraud, he ratifies the sale.[3]

Laches is a bar. And yet where a person buys stock in 1865 on the faith of false representations, and discovers in 1871 that the stock is worthless, and is told by one of the conspirators in 1889 that the representations were false, he may file a bill in equity for rescission of the sale and for recovery of the money paid.[4]

[1] Marten *v.* Paul, etc. Co., 99 Cal. 355 (1893). Acting as a shareholder is a waiver of the right to rescind for promoter's misrepresentations. Petrie *v.* Guelph, etc. Co., 11 S. C. Rep. (Can.) 450 (1885). Where a corporation issues stock and thereafter permits a transfer of the stock and sale thereof to another person, it cannot get the stock back on the ground of fraud on the part of the party to whom it first issued the stock. Tecumseh, etc. Bank *v.* Russell, 50 Neb. 277 (1897). Delay in rescinding, in hopes that the stock will be more valuable, is fatal. Weisiger *v.* Richmond Ice Mach. Co., 90 Va. 795 (1894). Where the vendee of stock becomes a director and has access to the books, and complains of fraud in the sale, and then takes a sum of money from the vendor in settlement, he cannot again complain upon the failure of the company. Powell *v.* Adams, 98 Mo. 598 (1889). A vendee who, after the purchase, becomes a director and signs statements similar to the representations made to him, and waits two years before repudiating the stock, cannot repudiate. Anderson *v.* Black, 32 S. W. Rep. 468 (Ky. 1895). A person may defeat notes given for stock which he was induced fraudulently to purchase from the corporation, even though he became and remained cashier for the corporation for over a year after the sale and before he set up the defense, and was a director and voted the stock. He did not necessarily learn the facts from occupying these positions, nor from the fact that he made official reports of the condition of the company. He was not bound to investigate. He tendered the stock back as soon as he discovered the facts. Especially do these rules apply where no creditors' or other stockholders' rights have intervened. Nat. Bank *v.* Taylor, 5 S. D. 99 (1894).

[2] Jessop *v.* Ivory, 158 Pa. St. 71 (1893); s. c., 172 Pa. St. 44. A payment after repudiating the subscription for fraud is not a waiver if made expressly to save money already paid. Fear *v.* Bartlett, 81 Md. 435 (1895).

[3] Anderson *v.* Chicago, etc. Bank, 195 Ill. 341 (1902).

[4] Higgins *v.* Crouse, 147 N. Y. 411 (1895), rev'g 71 Hun, 615. Even though by the statutes of a state (Arizona) a transfer of the stock is not good until recorded except as between the parties, yet where various stockholders have pooled their stock by turning in their certificates of

Ordinarily, however, delay is fatal.[1] A bill in equity to rescind a fraudulent sale of stock by a corporation lies, even against the

stock to one person to hold, and one of the parties so pooling has sold his pool certificate, and the manager of the pool knowing that fact refuses to permit the stock itself to be correspondingly transferred on the books of the company, and later fraudulently obtains a judgment against the party who originally entered the pool, and sells out his stock under such judgment, he may be compelled by a court of equity to transfer the stock to the purchaser of the pool certificate, even though the stock has advanced in value and two years have intervened. Brissell *v.* Knapp, 155 Fed. Rep. 809 (1907). Where a certificate of stock is stolen from a pledgee and the transfer on the back is insufficient in that the pledgor's name was written not at the end of the transfer but at the beginning, the pledgor may by a bill in equity redeem the stock from a person who purchased it from the thief. A suit in equity lies inasmuch as an act is involved as to the amount due and the dividends received. The ten-years statute of limitations applies, there being no acquiescence or unreasonable delay. Treadwell *v.* Clark, 190 N. Y. 51 (1907). Even though the vendee of stock and bonds had the property and business examined by an expert and was informed of the condition of the property before he purchased, and even though he took control of the corporation and managed it for twelve months before complaining of misrepresentations, yet unless the defendant proves that the plaintiff did not act on the representations or that he discovered the fraud, or should have discovered it while he was in possession of the property, the plaintiff may recover. Graybill *v.* Drennen, 43 S. Rep. 568 (Ala. 1907).

[1] A year's delay by the vendor of stock after being advised by his attorney that he had a good case of fraud is fatal. Perry *v.* Pearson, 135 Ill. 218 (1890). Where a purchaser, after learning of a fraud, delays for nearly a year before commencing suit to set it aside, his remedy is barred by laches. Burwash *v.* Ballou, 82 N. E. Rep. 355 (Ill. 1907). A delay of six years after knowledge of the fraud inducing a purchase of stock is fatal. Andrieson's Appeal, 123 Pa. St. 303 (1889). Three years' delay in tendering back the bonds is not fatal, nor is the fact that the vendee re-sold the bonds on the same terms, and the sub-vendee returned them to the first vendee. Wooster *v.* Sage, 67 N. Y. 67 (1876), aff'g 6 Hun, 285. Eight years' delay in commencing suit to cancel a transfer of stock for fraud is a bar, the party charged with the fraud having died in the meantime. Ripple *v.* Kuehne, 100 Md. 672 (1905). The question of laches may be submitted to a jury. Mayo *v.* Knowlton, 134 N. Y. 250 (1892). See also §§ 160–162, *supra*. Silence, delay, vacillation, acquiescence, or the retention and use of any of the fruits of a fraudulent sale or trade that are capable of restoration, for any considerable length of time after the discovery of the fraud, are fatal to the right to rescind the same. Stuart *v.* Hayden, 72 Fed. Rep. 402 (1895); aff'd, 169 U. S. 1. Where, six months after the fraud, the purchaser has every opportunity to investigate the truth of the statements and fails to do so, he cannot, after seventeen years' delay, complain, even though he alleges concealment, no dividends having been paid in the meantime. McEacheran *v.* Western Transp. etc. Co., 97 Mich. 479 (1893). Two years' delay in disaffirming is fatal. Zimmele *v.* American, etc. Co., 1 N. Y. App. Div. 327 (1896). A delay of three years after discovery of the false statements, and one year after

receiver of the corporation.[1] But a purchaser of national bank stock from the bank itself cannot, after the bank has passed into the hands

full knowledge of all the facts, is fatal. Byrd *v.* Rautman, 85 Md. 414 (1897). In the case of Krueger *v.* Armitage, 58 N. J. Eq. 357 (1899), the court of chancery held that the remedy of a stockholder for fraud inducing him to buy stock was at law alone, where the vendee after discovering the fraud instituted insolvency proceedings against the corporation as a stockholder and also delayed in filing his bill for rescission. Where a creditor of an insolvent corporation reorganizes it, and then by fraudulent representations induces another company to sell its property to the reorganized company in exchange for stock of the latter, and a mortgage is at the same time placed upon the combined properties and default takes place and foreclosure is commenced, the parties so selling the property in the said mortgage may still rescind unless innocent bondholders' rights have intervened, in which case money damages may be had against the parties bringing about the reorganization and making the misrepresentations. Such misrepresentations may consist of statements as to what will be done in the way of improvements out of the bonds, as well as statements as to the current net profits. Old Colony Trust Co. *v.* Dubuque, etc. Co., 89 Fed. Rep. 794 (1898). The question of what constitutes promptness in tendering back the stock for fraud may be a question of fact depending on the circumstances and conditions, especially where the stock was worthless. Heintz *v.* Mueller, 29 Ind. App. 42 (1901). A suit by one signer of a reorganization agreement to enforce it prevents laches being charged against other signers who do not commence suit until a long time subsequently. Cox *v.* Stokes, 156 N. Y. 491 (1898). In a suit by a stockholder to hold a corporation liable for his stock and dividends, by reason of its allowing a transfer by an unauthorized agent of the stockholder, the subsequent owners of the stock are not necessary parties. The defense of prescription may prevail. St. Romes *v.* Levee, etc. Co., 127 U. S. 614 (1888).

[1] Merrill *v.* Florida, etc. Co., 60 Fed. Rep. 17 (1893). The vendee may rescind even after the corporation has been foreclosed, if he sues within a reasonable time after he learns of the fraud. Barron *v.* Myers, 146 Mich. 510 (1906). Under the Kentucky statute a subscriber may repudiate for fraud, even after the corporation has made an assignment for the benefit of creditors, if due care was used to discover the fraud. Kentucky, etc. *v.* Schaefer, 120 Ky. 227 (1905), the court stating that the decision in Deppen *v.* Germand American, etc. Co., 70 S. W. Rep. 868 to the contrary was modified on the rehearing in 72 S. W. Rep. 768. Even after the corporation has passed into the hands of a receiver, a subscriber for stock may rescind and sue for money paid, fraudulent representations having been made as to the condition of the company, the subscription being for increased stock, and the increase not having been made until some time after the subscription. Newbegin *v.* Newton Nat. Bank, 66 Fed. Rep. 701 (1895); aff'd, Newton Nat. Bank *v.* Newbegin, 74 Fed. Rep. 135 (1896). A stockholder in a national bank who was induced to become such by fraud may have his name taken from the list of stockholders, except as against creditors of the bank who became such after he became a stockholder and without notice of the fraud. Stufflebeam *v.* De Lashmutt, 83 Fed. Rep. 449 (1897). Eleven months after an insolvent bank issues new stock, concealing the facts, a subscriber or purchaser cannot repudiate for fraud, a

of a receiver, defend against the statutory liability on the ground of fraud inducing him to purchase, unless he proves acts of diligence which negative any charge of negligence, and also proves that no debt was created nor credit given the bank after he became such stockholder.[1] In order to rescind a fraudulent sale of stock, the stock and also all other property received must be tendered back.[2] In a suit in

receiver having gone in, even though the subscriber had just ascertained the facts. Dunn *v.* State Bank, 59 Minn. 221 (1894). Even after the appointment of a receiver of a bank, a person who was induced to buy stock of the bank by fraudulent statements that the stock was worth par can rescind by suit. Robinson *v.* Dickey, 14 Tex. Civ. App. 70 (1896). See § 164, *supra*, and Wallace *v.* Bacon, 86 Fed. Rep. 553 (1898), and *cf.* 160 *Id.* 573.

1 Wallace *v.* Hood, 89 Fed. Rep. 11 (1898); aff'd, 182 U. S. 555. See also § 163, *supra*. A subscriber to the stock of a national bank cannot, after the bank has become insolvent, avoid his statutory liability on the stock by the defense that he was induced by fraudulent representations of the bank and its officers to become a stockholder. Scott *v.* Deweese, 181 U. S. 202 (1901). In a suit at law brought by the receiver of a national bank against a stockholder on his statutory liability, he cannot set up fraud on the part of the bank in inducing him to subscribe. That defense, if good at all, is available only by a suit in equity. Neither can the defendant set up a counterclaim for the money so paid by him for the stock. Lantry *v.* Wallace, 182 U. S. 536 (1901).

2 Wainwright *v.* Weske, 82 Cal. 193 (1889); Francis *v.* New York, etc. R. R., 108 N. Y. 93 (1888); aff'g, 17 Abb. N. Cas. 1, holding also that where the vendee has transferred said stock to another his action fails. An owner of land who has received stock for a deed of the land cannot have the deed canceled on the ground of fraud unless he returns the stock. Clint *v.* Eureka, etc. Co., 3 Cal. App. 463 (1906). The defrauded vendee must tender back the stock unconditionally. If he has used the stock in another transaction, even with the vendor, his right to rescind for fraudulent representations is barred. Bridge *v.* Penniman, 105 N. Y. 642 (1887). But where the vendee has sold part of the stock, he cannot maintain a suit in equity to collect money damages for loss occasioned by misrepresentations inducing him to purchase. His remedy is at law. No cancellation of the contract is involved. White *v.* Boyce, 21 Fed. Rep. 228 (1884). Selling some of the stock before repudiating for fraud is no bar to repudiation. 1 Ry. & Corp. L. J. 431. Rescission is not barred although the vendee has lost the stock by forfeiture, the vendor having knowledge thereof. Maturin *v.* Tredinnick, 4 New Rep. 15 (1864) and 2 New Rep. 514. If the party selling the stock states that he is selling stock owned by the corporation, when as a matter of fact he is selling his own stock, the vendee, upon discovering the fraud, may rescind the sale, and recover back the purchase price paid. He need not tender the same stock which he received, inasmuch as stock has no "ear-mark." If he has exchanged the stock for the stock of another company into which his company has been merged, he may borrow stock of the first company and make a tender of that. He must, however, rescind promptly upon the discovery of the fraud. Although he does not discover the fraud for four years he may then rescind. Mayo *v.* Knowlton, 134 N. Y. 250 (1892). A

equity by a purchaser of stock to cancel a sale for fraud and to recover money paid back on account, no tender prior to the suit need be made, if the plaintiff in his complaint offers to return the stock, and the decree requires a deposit of it with the clerk of the court for the benefit of the defendants.[1] It has been held in Indiana that the vendee must allege that he was damaged by the misrepresentations and was ignorant of the falsity of the same when made, and if he wishes to rescind must offer to return the stock, or must allege that it is worthless, especially where he is sued upon a note given in payment.[2] After the purchaser of stock has instituted an action

suit to cancel a sale of stocks and bonds, on the ground of fraud on the part of the purchaser, will not lie where the money paid at the sale has not been returned or tendered, even though the seller spent the money before he discovered the alleged fraud, and is unable to obtain the amount of money necessary for a tender. Such is the rule even though the amount to be distributed will be due to the plaintiff in case he succeeds in the suit. Rigdon *v.* Walcott, 141 Ill. 649 (1892). A stockholder who has been induced to purchase stock by fraudulent representations, the stock remaining in the hands of the vendor, may file a bill in equity to rescind. The vendee's offer to surrender all claim on the stock, together with a demand for the return of the money, is sufficient. Zimmele *v.* American, etc. Co., 21 N. Y. Supp. 846 (1893). Where part of the consideration in the sale of stock is that the vendor resign an office in the company and the vendee be elected in his place and this has been carried out, the vendee cannot rescind for fraud unless he resigns the position or does something towards restoring the vendor to his former position. Gassett *v.* Glazier, 165 Mass. 473 (1896). In rescinding for fraud the vendee of stock must return or tender the dividends back to the vendor, but cannot demand repayment of assessments paid after discovery of the fraud. Marten *v.* Paul, etc. Co., 99 Cal. 355 (1893). Where a party has given a note in purchase of stock in two corporations he cannot rescind unless he tenders back the stock in both. Rohrbacher *v.* Kleebauer, 119 Cal. 260 (1897). Where, according to contract, stock sold to the corporation is appraised by the corporation and the appraised price is actually paid to and received by the stockholder, he cannot maintain a bill to obtain a larger price, but must either rescind or sue at law. Tuttle *v.* Batchelder, etc. Co., 170 Mass. 315 (1898).

1 Chisholm *v.* Eisenhuth, 69 N. Y. App. Div. 134 (1902), holding also that even though the misrepresentations were made by the husband in selling the wife's stock, yet this is sufficient. Rescission can only be had where an offer to return the property has been made and kept good and the offer is repeated on the trial. Currier *v.* Poor, 84 Hun, 45 (1895); rev'd on another point in 155 N. Y. 344. See also § 335, *supra*.

2 Long *v.* Johnson, 15 Ind. App. 498 (1896). Where the vendee has disposed of some of the stock before he discovered the fraud, he need not tender back all the stock, but he must allege that he sold it before he discovered the fraud, and set forth the price and other facts. Hill *v.* Harriman, 95 Tenn. 300 (1895). A misrepresentation that large dividends and profits are being made by a coal company, whereas in fact they were made by fraud practiced upon a railroad company, is good ground for a rescission of the

for deceit he can no longer rescind.[1] Two vendors of stock may join in a suit to rescind the sale for fraud where false representations were made to one of them with the view of influencing both, and had that effect.[2] The bill is not multifarious, even though it asks for rescission and also for damages against the guilty parties.[3] But a suit by a stockholder against a promoter in behalf of the corporation, to require him to pay for his stock, and also to recover damages for false representations inducing the plaintiff to purchase stock, and also to enjoin a proposed sale of plaintiff's stock, in order to pay an assessment is multifarious.[4] A purchaser of stock through a broker may defend against a suit brought by the broker for the price on the ground that the vendor, a customer of the broker, was guilty of fraud, but such defense is not good so far as the broker advanced money to his customer on such stock.[5] If the person fraudulently

sale. No tender back of the stock need be made if the property is worthless. If there was a partial failure of consideration, the defendant could reduce the recovery *pro tanto*. A court of equity may set aside the sale on grounds which would not be sufficient at law. The court so held in an action at law for the purchase price, the answer setting up fraud as a defense. Boggs *v.* Wann, 58 Fed. Rep. 681 (1893). Where a corporation sells its property through misrepresentations, and in deeding the property causes all its outstanding capital stock to be delivered to the vendee, the vendee in suing to recover back the money need not allege that the stock was valueless, there being an allegation that the property was valueless. Keener *v.* Baker, 93 Fed. Rep. 377 (1899). A suit to cancel a note given in payment for stock, purchased by reason of fraudulent misrepresentations, must not be based also on an alleged agreement that the note would not be enforced. Bass *v.* Sanborn, 119 Mo. App. 103 (1906).

1 Hanrahan *v.* National, etc. Assoc., 66 N. J. L. 80 (1901).

2 Bradley *v.* Bradley, 165 N. Y. 183 (1900). Several persons induced by the same fraudulent representations to purchase stock may unite in filing a bill in equity to set aside the purchase and compel repayment of the money paid. Hamilton *v.* American, etc. Co., 143 Mich. 277 (1906). Persons who have been induced by fraud to purchase the debentures of a company which has become insolvent may file a bill in equity to wind up its affairs and to prevent the officers illegally taking its assets, even though the debentures are not yet matured. Christian *v.* Michigan, etc. Co., 134 Mich. 171 (1903). Slater Trust Co. *v.* Randolph, etc. Co. (U. S. C. C. 1908), N. Y. L. J., June 27, 1908.

3 Subscribers to stock may rescind the same on the ground that promoters who sold property to the company had misrepresented the character of the property. This suit may be in equity and is not multifarious, although the relief demanded is a cancellation of the sale of the property and for damages against the vendors and co-conspirators and also for rescission of the subscription. Such a suit lies, although the subscribers paid in only $150,000 of cash for $450,000 of stock. Rule 94 of the federal courts does not apply to such a case. Barcus *v.* Gates, 89 Fed. Rep. 783 (1898).

4 Pietsch *v.* Krause, 116 Wis. 344 (1903).

5 Leo *v.* McCormack, 186 N. Y. 330 (1906).

obtaining stock has transferred it to another party, or is about to transfer it, an injunction may be obtained.[1] The corporation should then be made a party.[2]

A purchaser of "watered" stock has various remedies if he has actually been defrauded.[3] The remedy against promoters who have absorbed the corporate property is considered elsewhere.[4]

Where the fraud is chargeable to the corporate officers or third persons, and the vendor of the stock is innocent, the vendee cannot rescind the sale unless such corporate officers or third persons acted as agents for the vendor.[5] A person induced by fraud to

1 See §§ 363, 364, *infra*. Where by fraud a corporation has been induced to sell the stock and it sues to recover back the same, it may have an injunction against the defendant assigning or transferring the stock, but cannot enjoin him from voting it. Maine, etc. Co. *v.* Alexander, No. 2, 115 N. Y. App. Div. 112 (1906). Even though the questions of fact are disputed, yet a preliminary injunction may be granted to prevent the transfer of stock pending a suit to recover it back on the ground of fraud and duress. Hoy *v.* Altoona, etc. Co., 136 Fed. Rep. 483 (1905).

2 Although the party seeking the stock of which he has been deprived by fraud makes the party complained of and the corporation itself parties defendant, yet if the certificates are not obtained from the party holding them the court will not order the corporation to issue new certificates. The outstanding certificates may pass into the hands of a *bona fide* purchaser. Joslyn *v.* St. Paul Distilling Co., 44 Minn. 183 (1890). Where a citizen of Wisconsin claims stock in a Wisconsin corporation as against a citizen of Illinois, in whose name the stock stands on the corporate books, the corporation is a necessary party defendant, and the case cannot be removed to the federal courts. Rogers *v.* Van Nortwick, 45 Fed. Rep. 513 (1891). See also § 338, *supra*, and § 579, *infra*. Where stock is deposited with a trustee for purposes of reorganization, and transferable certificates are issued therefor by the trustee, a claimant of stock which another person has deposited, and for which such other person has the trustee's certificate, cannot compel the trustee to deliver up the stock until the trustee's certificate is returned, even though the party holding it is a party defendant. Bean *v.* American L. & T. Co., 122 N. Y. 622 (1890).

3 See ch. III, *supra*.

4 See § 651, *infra*. Where a promoter to whom nearly the entire stock has been issued sells a part of it on the fraudulent representation that the stock belongs to the company, and then causes the company to be wound up, and himself to be released from certain subscriptions, and the property to be sold by a trustee named by him, the court will appoint a receiver at the instance of the party so defrauded, for the purpose of recovering back the property of the company. Du Puy *v.* Transportation, etc. Co., 82 Md. 408 (1896).

5 Moffat *v.* Winslow, 7 Paige, 124 (1838). Where the executive committee of the corporation represents the stockholders in selling their stock and makes fraudulent representations, the sale may be rescinded even though the seller did not know or authorize the representations. Garrett Co. *v.* Clark, 42 N. Y. Misc. Rep. 610 (1904). Benjamin on Sales (Bennett's ed., 1888), § 467*a*, says "the only remedy of a shareholder in a joint-stock com-

subscribe for stock may maintain a suit in equity to cancel the subscription and to hold liable for the purchase price the corporation and the officers who made the representations, and hence such officers are proper parties defendant.[1]

Equity will sometimes compel the vendor to make good his representations.[2]

§ 357. *Fraud in selling stock may be criminal.*—A combination of persons to fraudulently raise the price of a stock by misrepresentations and fraudulent practices may amount to a criminal conspiracy.[3] A vendor of stock may be prosecuted criminally for obtaining money under false and fraudulent representations where he induced the vendee to purchase thereby.[4] In New Jersey there is a statute making it a criminal offense for a director or officer to make or concur in making any written false statement with intent to deceive.[5] It is a criminal offense in England for any director, manager or officer of a corporation to publish false statements with intent to induce persons to purchase stock. Under this statute a person is liable as a manager for such acts, if he acted as manager, even though he was never appointed.[6] In England there is a statute under which the court has power, on the application of creditors, to direct the official receiver to prosecute criminally a director for alleged offenses as director, such prosecution to be carried on at the expense of the assets of the company.[7] In England, in 1858, the directors of a joint-stock bank were found guilty of a conspiracy to defraud, where, knowing the bank to be insolvent, they issued a balance sheet showing a profit, and declared a dividend, and issued advertisements inviting the public to invest on such representa-

pany, who has been induced to purchase shares by the fraud of the agent of the company, is rescission of his contract and *restitutio in integrum*."

1 Mack *v.* Latta, 178 N. Y. 525 (1904).

2 See § 354, *supra*. A company induced to enter a consolidation by misrepresentations of defendant may enforce his promise to assign to it certain patents which would make the business profitable. Anderson Carriage Co. *v.* Pungs, 134 Mich. 474 (1903).

3 A corrupt agreement of several parties, to sell stock for more than its worth by false representations in regard to its value, renders them liable to a criminal prosecution for conspiracy. People *v.* Summerfield, 48 N. Y. Misc. Rep. 242 (1905). Where brokers and promoters issue bonds greatly in excess of the value of the corporate property and by fictitious sales give a high market quotation of the bonds and borrow money thereon, the lender may hold them liable in a suit for loss due to a conspiracy. McElroy *v.* Harnack, 213 Pa. 444 (1906).

4 State *v.* Keyes, 196 Mo. 136 (1906).

5 State *v.* Ware, 71 N. J. L. 53 (1904).

6 Rex *v.* Lawson, [1905] 1 K. B. 541.

7 *Re* London, etc. Corp. Ltd., [1903] 1 Ch. 728.

tions.[1] Under the New York statutes a person who sells stock on misrepresentations may be guilty of grand larceny.[2] An indictment of a person for the unlawful obtaining of money by selling worthless gold-mining stock is not good when the stock was paid for not in money, but by check.[3]

1 Regina *v.* Brown, 7 Cox, Cr. Cas. 442 (1858); Regina *v.* Esdaile, 1 F. & F. 213 (1858); Regina *v.* Gurney, 11 Cox, Cr. Cas. 414. See Hurrell & Hyde on Directors and Officers, 3d (Eng.) ed., pp. 176–182, citing cases; Burnes *v.* Pennell, 2 H. L. Cas. 497 (1849). There cannot be such an offense against the United States by the directors of a national bank, since the offense is not recognized by statute. United States *v.* Britton, 108 U. S. 199 (1883). By the National Bank Act false reports by national banks constitute a criminal offense punishable by fine and imprisonment. It is difficult for a corporate creditor to seek collection by making out a conspiracy. Brackett *v.* Griswold, 13 N. Y. Supp. 192 (1891).

2 People *v.* Garrahan, 19 N. Y. App. Div. 347 (1897); aff'd, 154 N. Y. 769. The vendor of stock may be guilty of grand larceny where he brought about the sale by fraudulently causing another person to represent to the vendee that such other person would buy the stock at a higher price, the stock itself being of no value. People *v.* Putnam, 90 N. Y. App. Div. 125 (1904); aff'd, 179 N. Y. 518. The agent of a corporation organized for fraudulent purposes, who fraudulently induces a person to purchase stock of the corporation, may be guilty of grand larceny. People *v.* Walker, 85 N. Y. App. Div. 556 (1903); aff'd, 178 N. Y. 563. See *In re* London, etc. Corp. [1903] 1 Ch. 728.

3 Lory *v.* People , 82 N. E. Rep. 261 (Ill. 1907).

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